The Right to Request Flexible Working: Evidence from Employment Tribunal Judgments

Abstract

This study examines 5 years of Employment Tribunal judgments on flexible working requests and uses a thematic analysis to identify the issues that have been litigated and to assess how employment tribunals, employees and employers have navigated the Act's provisions. Whilst the right to request flexible working has been much critiqued because of its limited nature, there is little evidence and discussion of whether it provides a useable and effective process for employees and employers on its own terms. This article identifies three problems with the current legislation: employees can find it difficult to comply with the requirements for a valid statutory request, the difficulty of establishing and complying with the time limits in the legislation and finally the difficulty for tribunals in defining and applying core concepts relating to its power of review over employers' decisions. These issues will not be resolved through the new Employment Relations (Flexible Working) Act 2023 and in some ways will be made more difficult.

1. Introduction

Since 2014, all employees with 26 weeks service have the 'right to request' flexible working, understood as a request to change working time or place. Further changes have come into force recently through the Employment Relations (Flexible Working) Act 2023, following a consultation by the Department for Business, Energy and Industrial (BEIS) on flexible working in 2021. Although post Covid there is an increased interest in and demand for flexible working and these reforms make or suggest changes to the procedure and eligibility criteria, they do not change the substance of the right: it remains only a right to have the request considered by an employer, not a substantive right to flexible working.

Existing literature has pointed out the importance of flexible working for allowing employees to combine work with caring responsibilities, which if it is widely available and used, can encourage women to stay in the work force post maternity leave,[1] allow more equal sharing of care between men and women,[2] and help carers where the need for care is unpredictable, such as for elder care.[3] Flexible working has also been encouraged by UK governments as a way of increasing labour

[1] H. Chung, and M. van der Horst, 'Women's Employment Patterns After Childbirth and the Perceived Access to and Use of Flexitime and Teleworking' (2018) 71 *Human Relations* 47.
[2] M. Weldon-Johns, 'The Future of Work-Family Rights: The Case for More Flexible Working'(2022) *Proceedings of the 5th International Conference on Gender Research* 259.
[3] R. Horton, 'The Right to Request Flexible Working in the UK' (2017) 1 *European Equality Law Review* 38.

market participation, particularly of women, and more recently, of older workers.[4] In the latest government consultation on flexible working it has argued that it 'can reduce vacancy costs; increase skill retention; enhance business performance; and reduce staff absenteeism rates'.[5]

The chosen model for encouraging flexible working is a very light touch piece of regulation designed to create a structured process for consideration of employee requests, rather than imposing outcomes on employers. Whether such requests are accepted is therefore highly dependent on employer discretion and moreover on employees' understanding and internalisation of workplace norms, including peer norms and ideas about commitment and productivity.[6] The right has been heavily critiqued as too limited because it barely restrains employer discretion and gives very little possibility for employees with care responsibilities to reconcile their paid work with care when faced with an unwilling employer.[7] As Weldon-Johns has argued, it is unlikely to by itself achieve a cultural and societal shifts towards supporting flexible working.[8] There is also considerable debate as to whether the mere availability of flexible working does help to achieve a less gendered and more equitable division of care. [9]

Whilst these bigger debates about flexible working as part of work/life reconciliation rights and gender equality are important, there is so far little evidence and discussion of how the current right to request currently functions as a statutory scheme. My focus here therefore is not whether a right to request should be replaced by a more substantive right or whether flexible working should be the focus of work/life reconciliation rights. Instead, it focuses on whether the right provides a useable and effective scheme for employees and employers in terms of the procedural requirements it imposes on employees and employers and the current rights it gives employees.

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[4] BEIS, 'Making Flexible Working the Default: Government Response to Consultation' https://www.gov.uk/government/consultations/making-flexible-working-the-default; ONS, 'Living Longer: Impact of Working from Home on Older Workers' https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglongerimpactofworkingfromhomeonolderworkers/2021-08-25 [Last accessed 28 Feb 2024]

[5] BEIS ibid 6

[6] See Rose's study of software engineers and managers in a multinational telecommunications company. E. Rose, 'Workplace Temporalities: A Time-Based Critique of the Flexible Working Provisions' (2017) 46 *ILJ* 245

[7] H. Collins, 'The Right to Flexibility' in J. Conaghan and K. Rittich (eds), *Labour Law, Work, And Family: Critical and Comparative Perspectives* (Oxford: Oxford University Press, 2005); G. James, 'Mother and Fathers as Parents and Workers: Family-Friendly Employment policies in an era of shifting identities' (2009) 31 *Journal of Social Welfare and Family Law 271*; O. Golynker, Family-Friendly Reform of Employment Law in the UK: an Overstretched Flexibility (2015) 37 *Journal of Social Welfare and Family Law* 378; A Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2014) 39 *New Zealand Journal of Employment Relations* 59.

[8] Weldon-Johns above n2. See also Kelland et al 'Viewed with Suspicion, Considered Idle and Mocked – Working Caregiving Fathers and Fatherhood Forfeits' (2022) 29 *Gender Work & Organizations* 1578

[9] H. Chung, 'Women's work penalty' in access to flexible working arrangements across Europe' (2018) 25 *European Journal of Industrial Relations* 23; H. Chung, and T. Van der Lippe, 'Flexible working, work life balance, and gender equality' (2020) *Social Indicators Research* 365; R. Donnelly, 'Gender, Careers and Flexibility in Consultancies in the UK and the USA: A Multi-Level Relational Analysis' (2015) 26 *The International Journal of Human Resource Management* 80.

While there is research on requests for flexible working within the workplace,[10] there is little research specifically on how employees and employers navigate the statutory right and the legal issues they encounter in using it.

My focus is therefore on how well the right to request works as a legislative scheme. To do this, the study examines 5 years of Employment Tribunal judgments on flexible working requests with the aim of furthering our understanding of how statutory flexible working requests are used and litigated. While this 'purposefully foreshortened'[11] method, with its focus on the text of judgments can only give limited insight in how requests for flexible working are experienced by employees and employers involved in litigation, it illuminates how key concepts in the legislation are interpreted by Employment Tribunals and can identify and explore recurring issues in litigation. It allowed for analysis of two questions: firstly, as evidenced through the judgments, what are the difficulties for claimants and employers in navigating this legislation and secondly, how do ETs navigate the legislation in the sense of understanding the limits of their discretion (if any) and address ambiguities in its provisions (as perceived by the parties and tribunals). This is not the same as analysing whether claims were successful and why: if for example an employer simply failed to comply with the legislation this does not by itself show the legislation is difficult to use.

2. Study Dataset

The dataset this study relies on are Employment Tribunal decisions involving the right to request flexible working that were decided and uploaded to the government website between 2017 and Jan 2023.[12] Cases can be filtered on the website by selecting various types of legal claim claims by selecting the appropriate 'jurisdiction' box. Using this, 361 judgments were listed under Flexible Working.[13] However, of these, only 72 had a final judgment with written reasons. Many claims were withdrawn before reaching a final decision, possibly because the parties settled. Even if the case did reach a final judgment and therefore the decision is recorded, since reasons are often only given orally to the parties these were not always available for analysis.

[10] J. Atkinson, ''Letters Aren't Good': the Operation of the Right to Request Flexible Working Post-Maternity Leave in UK Small and Medium-sized Companies,' (2016) 38 *Journal of Social Welfare and Family Law* 380; C. Kelliher and L.M. de Menezes *Flexible Working in Organisations: A Research Overview* (London: Routledge 2019)

[11] E. Grabham, 'Doing Things with Time: Flexibility, Adaptability and Elasticity in UK Equality Cases' (2011) 26 *Canadian Journal of Law and Society* 485

[12] https://www.gov.uk/employment-tribunal-decisions. Although the right to request FW significantly predates 2017, it is only at this point that judgments were made available online and easily searchable via the government's website. As there is often a delay between judgments being given and reasons being uploaded onto the website, there may also be cases decided before the end of 2022 which were not considered.

[13] An identical search was made on the Northern Irish equivalent website. However, as this only led to 1 claim, which was withdrawn, the analysis is confined to Great Britain.

It should be noted that while the 'jurisdiction' filter is mostly accurate, it can be both under and over inclusive: some cases which do not involve a purported[14] flexible working request (FWR) under the Act are included under flexible working and some which are, are not. To catch remaining cases, a search for 'flexible working' as free text within judgments was made, which led to an additional 865 cases. These cases were read to see if they involved any claim specifically under the flexible working legislation. Cases where flexible working was simply part of the factual background or which involved flexible working understood in a more general way were excluded. These were most significantly (by number) claims of failure to make reasonable adjustments or other disability related claims. While a formal flexible working request may have been made at some point, these cases typically involved the structurally and substantively very different Equality Act disability related claims and no claim for the breach of the FWR right. Overall, 28 relevant cases were included, making 100 final judgments for detailed analysis and 389 cases altogether.

As can be seen, despite a 5 year period of data, the (expressed) desire of many employees for flexible working[15] and the existence of a well-established and publicised right,[16] the legislation has given rise to a relatively small number of cases reaching Employment Tribunals. For comparison, over the same period there were 8,330 sex discrimination decisions and 45,702 unfair dismissal decisions.[17] This small number of cases is likely to be for several reasons. Although it is difficult to obtain accurate figures, flexible working is widespread[18] and employees are likely to have their request accepted.[19] The converse of this is, as Rose has pointed out, that FWRs are very dependent on workplace culture.[20] Employees are not likely to make a request for flexible working, even an informal one, where they do not think it will be given or where there is not a culture of flexible working.[21] Rejected FWRs, especially FWRs that meet the statutory scheme, are therefore uncommon.

[14] 'Purported' because many of the cases are defended on the basis that no valid statutory request has been made.

[15] H. Chung, *The Flexibility Paradox: Why Flexible Working Leads to (Self) Exploitation* (Bristol: Policy Press, 2022) Ch2 and 10

[16] R. Cook et al, 'Fathers' Perceptions of the Availability of Flexible Working Arrangements: Evidence from the UK' (2021) 35 *Work, Employment and Society* 1014

[17] According to cases under the relevant jurisdiction tab. While this may be marginally under or over inclusive, it demonstrates the proportion of cases.

[18] Although different sources give very different percentages of those working flexibly, partly because of different definitions of flexibly. See Keliher and De Menezes above n 10 at 13-17

[19] 79% of employees who requested a change to their working patterns in the previous 12 months had their request accepted according to the Department for Business Innovation and Skills, (2013) *Fourth Work-Life Balance Employer Survey* available at https://assets.publishing.service.gov.uk/media/5a7eb49aed915d74e6225f52/bis-14-1027-fourth-work-life-balance-employer-survey-2013.pdf [Last accessed 28 Feb 2024)

[20] Rose n6 above

[21] Cook n16 above; H Chung, 'Gender, Flexibility Stigma and the Perceived Negative Consequences of Flexible Working in the UK (2020) 151 *Social Indicators Research* 521.

Furthermore, even if an employee makes a formal request and this is refused by the employer, the legislation only gives very narrow bases to bring a claim to the Employment Tribunal. In particular, the ET cannot assess the substantive fairness of the decision. Successful claimants can also only be awarded between 2-6 weeks' pay for an employer's failure to comply, which may divert claims towards informal resolution unless the FWR claim is combined with other legal claims. Perhaps for these reasons, the vast majority of FWR claims were brought alongside other causes of action with much higher possible compensation.

Given that many employment law cases settle or are withdrawn[22] and that written reasons for decisions are not always provided, the cases analysed are unlikely to be representative even of claims initially intended for formal legal resolution, let alone statutory FWRs in general. Because of these problems of representativeness and the relatively few decisions available, a quantitative analysis of this data was rejected in favour of a thematic analysis.[23] This analysis revealed three important themes: the prescriptive requirements for a valid request to be made; the importance but also difficulty of establishing time limits both in terms of the 3 month period that employers have to respond to employee's requests (reduced to 2 months via the Employment Relations (Flexible Working) Act 2023) and for establishing when the 3 month limitation period began to run; and finally the difficulty for tribunals in defining and applying core concepts, in particular 'reasonable manner' and 'incorrect facts'. Whilst it might have been expected that the problems identified in the case law examined in this study would match those identified in the consultation and new legislation, this was not the case.

Unsurprisingly, FWR claims were overwhelmingly brought alongside many other claims including unfair dismissal (both constructive and ordinary), direct and indirect sex discrimination, maternity/pregnancy discrimination and disability related claims, mostly a failure to make reasonable adjustments. Some of this fits with existing academic discussion of flexible working. There is, for example, considerable discussion of the gendered nature of flexible working requests. As Horton has identified, whilst the legislation is written in gender neutral terms, it is not used in a gender equal way. [24] Women are far more likely to request part time work. Men are less likely to make requests and to have their requests rejected, perhaps because of gendered ideas relating to the ideal worker norm. Flexible working is also more likely to be available in workplaces with a higher number of female employees. In relation to pregnancy, the Equality and Human Rights Commission's study in 2016 found 20% of mothers in the survey reported harassment or negative comments related to pregnancy or flexible working from their

[22] See discussion in E. Kirk, and N. Busby 'Led Up the Tribunal Path? Employment Disputes, legal Consciousness and Trust in the Protection of Law' (2017) 7 *Oñati Socio-legal Series* [online], and more broadly WLF Festinger et al, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) 15 *Law & Society Review* 631.

[23] In doing so I use a similar methodology to A. Blackham, 'Enforcing Rights in Employment Tribunals: Insights from Age Discrimination Claims in a New 'Dataset' (2021) 41 *Legal Studies* 390 and G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Routledge-Cavendish, 2008).

[24] Horton n3 above

employer/colleagues.[25] While 68% of mothers in this study had submitted a FWR and about 75% of these were approved, 51% of mothers who had had their request approved said they felt it resulted in negative consequences. This was more likely in the private rather than public sector and for higher paid employees. Two out of five mothers did also not request a type of flexible working they wanted because of the fear of negative consequences. The link between FWR claims and sex and pregnancy discrimination claims was therefore expected.

There has been less research relating to flexible working requests and disabled employees. While the disability Equality Act scheme is very different from the right to request flexible working, a FWR may well be the mechanism by which an employee requests reasonable adjustments because of their disability, such as shorter or different working hours or working from home. This may explain the number of disability related claims.

Unfair dismissal claims may be linked to FWR claims because for example an employee may be dismissed because they cannot work at the time/place an employer requires, or in a constructive unfair dismissal claim because the employee argues the employer has fundamentally breached an implied term of the contract in dealing unfairly with a flexible working request.

What was more unexpected were a significant number of claims, all unsuccessful or withdrawn, alleging that the decision not to approve their FWR was because of race discrimination.[26] There is little evidence in the literature so far of how the acceptance and use of FWRs differs across different racialised groups. The interrelationship between flexible working request and race discrimination therefore requires further research.

3. The legal context

The parameters of the right to request flexible working arose out of the Work and Parents Taskforce Report in 2001 and became legislation in 2002. Given the report's focus on parents, and specifically those with very young children who might otherwise leave the workforce, the right was originally only available to employees with a child under 5 who had 26 weeks' service with their employer. The request had to meet several requirements to be valid and only one request could be made per year.[27] From the outset therefore it was designed to be a mostly procedural rather than substantive right, providing a structured way of negotiating a contractual variation. It did however place 3 core obligations on employers:

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[25] Equality and Human Rights Commission, (2016) *Pregnancy and Maternity-Related Discrimination and Disadvantage* available at https://assets.publishing.service.gov.uk/media/5a749756e5274a410efd0d40/BIS-16-145-pregnancy-and-maternity-related-discrimination-and-disadvantage-summary.pdf [Last accessed 28 Feb 2024]

[26] *Zerehannes v Asda Stores Ltd* 2600155/2018; *Bouheniche v Commissioners for HMRC* 2503392/2018; *Thomas v King's House School Trust (Richmond) Ltd* 2301384/2019; *Dankyi v St Margaret's School* 3329472/2017; *Dolcy v Beautiful Body Company UK Ltd* 2201910/2020; *Williams v London International Exhibition Centre 3201306/2019*; *Hackley v Queen Mary University of London 3202385/2019*

[27] See ME Wellman 'Securing Upward Career Mobility for Professional Women with Caregiving Responsibilities? A Critique of the UK's Right To Request Flexible Working'. (PhD thesis, University of Reading, 2021) Ch3

1. To consider requests in a 'reasonable manner'.[28] An ET can review this to check if the employer's decision was based on 'incorrect facts' but cannot consider the substantive reasonableness of the decision.[29]

2. To refuse the request only for one of the 8 specified, but broad business reasons: (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,[30]

3. To make a final decision within 3 months, unless a longer period had been agreed with the employee.[31]

These principles remain in the current form of the legislation. However, the eligibility criteria have been widened in a series of reforms: in 2006[32] to some carers of over 18s, albeit very narrowly defined[33] and in 2009 to include parents of all children under 17 or 18 for disabled children.[34] In the most substantial change through the Children and Families Act 2014, the Coalition government severed the link between carer status and flexible working, making it available to all employees with 26 weeks continuous service. This had the aim of encouraging wider take up and demand, both to benefit individuals and to encourage participation in the labour market but has however, been strongly critiqued by Masselot among others. She has argued that a similar extension in New Zealand shifted the right 'from reconciliation between work and care focus to a strong and overpowering profit optimisation focus', and 'entrenching the idea that production and reproduction are disconnected'. [35]

In 2021, partly because of the changes to work caused by the Covid-19 pandemic such as greatly increased working from home, BEIS began a consultation, 'Making Flexible Working the Default', on further changes. These were aimed at improving the ease with which the right could be used to improve work/life balance for employees, particularly those with caring responsibilities, and to benefit the labour market as a whole by increasing employees' productivity and motivation levels.

[28] S.80G(1)(a)
[29] S.80H(1)(b)
[30] S.80G(1)(b)
[31] S.80G1A
[32] Under the Work and Families Act and the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006, SI 2006/3314
[33] The person to be cared for had to be married to, in civil partnership with or the partner of the employee or a relative of the employee or living at the same address as the employee.
[34] The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009, SI 2009/595 amending reg 3A of The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236
[35] Masselot above n7

Due to changes in political direction a response to this consultation this was delayed until December 2022 when the government decided to support the following changes to the right:

a) To make the right to request flexible working a day one right
b) Introduce a new requirement for employees to consult with the employee when they intend to reject their flexible working request
c) Allow 2 statutory requests in any 12-month period (rather than the current one)
d) Require a decision period of 2 months in respect of a statutory flexible working request rather than the current three
e) Remove the existing requirement that the employee must explain what effect, if any, the change applied for would have on the employer and how that effect might be dealt with

Although the Consultation also asked whether the 8 listed business reasons for rejecting a request should be reformed and most responses were in favour of reform, there was no consensus as to what form this should take and so reforms were not taken forward. BEIS has also committed to consider how further guidance particularly for small businesses might be helpful, how short notice or informal requests fit into the structure and to a call for evidence on flexible working generally.

Given the delay between the Consultation and the government response, a Private Members' Bill, the Employment Relations (Flexible Working) Bill was introduced in Parliament in June 2022 and received royal assent in July 2023. This Act came into force in April 2024 and makes changes b) to e) above.[36] Significantly, it does not make the right to request a day 1 right as envisaged by the BEIS proposals, despite the fact that many women in particular report being locked into work that is paid less or lacks status because they cannot find alternative work which fits their caring needs.[37]

The current legislation allows an employee to bring three potential legal claims: that the employer did not make a decision within the required 3 month period, that the decision was made on incorrect facts or was not made in a reasonable manner and/or that the employee was subjected to detriment because they made a FWR. In the ET cases examined in this study, there were very few detriment claims and so this article only analyses the first two types of claim. Within these claims there were three recurring themes. Two related to the difficulties claimants and employers found in navigating the legislation: the complexity of making a valid statutory request and the problem of identifying and complying with time limits. The final theme related to difficulties

[36] Business, Energy and Industrial Strategy, 'Millions of Britons to be able to request flexible working on day one of employment' Press Release 5 Dec 2022. https://www.gov.uk/government/news/millions-of-britons-to-be-able-to-request-flexible-working-on-day-one-of-employment. [Last accessed 28 Feb 2024]. Earlier Private Members' Bills had failed: Flexible Working Bill 2021-22 and Employment Rights (Shared Parental Leave and Flexible Working) Bill 2017-19.

[37] M. Costa Dias et al, 'The Gender Pay Gap in the UK: Children and Experience in work, (2020) 36 *Oxford Review of Economic Policy*, 855; BEIS above n4 23

experienced by Tribunals in applying the legislation, particularly provisions relating to the limits of their control of employers' managerial prerogative.

4. Judgment Themes

4.1 Valid Request

The first recurring theme in the cases was the difficulty some claimants found in engaging the rights under the legislation at all. Several failed at the outset because no valid request had been made and therefore an employer was under no statutory obligation to consider the request.

The Act lays out three formalities to be a valid request: it must state it is an application to make a request under the statute; specify the change applied for and the date on which it is proposed the change should become effective; and detail 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.[38] In addition, the Flexible Working Regulations 2014[39] require that an FWR must be in writing, state whether the employee has previously made any such application to the employer and if so when, and be dated. While the ACAS Code of Practice states that employers, 'should make clear to your employees what information they need to include in a written request to work flexibly' this is not a legal requirement.[40] There are therefore several hurdles an employee needs to overcome to meet this first threshold.

As identified above, the requirement to identify the effect granting the request will have on the employer and how it can be dealt with will be removed shortly. The Consultation argued the obligation placed a burden solely on employees when this should be a joint discussion exploring possible routes to agreement and that the perceived need to present applications in 'business case terminology' made the right less accessible to lower status and more junior employees or those with certain disabilities.[41] Interestingly though, as far as is possible to tell through the judgments, this requirement, unlike others, did not appear to be problematic for most of the claimants in this study,[42] although this may be because it only includes a very small subset of those making FWRs and will inevitably over include those who have the skills and resources to present arguments formally. It is worth noting that the employee's statement does not have to be complete or even accurate for it to form part of a statutorily valid request, although of course it may influence the employer's decision. Nevertheless, it is the employer and not the employee who is far more likely to have access to relevant information, such as whether other employees can change shift patterns or the cost and availability of agency staff. Removal of this requirement by the 2023 Act therefore lessens the burden on the employee and the new requirement for a

[38] S.80F(2)
[39] 1398 Reg 4
[40] ACAS, 'Code of Practice on Handling in a Reasonable Manner Requests to Work Flexibly' https://www.acas.org.uk/acas-code-of-practice-on-flexible-working-requests/html [Last accessed 28 Feb 2024]
[41] BEIS above n4 17
[42] For an exception see *Lacey v Oxford University Hospitals NHS Foundation Trust* ET 3302650/2020

meeting between employee and employer means discussion of these issues is likely to take place in practice anyway.

The other requirements for validity are not referred to at all in the new Act or the consultation, The Explanatory Notes to S.80G Employment Rights Act 1996 state that the purpose of the requirements is 'to ensure that requests are not made on the spur of the moment and as such the employee will have to make a formal application containing specified information.' Some formality is appropriate given that the effect of a successful FWR is to change the contract of employment and this could well not be the intention or desire of either the employer or the employee. An employer may for example have an informal policy allowing employees to work from home but retain a right to require people to come into the workplace. Employees may also agree to short term changes to work patterns to cover staff absences/changes in customer demand. That is very different from an enforceable contractual right to work from home or to work extra hours. Not all this standard give and take within the long term relationship of employment should be formalised. In addition, it is important for employees and employers to be clear whether the request is a formal one, given the legal consequences that arise for employers and because an employee can only make one (shortly to be two) statutory requests per year. The exclusion from protection of some requests in the judgments analysed such as the oral requests in *Iaghanashvii v LNA Trading Ltd*[43] and *Macartney v Black Swan Hotel (Yorkshire Ltd)*[44] then is not of concern. As will be seen though, in several cases, a request was made which was clearly intended to be formal, but because it did not meet all the requirements, most usually that the employee did not explicitly state the request was made under the Act, the employer could argue there was no valid request and therefore there was no breach of the legislation. Furthermore, in *Reyland,*[45] both parties considered that the claimant had made a statutory request at the time, but since the validity of the request goes to the ET's jurisdiction it was held not to be sufficient. The rigid demands of the Act and Regulations can therefore make the right illusory.

This is particularly concerning where the employee has followed their employer's required process to request flexible working by for example filling out their employer's flexible working form but the form does not comply with the Act's requirements.[46] An employer could thereby defeat the whole statutory scheme. In *Holt v London Borough of Haringey*[47] her employer's form did not ask employees the date on which the proposed date would come into effect. The ET held this meant there was no valid request despite it being a very large employer with access to legal and HR advice and acknowledging that this meant that 'every request for flexible working that the respondent has ever received on its own form is unenforceable'. This was described by the ET as 'ironic' but it did not seem otherwise concerned by this.

[43] ET 2205711/2018
[44] ET 1800000/2019
[45] 3202103/2019 and 3219830/2020
[46] See also *Cummings v London United Busways* ET 2303818/2018 where the employer's form still referred to the previous eligibility requirement of having a child, 4 years after the law had changed.
[47] ET 3301964/2020 and 3307354/2020

There is some variation in the judgments in terms of how strictly the requirements are interpreted and whether for example additional emails adding later points can rectify an initial failure to include all required information.[48] In *Bunker v London Underground*[49] the form did not state that the request was an application made under the Act, which would appear to breach the requirement in s.80F. The ET though held that to conclude there had been no valid request when employees were never warned about this, the form came from a well resourced employer and had been used for many years, would be to 'effectively deny the employee the protection which the law affords them'.[50] Although the ET demonstrated considerable uncertainty on this point, it decided that since the form was to be used alongside Transport for London's flexible working policy which did refer to the statutory right, it met the requirement even though the request did not comply with the strict wording of the Act. Interestingly in *Whitmore*, [51] where the facts arise at about the same time against the same employer and therefore it is very likely the same form was used, there is no mention of this issue. This is not to say that employers face no risk if they by omission or design do not include this on their form. Even if a statutorily valid request has not been made, failing to deal with a request in a reasonable way may give rise to a constructive dismissal claim as it may well breach the implied term of mutual trust and confidence.[52]

In other cases, the employer did not have a specific form and requests were made by email or otherwise in writing. This places a significant responsibility on employees to comply with the requirements. Although there is a clear guide to flexible working requests on the government website, it does not make it clear that failure to comply with all these requirements will lead to no statutory protection.[53] There are several examples from the study where employees failed to meet the requirements.

In *Brown v Governing Body of Wennington Hall School,*[54] a school administrator wanted to reduce her working hours due to tiredness caused by effects of chemotherapy. However, her request did not meet the statutory requirements because it did not state whether she had previously made a statutory application and if so when, and did not state it was an application made under the statute. The ET therefore held it did not have jurisdiction to consider this complaint even though her employer delayed in making a decision, did not hold a meeting with her, it was 'doubtful it gave sufficiently careful consideration to the proposal' and failed to provide a response in writing. While the Tribunal expressed 'some reluctance' in making this conclusion, her request did not meet 'the technical nature of the obstacles placed by the legislation'.

In *Maher*[55] the employee's failure to state the request was an application under the Act meant the ET held it was not a valid request. She therefore had no redress under this legislation even

[48] *Cocks v Construction Industry Training Board* 3304104/2020
[49] ET 3324388/2019
[50] Ibid para 166
[51] *Whitmore v London Underground Ltd* 2300573/2019
[52] See eg *Chopra v BrandAlley* 2206095/2018
[53] https://www.gov.uk/flexible-working [Last accessed 28 Feb 2024]
[54] ET 2424499/2017
[55] *Maher v Taylor Engineering & Plastics Ltd* 2401590/2020

though there were significant failures from the employer in complying with its own FW policy and with the legislation. Her employer, 'failed to deal with [the requests] in any meaningful way'. Its decision to refuse the request, 'was a knee jerk reaction tainted with stereotypical assumptions' based on the fact she had recently had a child and it erroneously believed her proposals all asked for part time work. This failure to deal with her requests for flexible working did lead to her success in claims for pregnancy and maternity discrimination, detriment for taking maternity leave and indirect sex discrimination, all of which are likely to lead to far higher damages than her FWR claim but does not mean it is unproblematic. This is an additional wrong with its own cause of action and in other circumstances other claims would not be available.

Other claims along similar lines include *Smith v Warrens Warehousing*,[56] *Reyland v Hanley Smith Ltd*,[57] *Chatfield v Lumb* [58] and *Fitzgerald v Casual Dining Group Ltd*. [59] It must be remembered that this study does not include claims either not brought to ETs at all or withdrawn by claimants because they belatedly realised the statutory requirements had not been met. This issue is therefore likely to arise far more frequently than the recorded judgments show.

The stringent obstacles the combination of s80F and the Regulations cause pose unfair burdens on employees who cannot be expected to know the minutiae of the legislation but reasonably expect to receive statutory protection, especially where they have followed their employer's required process. Whilst the ACAS Code states that employers should inform their employees of what is required to make a valid request, there is no legal obligation to do so. The consultation and new legislation acknowledge the requirement to identify the effect granting the request will have on the employer and ways of ameliorating it may have a disproportionate impact on lower status employees and thus proposes its removal, but it does not acknowledge that this applies to other eligibility requirements as well.

Flexible working is currently disproportionately used by higher status employees and those in professional jobs.[60] If, as the title of the consultation states, the government's intention is to make flexible working available to all, the process needs to be simplified. The focus should be on whether the request was intended to be a formal request and whether the employer had sufficient information to assess the practicality of the request made. The current requirements should therefore be reviewed.

4.2 Time limits

[56] 2402715/2021
[57] 3202103/2019 and 3219830/2020
[58] 2501539/2017
[59] 3325154/2017. Other examples include *Adams v Hoyer Petrolog* 3202436/2018 and *Choudhury v Home Office* 3301004/2021
[60] H. Chung 'Dualization and the access to occupational family-friendly working-time arrangements across Europe' (2018) 52 *Social Policy & Administration* 491; H. Chung and Van der Horst, 'Flexible Working and Unpaid Overtime in the UK: The Role of Gender, Parental and Occupational Status' (2020) 151 *Social Indicators Research* 495.

The second issue that was frequently litigated in the cases in the study related to time limits. Strict, and short time limits are an ongoing cause of concern in employment law claims.[61] There are two interrelated time limits relevant to this issue. Firstly, an employer has 3 months from the date a qualifying request is made to make a decision to accept or reject the request. This period can be extended by agreement with the employee. This time limit is reduced to 2 months by the 2023 Act. Secondly, there is a 3 month limitation period once the final decision is communicated to the employee or after the 3 month response period has expired with no decision, whichever is earlier, to bring a claim to the ET, although the Tribunal has limited discretion to extend time in some circumstances.[62] For example, in *Bunker*[63] the employer was only one working day over the time limits allowed but this was still a breach of the legislation and entitled the employee to compensation.[64]

Three months may sound like a long time for an employer to make a decision on a relatively small issue, especially where the change to working hours/place is urgently required by the employee. But a FWR may well give rise to extensive discussions about whether a modified proposal would work to the benefit of both parties. Take for example an employee who wishes to reduce their hours from full time to working Monday-Wednesday. The employer would accept this proposal but only if a longer day than normal is worked on a Tuesday. This will require extra childcare. Additional paid childcare is investigated but is unavailable or too expensive, and so this leads to further negotiation about whether these extra hours could be worked at home.[65] Too short a decision period may therefore work against the government's expressed desire for statutory flexible working requests to be a discussion based process, ideally leading to a solution which works for both parties. Furthermore, importantly, this 3 month time period is to reach a *final* decision and therefore includes any internal appeals against the original decision, unless an explicit agreement is reached to extend it.

In some of the cases examined, knowing when the 3 month decision period ended was not straightforward. In particular, it may be difficult to know whether time been extended by agreement or whether an employee has not agreed but merely accepted the delay given the power imbalance in the employee/employer relationship[66] or where given the significant formalities required for a valid request it is not clear whether the initial application made a valid claim when more than one request has been made.[67]

Although 3 months is a maximum period and not an aim, claimants in the study were not successful in arguing that a decision had not been made in a reasonable manner where an

[61] Law Commission 'Employment Law Hearing Structures: Report' (Law Com No 390, 2020); Blackham n23 above
[62] It can be extended for a 'reasonable period' if it was not 'reasonably practicable' to bring the claim within the time limit S.80(5)(b)
[63] 3324388/2019
[64] See also *Frances v MLCG Ltd* 2302073/2016 and *Arnett Davis v Ministry of Defence* 2501029/2018
[65] This broadly follows the facts in *Milligan v Coca Cola European Partners Great Britain Ltd* 3323906/2016
[66] *Arnett-Davies* above n 64
[67] *Lacey* above n 42

employer had not breached this three month period, even where for example the internal policy referred to shorter timescales[68] or where the issues were straightforward. Allowing such claims would create uncertainty for employers and employees. This is not to underestimate the difficulty even a 2 month decision period may cause where an unexpected change in circumstances, such a change to child care arrangements, requires a quick decision from the employer in order for the employee to remain in work. This problem is identified in the Making Flexible Working the Default consultation but the solution may be outside the scope of flexible working rights.

It is worth noting that the cases demonstrated that reducing the decision period to 2 months will not always be beneficial for employees. An employee only has 3 months from the end of the employer's decision period to bring a claim, even if a final decision has not been made at this point. Reducing the decision period to 2 months may mean an employee may be required to bring a complaint to the ET even where the internal process (including an appeal) has not yet been resolved, unless there is a clear agreement to extend the decision period.[69] In addition, in *Payne v Lifeways Community Care Services*[70] and *Sherrington v GM Buses South Ltd*[71] it was held that the time to bring a claim to the ET runs from when the decision is communicated to the Claimant, which does not have to be in writing. To hold otherwise would be to unnecessarily complicate the statutory wording, but it is also not surprising a Claimant may delay making an internal appeal until they receive formal written confirmation. Making a final decision within the time frame can also be difficult given that FWRs may well be made by employees on sick or maternity leave and so organising and attending meetings may be challenging.

Although the limitation period will remain at 3 months, because of the interrelation between this and the decision period, the reduction of the decision period to 2 months may still reduce the time between the request being made and the end of the limitation period. Tight limitation periods may limit access to justice and may not lead to the speedy resolution of disputes given that there are substantial delays in cases being heard at Tribunal.[72]

Alongside these borderline cases, the data set examined included several cases[73] where an employer had taken far longer than the statutory maximum: in some cases more than 18 months. These long delays were also used as the basis for other claims with more significant compensation such as constructive unfair dismissal or disability claims such as a failure to make reasonable

[68] *Milligan* above n 54, *Davison v Just Costs Ltd* 2206319/2016 and *Kelly v Norfolk and Norwich Hospital NHS Foundation Trust* 3307324/2020
[69] See also Law Commission n 61 above and Blackham n 23 above
[70] 1804827/2021
[71] 2405389/2016
[72] HM Courts and Tribunal Service 'HMCTS management information- December 2021 to December 2022' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1136250/CSV_HMCTS_management_information_Dec21_to_Dec22.csv/preview [Last accessed 28 Feb 2024]
[73] *Hopwood v Met Office* 4111283/2019; *Seed v Imperial College of Science, Technology and Medicine* 2205052/2018; *Phillippou v Secretary of State for Justice*: 2302442/2018; *Abdul v Santander UK plc* 3331221/2018 and 2205965/2018

adjustments.[74] They did not always stem from the employer's malice or even lack of care towards the employee. The factual situations may be complex and fluid, for example where the employee's health is uncertain and so it may be unclear when they are returning to work and therefore when the changes sought would take effect, if at all. Nevertheless, this has not and should not be accepted as a reason not to comply with the time requirements,[75] given the importance of certainty for employees.

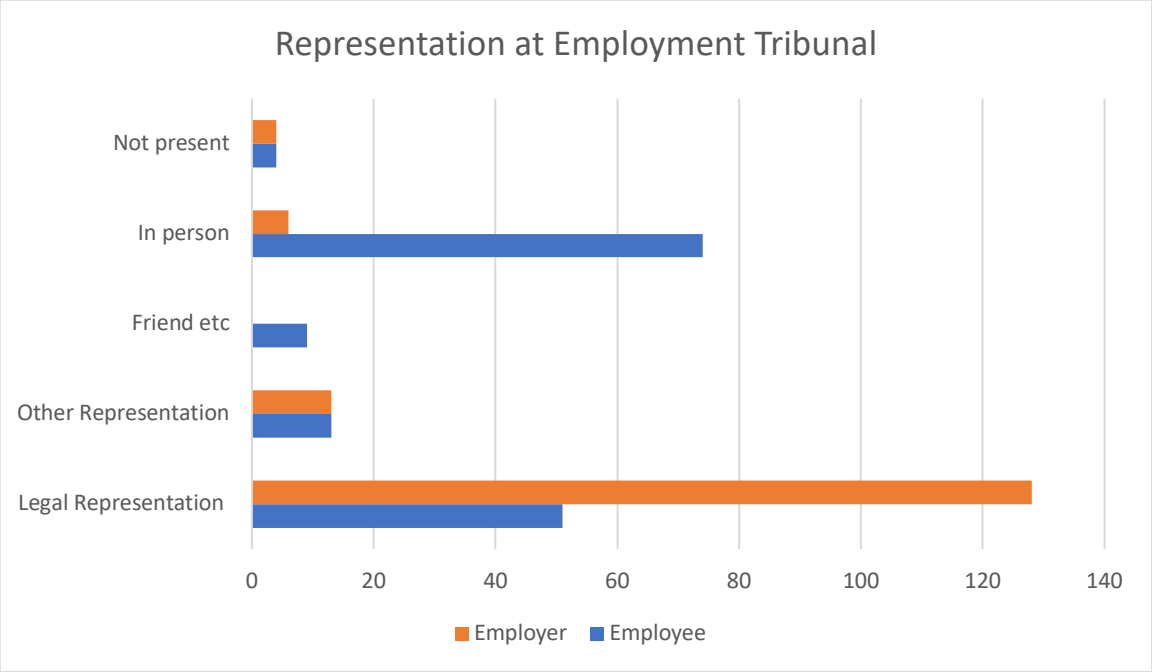
Overall then, this is another example, explored in Grabham's work, of how time and how it is experienced can be central to claimants' and employers' experience of employment law.[76] In some cases claimants' experience of flexible working claims was one of waiting: waiting for a decision, waiting for an internal appeal, waiting for the Tribunal. In others, claimants lost their opportunity to bring claims because they had delayed too much.

4.3 Tribunals' discretion and interpretation of concepts

These first two themes identified from the judgments examined relate to the difficulties claimants and employers face in trying to use the law. The final theme relates to the difficulties *tribunals* have found in navigating the law relating to the limits of the ET's discretion under S.80G and H ERA 1996.

Under s.80G(1), an employer must 'deal with the application in a reasonable manner' and can only refuse it for one of the specified reasons.[77] Under s.80H a complaint can be made to an ET either if the application was not dealt with in a reasonable manner or if the 'decision to reject the application was based on incorrect facts'. Many claims combine the two provisions. As can be seen from the wording, there is no requirement that the employer's *decision* must be reasonable. However, in many of the cases, the claimants use these provisions to essentially make this claim. This may be because, not unreasonably, the perceived unfairness of the employer's decision is the motivating force behind the claim, rather than the strict statutory wording. As seen in the table below, many of the employees in the study were not legally represented and were unrepresented at a higher rate than employers.[78] They may therefore have difficulty in 'translating' their sense of unfairness into a legal claim.

[74] Se eg *Dr B Borgstein v Imperial College Healthcare NHS Trust* 2203411/2021; *Urquart v Sky Subscriber Services Ltd* 4113412/2019
[75] See eg *Phillippou* above n 73 (although see the dissenting EJ in *MacFarlane v HMRC* 4101202/2022.
[76] Grabham above n 11
[77] See Section 3
[78] In 207 claims no information was available, usually when it did not progress to a hearing. See also the EAT's description of the unrepresented claimant's claim in *Singh v Pennine Care UKEAT/0027/16.*



Three separate aspects of s.80H have given rise to issues in the claims examined: the relevance of the ACAS code in deciding whether the request was decided in a reasonable manner; whether the case has been decided in a reasonable manner if an employer goes through the required process but from the outset has decided to reject the request; and how much discretion the 'incorrect facts' provision gives ETs to hold there has been a breach of the Act.

Reasonable manner and ACAS Code of Conduct

Neither the statute or the Regulations give more detail about what is meant by considering the request in a reasonable manner or lay out any requirements as to an appropriate process employees should follow.[79] However, the ACAS code lays out quite extensive obligations:

It states that an employer should:

1. Arrange to talk with the employee as soon as possible after receiving their written request unless they intend to approve the request
2. Allow an employee to be accompanied by a work colleague
3. Discuss the request with the employee, wherever possible in a private place
4. Consider the request carefully, 'looking at the benefits of the requested changes in working conditions for the employee and your business and weighing these against any adverse business impact of implementing the changes'
5. Inform the employee in writing of the decision as soon as possible
6. Allow a right of appeal if it rejects the decision

[79] Until 2014 employers had to comply with a detailed procedure but this was repealed because of its complexity.

The Code is not legally binding but is taken into account by ETs. The standard approach in the cases examined is described in *Whitmore*, 'whilst there is no case law stating that compliance with the ACAS Code creates a rebuttable presumption of reasonableness, and vice versa, the tribunal considered that the ACAS Code was a useful starting point.'[80] In the judgments in the study, the Code was particularly important when considering whether a failure to hold a meeting with an employee or to give an opportunity for an appeal (neither mentioned in the ERA 1996 but are referred to in the Code) breached the requirement to consider the request in a reasonable manner.

In *Summers v B.I.M.S.*[81] and *MacFarlane v HMRC*[82] the ETs held not holding a meeting with the employee before rejecting the request meant the application was not decided in a reasonable manner, relying on the ACAS code requirement in both cases. Holding a meeting is not particularly onerous for an employer but may be very important to the employee from the perspective of procedural justice. Cases on a right to appeal are less clear. A failure to provide an opportunity for an appeal was held to contribute to a breach of the reasonable manner requirement in *Summers* even though this was a very small company and the initial decision had made by the business owner. However, in *Cocks*[83] it was held that it had been decided in a reasonable manner even though not giving an appeal breached its own internal FWR policy.

There is of course a significant difference between best practice guidance and legally binding rules and it is important not to overly penalise employers or complicate the process. However, the forthcoming requirement of consultation with an employee before a request is rejected adds clarity and allows employees to explain their situation to an employer. In future reforms, it should also be considered whether a right to an appeal, at least for larger companies, would lead to more consistent and careful decisions by requiring a refusal to be considered by someone at one step removed from the immediate work environment and decision making process.

Reasonable manner and 'closed mind' cases

The second recurring aspect of 'reasonable manner' in the cases at issue were cases demonstrating a 'closed mind' to flexible working from the employer. The purpose of the right to request is of course not to have the process for its own sake but to require the employer to consider whether the request can be granted. Does an employer comply with the legislation if it goes through the motions and refuses the request for an appropriate and factually true reason but never had any intention of agreeing to it? This goes against the spirit of the legislation, at least in cases where the request is practically possible given the nature and structure of the work, but it is hard to identify a breach of the right.

[80] *Whitmore v London Underground Ltd* 2300573/2019 para 27
[81] 1601577/2018
[82] Above n 75
[83] Above n 48

Of course, in most cases, it will be impossible to know whether an employer really considers the request with an open mind or is merely going through the motions. In *Dankyi v St Margaret's School*[84] though the employee discovered a letter written in advance of the meeting to discuss her FWR thanking her for attending the (as yet non-existent) meeting and refusing her request. The ET held that since an employer was under no obligation to hold a meeting, pre-drafting it in this way was not a breach even though it clearly shows the decision maker failed to take seriously her request. On the other hand, in *King v Tesco*[85] the reasonable manner provision was breached where numerous managers showed very considerable reluctance to engage in the statutory process at all and where, the ET held, the manager had made a decision before the meeting and the purpose was only to tell the employee the outcome. A clearer failure in *Gentle v Flare Products*[86] where the employer was 'resistant to [flexible working] from the outset, becoming angry with the Claimant when he raised it', led unsurprisingly to a successful claim.

A similar issue, although less clear cut, arises in cases in industries with strict rota systems allocated in agreement with collective agreements.[87] In *Whitmore v London Underground*, the employee was a tube train driver who wanted to reduce his working days to 4 per week. Here the ET held that the 'central question for the tribunal is whether the employer genuinely considered the request rather than approaching it with a closed mind.' Despite this seemingly interventionist attitude, it held the employer did not have a closed mind despite having a policy that only 3 drivers per depot could work on amended hours and only ever recruiting full time drivers so eg job share requests were unlikely to be successful. This was because the policy 'was not an absolute' bar and sometimes there had been more than 3 drivers at some depots. This very rigid approach to considering requests demonstrates the very limited utility of the current legislation in breaking down barriers to flexible work, in perhaps not coincidentally, very male dominated jobs.

Of course, all these cases turn on their own facts, but they demonstrate that the right relies on employers being willing to allow flexible working: even where there is evidence of a policy or mindset against flexible working this is not likely by itself to demonstrate a breach of the legislation.[88]

Reasonable manner/ Incorrect facts

The final aspect of the reasonable manner requirement that recurs in the cases in the study involves the most legally complex issue in the legislation. Employers can only refuse the request for a specified 'business reason'.[89] An employee cannot challenge the reasonableness of this

[84] Above n 26
[85] 2301268/2017
[86] 3313818/2019
[87] See also *Bunker* and *Cummings v London United Busways* 2303818/2018, although in *Simmons v Hampshire Fire and Rescue Service* 1406244/2019 a more flexible approach was taken.
[88] In *Tait v Biggar Medical Practice* 4103207/2020*,* for example, the employee did not make a formal request because she was told informally it would not be successful. This did not breach the implied term of mutual trust and confidence and so did not amount to constructive dismissal.
[89] See Section 3 above

decision, but can argue that the employer's decision to reject the application was based on 'incorrect facts'. This part of the provision is not mentioned at all in the consultation nor are any changes made by the 2023 Act. However, this is the only place where the substance rather than the process of the decision can be reviewed by the ET, albeit in a highly restricted way, and it is the only part of the legislation which has been litigated to the EAT, in 2006 in *Commotion Ltd v Rutty*[90] and in 2016 in *Singh v Pennine Care.*[91]

The deceptively straightforward framing of the issue in the legislation is complex not only because it raises familiar questions of ETs' control over employers' managerial decisions: note the ongoing debate on unfair dismissal and the range of reasonable responses test,[92] but because it is not clear what the purpose and extent of the provision is. At its most basic what a 'fact' is and we mean by it being incorrect are not clear given the inherently evaluative nature of some of the business reasons. Both the intensity and the permissible scope of the review are therefore unclear: not only how much discretion the ET should give to employers' decisions but also what the ET can scrutinise and what it should take into account when doing this. It is also worth noting that these claims are often brought alongside other claims which do require assessment of the substantive reasonableness of the decision such as constructive dismissal claims, meaning that factual issues may be more broadly discussed (and perhaps at the least subconsciously considered?) than is required by the statutory test here.

The cases at issue are decided against the background of two EAT cases, which provide guidance but still leave ambiguity. In *Rutty*, the EAT held there was a difference between assessing the correctness of the employer's assertion and whether it is a justified assertion. In considering whether there was an inability to reallocate work among existing staff, an ET can therefore 'enquire into what would have been the effect of granting the application' and whether the employer 'could have coped without disruption, what did other staff feel about it and could they make up the time'. It therefore held that the ET had not therefore overstepped its boundaries in deciding that the decision not to grant part time work, based on assertions that employees working different hours would negatively affect 'team spirit' and that this would strain the employee's resources, was based on 'outdated' and 'off the cuff' responses without proper investigation and therefore was made on 'incorrect facts'.

In the later case of *Singh*, the claimant was unsuccessful, although this would have been likely to be the case even under a reasonableness assessment. Singh worked as a nursing assistant providing residential care. Having worked night shifts for many years, her parents became ill and could no longer care for her child in the evenings, meaning she wished to change to day shifts. Her request was refused on three grounds: the work could not be reallocated amongst existing staff, there would be additional costs in having to use bank workers and it would otherwise leave the unit short staffed. The ET accepted that there was a need for staff at night and that agency

[90] [2006] IRLR 171
[91] Above n 78
[92] Aaron Baker, The 'Range of Reasonable Responses' Test: A Poor Substitution for the Statutory Language' (2021) 50 *ILJ* 226

workers were more expensive. Singh argued her employer had based the decision on incorrect facts because existing staff could be reallocated to the night shift and it was unfair others had had their requests for flexible working granted ahead of her. The EAT agreed that the employer's refusal to change the shift pattern of other employees did not mean there was not an inability to reorganise work.

Although both the EAT cases reach justifiable conclusions, both these cases show the incoherence and difficulties in applying the incorrect facts provision. In *Rutty* the employer's argument to the ET rested on two putative 'facts'. Firstly, part time working in a warehouse affects team morale because morale requires everyone to start and end at the same time. Secondly, the work cannot be reallocated, so packing parcels for delivery would take longer and therefore would negatively affect the ability to meet customer demand. The first 'fact' does not seem likely to be true, but it is difficult to demonstrate either way and, more fundamentally, even if it were true for that group of employees, should this be enough to stop changes to a work pattern which would otherwise require a longstanding employee now in a difficult and unexpected situation to leave her job? The second *might* be factually true, but the employer had not investigated the possibilities of reorganising the work so on the evidence to the Tribunal it could not be said that it *was* true. In *Singh* it would theoretically have been possible to reallocate staff but it is understandable why an employer would have been very wary of changing established work patterns. However, an incorrect fact test needlessly complicates this review.

Some cases in the study do involve straightforwardly factual issues which could be characterised as 'mistakes' on the point of view of the employer. For example, in *Hedger v British Deaf Association*[93] the employer considered her request on the basis that her commute was 50% longer than it was and that she only wanted to work 14 hrs per week when she had shortly afterwards by email said she could do 16 hours. In *Summers v B.I.M.S.*,[94] the employer partly based the decision on incorrect facts as to how much she would be lone working and whether lone working had been previously accepted. Similarly, in *Scott v HBOS*[95] a bank manager wanted to change one of her working days. The incorrect fact the employer has used was that Friday was a busier day in the branch than Tuesday when this could not be proved.

The ET's focus on 'incorrect facts' does not necessarily lead to a hands-off approach from the ET in these cases but can instead lead to intense scrutiny of the factual context of decision making. For example, in *Neiman and Keenan v British Airways,*[96] BA would not allow staff on worldwide fleet terms who worked part time to increase their hours (as opposed to those on newer 'mixed fleet' terms which were less generous) because it would, they argued, lead to an increase in costs. However, the claimants argued that an increase in capacity on worldwide fleet terms would actually be cost neutral. Taking *Neiman* as an example, the evidence on whether a policy is cost neutral may be finely balanced or difficult to obtain but the structure of the legislation turns the

[93] 3318925/2019
[94] Above n 81
[95] 4109548/2021
[96] 3346924/2016

issue into a yes/no question, which may give very little discretion to employers making decisions in uncertain or fast-moving situations. Taken strictly, this test could mean a lack of discretion for employers where they have acted objectively incorrectly but were reasonable in coming to that decision.

Neiman is unusual though in that the employer's decision rested on one factual issue. However, most of the flexible working decisions examined in this study were based on inherently evaluative judgments: does allowing people to work part time or from home lead to a detrimental impact on quality or performance? What happens when employees and employers reasonably disagree on this, especially where it may involve intangible concerns like collaboration between colleagues? Seeing these issues as 'facts' to be proved or disproved can therefore be reductive.

Many of the cases examined in this study raised consideration of how far ETs should intervene in reviewing employer's decisions. In *Rutty*, the EAT warned against two erroneous approaches. At one end, 'all 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, there is a 'full enquiry looking to see whether the employer has acted fairly, reasonably, and sensibly in putting forward that ground'. Instead, an ET can 'look at the assertion made by the employer i.e. the ground which he asserts is the reason why he has not granted the application and to see whether it is factually correct'.[97] An examination of the cases though demonstrate a wide range of approaches taken by Tribunals.

In some cases, the ET took a check box view asking simply whether the employer has identified an appropriate reason. For example, in *Collinson v Michie*[98] the ET stated that the right only gives 'primarily procedural requirements which do not enable a Tribunal to substitute its view of what the respondent should have done' and that the legislation 'requires a mechanical tick box exercise and the respondent just about ticks all the boxes'. In *Cocks v Construction Industry Training Board* the ET held 'we empathise with the claimant in his view that the respondent's concerns may have been overstated or even unreasonable but ultimately these are operational issues which are for the employer to determine. It is not for the employee nor for the Tribunal to try to go behind the reasoning and reach an alternative conclusion.'

Other cases, such as *Pullin, Ellis* and *Seed* seem on all fours with the decisions in *Rutty* and *Singh,* albeit that the statutory language is unhelpful in the enquiry. Each case analyses the circumstances of the request, interrogates why the employer reached the decision they did and that there was some evidence for it, but leaves operational issues to the employer.

In *Pullin v Neovia Logistics Services*[99] the claimant won where the ET held there was no 'objective evidence of potential difficulties in meeting customer demands, no evidence as to concerns regarding the workloads of other employee, [and] no evidence colleagues could not assist in

[97] Para 37
[98] 2501780/2018
[99] 2602524/2019

carrying increased workload.' This is an unusual case though where it involved a change to hours insisted on by an employer (an increase in her contracted hours from 27.75 to 32) and resisted by the employee through the flexible working procedure. Perhaps it is likely there will be more scrutiny in such an unusual fact pattern.

In *Seed v Imperial College*[100] the employee was pregnant and had a 2 hour commute so wished to reduce her days working in the office. She proposed that she would notify colleagues on Monday of the days she would come in that week and would work from home unless she had meetings. This was refused by the employer because, it said, she needed to be mostly physically present in the office to be aware of her employer's activities and to understand projects and future plans. The Tribunal held that the employer's reasons came within 'detrimental impact on ability to meet customer demands' and 'detrimental impact on quality and performance', even though these terms were not used by the employer. It was held that there were no incorrect facts.

In line with other claims such as unfair dismissal, Tribunals have given discretion to employers' expertise and competence in deciding employees' workload priorities and the way the work is done. In *Ellis*, the employee worked as a Nurse Specialist in the Infection Prevention and Control Team and had been predominantly working from home. After a change in manager, she was asked to take a more 'hands on' approach working in the hospital. The ET held there was no 'mistake' about what her job entailed, where she had been working or what was achievable from home, merely a permissible change in focus from a policy/training job to a practical one.[101] The employer had not therefore breached the statute.

A further question is about the scope of review. In particular, should the reasons for the request and the effect on the claimant be balanced against the needs of the employer? In other types of employment law claims, for example in unfair dismissal, there is a broad scope of review taking into account not just the decision to dismiss but much of the working history but with a, frequently argued, not sufficiently intensive review.[102] Unlike such claims though, the incorrect facts provision would seem to exclude any balancing of the reasons for the request against the reasons why the employer refuses it. However, a few cases do appear to assess the 'fairness' of the decision and balance the interests of employees and employers, despite the criticism of such an approach in *Rutty*.

In *MacFarlane*, the dispute centred around a requirement for employees to move back to working in the office after the government's guidelines to work from home where possible were removed in summer 2021. MacFarlane refused to return because he had health concerns over catching Covid and because he was caring for his wife. At the time of the request, he had worked for HMRC for more than 40 years and was within a few months of his retirement. He was never actually required to come back to the office before he retired because the policy changed back following

[100] 2205052/2018
[101] See also *Lacey v Oxford University Hospitals* above n 42
[102] See Baker above n 92

a new recommendation from the government to work from home where possible in November 2021.

His employer refused the FWR on the basis that him being in the office would help collaboration between colleagues and because of a 'planned structural change' of 28 new trainees coming into the department (although he would not be directly training them it was argued they would benefit from his expertise more if he were physically present). Unusually, the ET decision was not unanimous. There was a fundamental difference of approach between the Employment Judge and the two lay members.

The lay members explicitly used a balancing approach, more commonly seen in cases applying a proportionality test, such as indirect sex discrimination: stating for example that '[his manager]… focussed on the business needs (that is, getting people back to work after lockdown) and failed to balance this against the claimant's concerns regarding health and caring responsibilities' and that his manager 'displayed a lack of empathy for the difficulties surrounding [MacFarlane's] caring responsibilities'.

The Employment Judge on the other hand fundamentally disagreed with their analysis. She held that his manager had read and considered all the information, had considered there were no business benefits to MacFarlane being a designated homeworker and that HMRC was an 'office-based organisation, committed to creating workplaces that encourage collaboration and a sense of community… employees had to interact with each other face to face some of the time, sharing knowledge, experience and learning with others.' She pointed to the EAT's decision in *Singh* that it is not for an ET to judge the reasonableness or fairness of the decision. These drastically opposed approaches illustrate the difficulties in applying this provision.

Summers also demonstrates a balancing approach. The employee wished to reduce her hours and it was agreed that recruiting additional staff for the specialist work for the limited hours now not covered would have been very difficult. Nevertheless, the ET still said that the decision was based on incorrect facts because the employer 'needed to properly weigh into the balance, and did not do so, the risk of losing the claimant as an employee and with it the total loss of her skilled work which could not easily be replaced'.

These significantly varied approaches ranging from a check box view, to intensive but narrow scrutiny of relevant facts, to a balancing approach with a wide scope of review, is partly because there is an inherent uncertainty about what the right to request FW is designed to *do* and whether the reason flexible work is requested has any significance. It is notable that in all the cases where reasons are available, it is explained why the employee wished to request flexible working, although this is of minimal legal relevance because the focus of permissible review under the legislation is the employer's decision making process rather than the effect on the employee.

Given the inherently evaluative nature of many of the 'facts' underlying the business reasons provision, especially in a context where more employees want to work from home and technology

allows secure access to work systems and collaboration with colleagues and clients, the question of the extent of employer's discretion to deny requests over where and when work is done is likely to keep arising. The legislation strongly suggests ETs should have some reviewing power over this and employers cannot simply assert that working from home or working non standard hours will have an impact on collaboration and teamwork. However, to reduce these assessments to 'facts' which are either 'true' or 'untrue' is confusing to claimants,[103] reductive and unhelpful, given the inherent requirement of evaluation. In some cases, even arguably in *Rutty* itself, there is essentially a reasonableness test but this is not done openly. Whilst the government shows no appetite to change the substance of the right at present, this should be kept under review.

5. Conclusion

The right to request flexible working in some ways an oddity: an employee of course always has the right to request a contractual variation. It does not give any substantive right to flexible working. However, it nudges employers towards considering requests they would otherwise have outright ignored. This study provides an insight into the recurring issues raised by claimants when using this right and how ETs have interpreted key concepts in the legislation. It has demonstrated that the process is not straightforward: claimants have to overcome several obstacles to bring their request within the ambit of the legislation and within the time limits required. Employers too may find the soon to be decreased decision period difficult to comply with. More substantively, the concepts of incorrect facts have led to differing intensity and scope of review. Notably, the key themes identified from this analysis of existing case law do not match the problems and consequent reforms identified in the new Act and the BEIS Consultation. This article has therefore provided new insights into how this law is being used and suggestions for reform.

[103] See eg discussion in *Singh v Pennine Care*