These notes refer to the Employment Act 2002 (c.22) which received Royal Assent on 8 July 2002

EMPLOYMENT ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Miscellaneous and General

Miscellaneous

Section 47 and Schedule 7: Flexible working

118. Flexible working was the single biggest issue raised by consultees during the consultation for the 'Work and Parents: Competitiveness and Choice' Green Paper of December 2000. Responding to this, in June 2001, the Secretary of State for Trade and Industry set up the independent Work and Parents Taskforce to examine how to meet parents' desire for more flexible work patterns in a way that is compatible with business efficiency. This section therefore gives parents the right to apply for flexible working. It lays out:

- The eligibility criteria which must be met in order for an employee to apply for a flexible working pattern;
- A clearly defined framework for a procedure to be followed by employees and employers when making and considering requests for flexible working;
- The employer's duties in relation to an application under the new provisions;
- The right for an employee to take their case to an employment tribunal; and
- What happens if a tribunal finds that an application has not been dealt with correctly.

119. The new provisions will be inserted into the Employment Rights Act 1996.

80F Statutory right to request contract variation

120. Section 80F sets out the criteria that must be satisfied in order for an employee to be eligible to make a request for a flexible working pattern. It is intended 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.

121. Subsection (1) identifies the kind of variations of the terms and conditions a qualifying employee may apply to his employer for under this part of the Act. It is intended that the changes are limited to the hours the employee is required to work, the times he is required to work, and where he is required to work. The intention is that this will cover work patterns such as compressed hours; flexitime; home working; job-sharing; teleworking; term-time working; shift working; staggered hours; annualised hours; self-rostering. By regulations, the Secretary of State may also specify further criteria if it is found at a later date that the list is not exhaustive enough to cover all the changes that may be needed.

122. Subsection (1) also makes clear that these changes can only be made for the purpose of caring for a child. The right to apply will be available to a qualifying employee who has a relationship with the child, which will be specified in regulations. It is intended that this will cover anyone who has responsibility as a parent of an eligible child. For example, biological parents, adoptive parents, and new partners of parents where they share the responsibility of caring for the child. It is not the intention that the ability to apply for flexible working should extend as far as anyone who lives in the same house as the child but does not have responsibility for caring for the child e.g. grandparents, aunts, uncles (unless they specifically have parental responsibility).

123. Subsection (2) sets out what must be included in an application. Qualifying employees will have to explain why they are eligible for making a request i.e. self-certify. The effect of an application being accepted will result in a variation of the terms and conditions of an employee's contract of employment. This means that should an employer subsequently discover that their employee has lied and never intended to use the flexible working pattern for the purposes of caring for the child then they may take disciplinary action.

124. Subsection (3) specifies the age limits of the child. The ability to request flexible working will be open to those employees who care for children under six years of age so as to cover two periods when the levels of requests are expected to be high; that is, the time following the child's birth and when the child starts school. Regulations will allow for the possibility of changing the age limit in the light of experience (subsection (6)). Parents of disabled children face greater challenges in raising their children and they will be able to make requests up until their child is 18 years of age. It is not the intention of the Government that it will use this power in the short-term. The Government will first review the right three years after it comes into force.

125. Subsection (4) deals with the frequency of applications. It limits the number of requests an employee may make to one per year, from the date the application is made, because of the costs of dealing with an application. The latest an employee will be able to make an application is 14 days before their child reaches either age limit. Once this time period is reached, the employee will no longer have the right to apply to change their working pattern and their existing working pattern will continue. The Work and Parents Taskforce did not find a willingness amongst employers and employees for undoing the original changes made to implementing a flexible working pattern when either of the limits is reached.

126. Subsection (5) provides for regulations allowing changes to how an application should be made**.**

127. Subsection (7) provides that the reference to a disabled child for the purposes of this section is to a child claiming disability living allowance within the meaning of Section 71 of the Social Security Contributions and Benefits Act 1992.

128. Subsection (8) provides the power to establish the criteria under which a person will be classed as an employee for the purposes of making an application. It is intended that the requirement as to duration of employment will be continuous service with the same employer for at least 26 weeks. Agency workers who are employees will not be eligible to make a request. This is for practical reasons. The agency will not have a detailed knowledge of the business of the company with which the agency worker is placed to be in a position deal with an application. On the other hand the company with which the agency worker is placed will have approached the agency to provide a specific service without an expectation of having to adjust their working patterns to the individual's circumstances.

80G Employers' duties in relation to applications under section 80F

129. Regulations will be made concerning an employer's duties in relation to dealing with applications for flexible working.

130. When an employer receives a request it will be their duty to accept it or to establish the business case for rejecting it and they will need to follow a prescribed procedure to ensure and demonstrate that the request has been properly dealt with. The aim is to encourage dialogue between the employer and employee in the workplace about changing work patterns and how to meet both parties' needs.

131. There will be occasions where an employer believes that they are unable to accept a request. In order to reject an application they must, in their opinion, have specific business grounds for doing so. Subsection (1) (b) specifies what each of these are:

- The burden of additional costs;
- Detrimental effect on ability to meet customer 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 employee proposes to work; and,
- Planned structural changes.

132. There is a power to make regulations to add to these grounds if the Secretary of State becomes aware of other grounds that should be included. The section contains all those identified by the Taskforce. Employers will not be able to simply tick a box saying one or more grounds exist but will have to provide sufficient explanation to the employee of why, in their opinion, the ground applies to their business and why it results in the refusal of the application.

133. Subsection (2) identifies regulations that are intended to outline the procedure for dealing with an application for flexible working. In practice, the intended procedure will work as follows:

- A request is received specifying the desired working pattern, the date from which it is proposed it should apply, and explaining what effect the employee thinks the change will have on the employer and how it might be accommodated. The employee will have to explain why they are eligible under the right to make an application.
- The employer arranges a meeting within 28 days of receiving the application to discuss the request. The employee is able to bring a representative if they wish.
- The employer writes to the employee within 14 days of the meeting either (i) agreeing the new working pattern, any action on which it is dependent, and a start date; or (ii) confirming any compromise suggested and the start date; or (iii) setting out the business reasons and an explanation of why the request cannot be met, together with details of how to appeal if the employee is not content with the decision.
- An employee has 14 days following the notification of their employer's decision to appeal.
- Within 14 days of being informed that the employee wishes to appeal the employer should arrange a further meeting to hear the appeal. The employee may be accompanied by a representative if they wish.
- The employer must provide a decision within 14 days of hearing the appeal.

134. The practical details of the procedure for both employees and employers will be specified in regulations. This is to ensure that all the details can be kept together. It

is the intention that these will define how the meetings are to be arranged and the arrangements for postponement in circumstances where one of the parties is unable to attend. The regulations will explain who can accompany the employee. It is the intention, as the Taskforce recommended, that this will be a fellow employee, friend or appropriate recognised trade union representative. The Taskforce did not want unduly to limit the people who could accompany the parent making the request and preferred a wider formula that would encompass all expertise in this area. The Government intends to consult widely on this issue. The regulations will also detail the points that will need to be covered when informing the employee of the employer's decision. Where an employer rejects an application the intention is that the employer should set out their business reasons (which will have to be from the list shown above) backed up with an explanation of the reason why, in their opinion, it applies. This is to help the employee understand why the employer has arrived at his decision and to help demonstrate that the request has been considered seriously. It is envisaged that a couple of paragraphs will usually be sufficient. The intention is that the guidance to accompany the right will include a variety of differing examples for each of the business reasons. One illustrative explanation might be:

""I am sorry that I cannot grant your request to leave at 3:30pm each day as this will severely effect our ability to meet customer demand and I am unable to cover your absence. You are currently the only certified forklift truck driver that works at the end of the day and it is essential that we are able to load the lorries for over-night delivery. Due to the fact that we supply perishable goods it is not possible to load the delivery lorries any earlier in the day. I have spoken with our other two forklift truck drivers, and they are presently unable to change their hours. I also advertised in the local paper when Sam left and notified the Job Centre of the vacancy but could not find anyone to cover his job. As that was only two months ago it is not appropriate to go through the process again now."

135. The regulations will also cover the appeal process. The intention is that the employee will have to set out the grounds for their appeal. These grounds may include, but need not be confined, to the following: concern that the procedure has not been properly followed, that the business reasons for rejecting the request have not been sufficiently explained, or that a fact in the explanation of the business reasons is incorrect. The intention is that the appeal should be held with a more senior manager than the initial meeting where possible. This will not always be possible especially for small businesses. The regulations will also explain the points that the employer should cover when informing the employee of the outcome of the appeal. The intention is that the employer should give a sufficient explanation, building on the earlier communication where appropriate. Where the procedure has been followed correctly (either up until the appeal stage or through the appeal stage itself) then it is the Government's intention that the employee should not be able to claim a grievance against the employer when informed of the outcome just because they do not like it. It is intended to make use of the regulations elsewhere in the Employment Act to disapply the three-step grievance procedure in these circumstances. It is also the intention that the regulations will allow for the appeal to be heard as part of an employer's established procedure for handling appeals on other issues, as long as the timescales are no less than those for the appeal procedure described above. This is to encourage the employer and employee to use all the avenues open to them to try and find a satisfactory outcome.

136. Subsection (3) enables regulations under subsection (1)(a) to disapply any part of the procedure if an application is agreed or withdrawn; to provide for an application to be treated as withdrawn in specified circumstances; and to provide for a time limit to be extended, for example if the employer and employee agree the extension.

137. Regulations will allow for:

- Changes to the procedure where there is agreement between both parties. For example, the employer may feel able to accept the request immediately and thus a meeting would be inappropriate.

- Changes to the timescales where there is agreement between both parties. This is to cover circumstances where it may be extremely difficult for one party to follow a certain part of the procedure. For example it may be that during the meeting to discuss the request an alternative is identified but further information is needed to ensure that it is workable. It may not always be possible in the circumstances for this information to be obtained within the two weeks the employer has to notify the employee of their decision. It is the intention that the regulations will specify how the agreement to postpone is to be handled and recorded.

- The request to be treated as withdrawn in some circumstances. The intention is that where an employee fails repeatedly to attend the meeting and to answer letters without proper explanation then the employer should be able to conclude that the employee no longer wishes to pursue the request to work flexibly.

138. Subsection (4) allows Subsection (2) to be amended by order. This enables the procedure for making an application to be changed at a later date if it is found necessary to do so.

80H Complaints to employment tribunals

139. Where cases cannot be resolved in the workplace or through other alternative dispute resolution mechanisms (employees will be able to use the Advisory Conciliation and Arbitration Service binding arbitration scheme), an employee will be able to take their case to an employment tribunal.

- Subsection (1) identifies the circumstances under which an employee who has made an application under 80F may present a complaint to an employment tribunal.

- Subsection (2) clarifies that no complaint can be presented to an employment tribunal in respect of an application which has been disposed of by agreement or withdrawn.

- Subsection (3) clarifies that in the case of an application that has not been disposed of by agreement or withdrawn, a complaint cannot be made under this section until either the employer notifies the employee of a decision to reject the application on appeal or commits a breach of regulations under section 80G(1)(a).

- Subsection (4) provides that a complaint cannot be made under this section in respect of a failure to comply with regulations under section 80G(2)(k), (l) or (m). This is because the regulations themselves will include a right to complain to the employment tribunal in such cases.

- Subsections (5) and (6) explain that a complaint cannot be presented to an employment tribunal unless it is made within three months of the date on which the employee is notified of the employers' decision on the appeal, or of the breach of the regulations, unless there is an extension under subsection (3) (b). However, it allows for the cases to be heard after this time limit if the tribunal feels it was not reasonably practicable for the complaint to be made within it.

80I Remedies

140. This new section outlines what will happen if an employment tribunal finds a complaint under section 80H well founded.

- Subsection (1) provides that if a tribunal finds that a complaint is well founded, the tribunal will have the power to order an employer to reconsider a request. It also

gives a tribunal the power to consider whether an award of compensation should be made to the employee in such circumstances.

- Subsection (2) enables the tribunal to make the award of compensation at a level they feel to be just and equitable given the specific circumstances of the case. In deciding the amount, the tribunal will take into account the behaviour of the employer (e.g. whether they have lied) and of the employee (e.g. their willingness to consider acceptable alternatives).

- Subsection (3), however, limits any compensation award to a maximum to be specified in regulations. There will be consultation on regulations to specify how many weeks pay should be the maximum.

141. Schedule 7 provides for amendments to other legislation which are consequential on the amendments made by section 47. These include an amendment to the Trade Union and Labour Relations Act (Consolidation) 1992 to allow disputes over flexible working to be settled under the ACAS arbitration scheme and to the Employment Rights Act 1996 to exclude the Armed Forces from these provisions.