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**BEIS consultation: Transparency: Flexible working and family related leave
and pay policies**

Response from Employment Lawyers Association

7 October 2019

About ELA

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A working party chaired by Louise Taft was set up by the Legislative and Policy Committee of ELA to respond to the above consultation document issued by BEIS. Members of the ELA working party are listed at the end of this paper

BEIS Consultation extract:

Section 1: Publishing family related leave and pay and flexible working policies

If a requirement to publish family-related leave and pay and flexible working policies was introduced, large organisations might be required to provide a link to the relevant policies on their website. As the purpose of the requirement is to achieve greater transparency, we believe that this should be the case whether their offer exceeded the statutory minima or not. Where the offer does not exceed the statutory, a simple statement should suffice.

Question 1 Do you agree that large employers (250+ employees) should publish their family related leave and pay policies on their website?

ELA Response:

We agree that requiring employers to publish information on their family related leave and pay offering will help meet the objective of ensuring these entitlements and benefits are transparent and clear to all potential applicants from the outset. We consider that it will also help to ensure applicants are making informed decisions about job opportunities (by being aware of what certain pay entitlements are, which will inform decisions on whether to leave a current role and/or whether to progress an application with a particular employer) and allow companies to see what their competitors are offering in terms of family related leave and pay and benchmark/improve their own offering, which could in turn lead to a more competitive job market. Committee members have personal experience of knowing people who, when applying and interviewing for jobs, have wanted to ask about entitlement to family related pay, but have been put off doing so for fear that it will result in their application being rejected. The concern is that if an applicant gave an indication of wanting to start a family, or indeed growing their family, this would put off a prospective employer. Although the law is clear that a decision to not offer an applicant a role for discriminatory reasons is unlawful, this is of little comfort to applicants whose immediate objective is securing work. However, we also consider that the key issue where transparency is needed is the pay entitlement, as opposed to the leave entitlement which, in our experience, is typically limited to statutory leave. Whilst we appreciate that family related pay is intrinsically linked to the relevant leave entitlement, both leave and pay are typically addressed in the same policy and it may be easier for employers to simply refer to a copy of their policies to provide information on their family related leave and pay offering. The consultation objectives may be better met by simply having employers confirm whether any leave and pay enhancements are offered and what (in brief) are the eligibility criteria. Providing the information in such a simple and straight-forward format will ensure that the entitlement is understood by all. This is important as, in our experience, family related leave and

pay policies are typically some of the most comprehensive policies containing a host of definitions and technical terms which may cause confusion to those trying to decipher entitlements without having the benefit of being able to ask their employer what their entitlement is.

Question 2: Do you agree that large employers (250+ employees) should publish their flexible working policies on their website?

ELA Response:

In our experience, often flexible working policies simply restate the procedure under the statutory flexible working scheme. They do not give any real information or indication on an employer's attitude to flexible working. If this approach is taken, we do not see how publishing flexible working policies will help improve access to flexible working or help create transparency on an employer's approach to flexible working. Those employers seeking to promote flexible working as an employee benefit might go further than statutory requirements, but if wanting to do so, they might well volunteer this information so forced transparency would be of limited benefit. Further, a perverse result could be that employers required to publish flexible working policies would limit flexible working in ways they wouldn't to an existing employee. For example, an employer might be more willing to accommodate homeworking for a valuable employee with whom they have developed a trusting relationship but be more reluctant for a new recruit.

Question 3: Do you agree that transparency of these policies will help employers to recruit and retain staff?

ELA Response:

With regards to flexible working, for the reasons set out at question 2, we do not agree that the transparency of these policies will help employers to recruit and retain staff. Whilst there is no doubt that more people want to work flexibly (the Working Families 2019 *Modern Families Index* shows that fewer than half of working parents work flexibly, despite 86% saying they would like to), we are sceptical that the forced transparency of flexible working policies would have this effect. However, with regards to family related leave and pay, for the reasons set out above, we agree that the transparency of family related pay will help employers recruit staff who might be more willing to join employers knowing they enhance statutory pay. It may also help retain staff if there is a culture of such entitlements not being understood or discussed at work.

Question 4: Do you agree that, where the employer has a policy on family related leave and pay which extends the statutory minima, reworking and publishing your internal policy document on a public-facing website would not be a significant or expensive task?

ELA Response:

C. Approach to informal flexible working (such as later starts to accommodate health and other appointments)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
D. Enhancements to different types of family related leave and pay, for example: <ul style="list-style-type: none"> • Maternity Leave and Pay; • Paternity Leave and Pay; • Adoption Leave and Pay; • Shared Parental Leave and Pay; • parental leave taken in respect of older children; • or, any other contractual enhancements to family related leave and pay. 	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

The answers to (a) – (c) above are dependent on whether the employer would be providing their response in respect of the particular role advertised or across their workforce generally. If the latter, then there is a concern that the information provided would be a general statement of the employer’s approach to flexibility, caveated to take into consideration the different requirements across the business to the extent that the information provided risks being meaningless and thus fails to improve clarity, certainty and an understanding of the employer’s policies. This would not achieve the policy aims of creating transparency and facilitating women returning or staying in work. Broad statements of intention would in turn fail to increase female participation rates only widening the gender pay gap and general inequality within the workplace (and at home) further. If employers were required to provide this information based on the particular role advertised this would enable applicants to make informed employment choices that suit their family requirements. Those recruited into the role are more likely to remain in the position if provided with the flexibility required, in accordance with the employer’s initial information, which in turn is likely to improve the employee’s health and well-being, motivation, and loyalty. However, providing this information on a role-by-role basis would be better placed in job adverts, rather than on a central database. This is because applicants are far more likely to benefit from the information being available within the advert itself - preventing them having to research elsewhere into the employer’s potential flexibility options when assessing whether the role is suitably flexible. Furthermore, if employers had to provide the information in (a) – (c) on a central database for each role advertised, in addition to the job advert, this would be considered to be too onerous a duty, time consuming and potentially costly for employers. A more balanced approach would be for employers to provide on a central database, such as the Gender Pay Gap reporting portal, a narrative setting out their approach to flexible working and those positions or areas within the organisation that are not able to be worked flexibly as per grounds (a) – (c), including their reasons why in a narrative. Reporting in the negative would prevent the use of a meaningless broad statement setting out their approach to flexibility.

Instead it would send a message that unless specified, flexible working is the norm, available and that applications for such would be considered positively; rather than the current presumption against flexibility. Reporting in the negative would be a less onerous task for employers. It would force employers to not only consider whether a position/area of their workforce could be worked flexibly but also the important consideration of 'why not?' when providing a narrative for those positions/areas that are considered unable to be worked flexibly. This would hopefully result in more employers establishing that whether the work as undertaken flexibly or not doesn't matter as long as the work is completed. For those positions/areas that after consideration remain unsuitable for flexible working, having this information available prior to applying for a position would increase transparency and provide potential applicants at the outset with the information required to assess whether it meets their work-life balance needs. In turn this would reduce the time employers waste on interviewing and recruiting candidates that require flexibility when this is not possible. As regards (d), on the presumption that this will only apply to those employers whose policies and pay exceed the statutory minima, if this information was already provided on the employer's website (question 1) then the benefit to be achieved by also providing this information on a central database would be the ability to compare employers. This measure could be more beneficial to employers, allowing them to compare their data against their competitors, than it would potential employees. As such, its ability to further the government's aims and objectives is limited.

Question 7: To what extent do you believe that a job applicant's decision on whether to apply for a job depend on the publication of the information mentioned above?

ELA Response:

Imposing a duty on employers to publish their family related leave and pay, and to a lesser extent their flexible working policies, on their website (as in accordance with the responses to questions 1-5) would significantly assist a job applicant's decision in whether to apply for a job. To date, job applicants have feared discrimination for requesting this information, which has perpetuated the gender pay gap as women are more likely to apply for obviously flexible or part time roles at lower salaries. Transparency is essential if we are to enable women to make informed employment decisions that improve their access to flexible working and remain mobile in the labour market. Job applicants would also be assisted with information on an employer's approach to flexible working on a central database (in accordance with the response to question 6) if a presumption of flexibility existed. This would afford job applicants with the ability to assess at the outset whether the role and employer's approach to flexibility are suitable to meet their work-life balance needs. This would encourage more women to return to work following a period of family-related leave or apply for positions that better suit their requirements.

BEIS Consultation extract:

Section 2: A requirement to report or a voluntary approach?

There are already a number of mandatory reporting regimes in place, including gender pay gap reporting (mandatory for all large businesses, i.e. those with 250+ employees). These provide incentives on businesses to take action to improve their performance, so we are mindful of introducing additional regulation without testing a voluntary approach in the first instance – particularly given the impact the reporting requirement alone appears to be having in raising the profile of these issues.

However, the potential for change to be driven by greater transparency around existing policies should also be weighed against the potential stimulus for change which an action plan might provide. Around 50% of large employers already voluntarily supplement their gender pay gap information with a narrative or an action plan, which sets out the steps they are taking to narrow the gap. It may be that a dynamic action plan is a more effective way of driving cultural change also on this issue.

Question 8: How effective do you believe a voluntary approach to encourage greater transparency about an organisation's approach to flexible working and family related leave and pay (e.g. through the Gender Pay Gap Reporting Portal) might be in providing information about employers' policies?

ELA Response:

Requiring this information on a voluntary basis would be helpful. It is likely that most organisations that encourage flexible working will voluntarily provide the information, while those who do not proactively encourage it are likely to provide less information. That in itself will be revealing. It may therefore assist to have some form of assumption in place which applies to those who do not publish any information. For example, it may be assumed that unless stated otherwise, the employer does not encourage flexible working or go beyond the statutory minimum requirements. However, given that this question deals with voluntary reporting only, it would be difficult in practice to build in any form of accurate assumption about the practice of those who fail to report. Ultimately, even with other mandatory initiatives in place, voluntary participation may be unlikely to bring about cultural change. Furthermore, for those who do offer enhanced policy elements, they may not want to publish as it might limit their flexibility to make change, or create animosity for existing employees – see our comments at Q2 around different attitudes to flexibility requests from trusted existing staff and new recruits.

Question 9: How effective do you believe creating a facility on the Gender Pay Gap Reporting Portal on GOV.UK to record details about an organisation’s policies on flexible working and family related leave and pay would be

ELA Response:

	Very effective	Fairly effective	Not very effective	Not at all effective	Don't know
A. To provide a central point of information for employees or prospective employees?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
B. To let employers record the information as a part of the annual cycle of Gender Pay Gap Reporting?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The GPGR facility simplifies the administrative part of the process, makes compliance straight forward and is a prompt for businesses to recognise the overlap between two issues. If the aim is to create a central portal then it would be appropriate and efficient to use the existing GPGR facility to record information centrally. Central records may be of assistance to ensure credibility of the data provided and would be helpful as a source for searching in a particular context. However, prospective employees considering whether to apply for a job are more likely to access the employer’s own website. We therefore consider that publishing information concerning family policies on the employer’s own website is likely to be more effective than a central portal.

Question 10: How effective do you believe it might be to encourage employers to set out how they are using greater transparency about their employment policies as part of their gender pay gap action plans?

ELA Response:

Employers who are pro-actively addressing this issue will likely provide this detail. Those who are not will be encouraged to consider transparency as a way to tackle any gender pay gap. There is a clear correlation between gender pay and employment policies around flexible working and family leave and pay. As such, it is likely to be effective that action plans seeking to reduce gender pay gaps should include clear and transparent, internal policies governing these issues.

Question 11: Do you agree that it would make sense to enforce a reporting requirement of this kind in the same way as gender pay gap reporting (i.e. a requirement to provide this information as part of the gender pay gap reporting process)?

ELA Response:

While all large employers are equally impacted by the general requirement to report on gender pay gap, any additional reporting requirements around family leave and flexible working policies may become more burdensome for the employers who go above and beyond the statutory minimum. Care should be taken not to make the reporting requirement unduly onerous, or different between those who comply with the statutory minimum only, and those who offer enhancements. Increasing the reporting burden could penalise those who do the most and dissuade others from adopting formal policies that would need to be reported on. This would be especially true if penalties were imposed on flexible employers who offer the highest benefits, in cases where they were found to have underreported. Nonetheless, gender pay and flexible working are interlinked and enabling more flexibility is highly likely to bring about more equal pay between genders. Therefore, it would make sense to align the requirements and enforcement with gender pay.

Section 3: A requirement to say whether jobs may be open to flexible working in an advert

If employers were to be required to say in a job advert whether flexible working was available, there would be a need to strike a balance between what information it was practical to provide, and what a candidate would find helpful.

Question 12: Thinking about the balance between what it is practical to provide in a short job advert and what is useful to a candidate, which of the following is the best option (please select one)?

ELA Response:

A simple statement (such as “Happy to Talk Flexible Working”)	<input type="checkbox"/>
A short statement covering the organisation’s approach to place, hours and times (e.g. “core hours”) of work	<input type="checkbox"/>
A simple statement and a link to a published policy	<input type="checkbox"/>
A short statement covering the organisation’s approach to place, hours and times of work and a link to a published policy	<input checked="" type="checkbox"/>
Other	<input type="checkbox"/>

Clarity is a really important part of helping applicants and employees to understand the boundaries and values of the organisation to which they are applying, or for whom they work. For any information to be meaningful we consider that it should clearly address the approach to requests for changes in hours, times and work location in respect of a particular role, and when such changes may be agreed (i.e. from day-one or only after 26 weeks' service). It should also be provided in a relatively consistent manner that allows for comparison.

Question 13: If a requirement was introduced to state in job adverts whether flexible working may be available or not:

A. Who might the enforcement power sit with? Please describe.

ELA Response:

If this is to be implemented, we consider that there would be a benefit in having an enforcement power by the EHRC (given that its purpose is to reduce inequality and the gender pay gap) together with a right for an individual to pursue a claim in the employment tribunal (however, see comments below regarding concerns about how this might work).

B. What should be the process for reporting a breach? Please describe.

ELA Response:

(1) The preliminary question here is "what would a breach look like?" Would it be an employer saying it was more flexible than it was; not saying it was flexible when it in fact was; generally including inaccurate or incomplete information; or all of these? And does it refer to: an organisation's general policy, or in respect of the specific role being advertised; day-one flexibility or only those after 26 weeks' service? What if the job itself as advertised already includes flexibility, for example it is a part-time post? What if circumstances change after the point of advertising/recruitment? Given the number of permutations of a flexible working request, it may be difficult to know whether information provided is accurate and complete. For example, a statement that says the job could be performed part-time would be helpful for some, but not for those interested in considering home working or condensed hours. (2) In any case it seems that employers who operate flexible working policies (either at the point of advertising, or after recruitment) will have the greatest reporting burden and are therefore at the highest risk of acting in breach. This policy could therefore act to penalise the employers who are doing the most (because they are at the highest risk of failing to publish all required details). (3) There is also a concern that an employer may be dissuaded from granting a flexible working request if they had not included a reference to flexible working in the job advert. Subsequently granting a request could arguably be used as evidence by a potential candidate who did not apply because they were not aware of flexible working. As such, the requirement to publish an approach in advance, could have unintended consequences. (4) The policy may also legitimise employers who do not operate flexible working. There is already a statutory requirement for all organisations to consider flexible working requests for employees with 26 weeks' service. Such requests can only be

turned down for one of the specified business reasons. It therefore seems meaningless to have a requirement that job adverts include the phrase “Happy to talk about flexible working” for example, because that should be the default for all employers. (5) An employer could be encouraged to publish its approach to flexible working and any flexible working policy, but it would remain the case that each individual request would need to be decided on a case-by-case basis. It is also difficult to factor in third parties, such as recruitment agencies or group secondments and it is not straight forward to consider to what extent these parties would be responsible for advertising and promoting the prospective employer’s approach to flexibility within the role/organisation (6) It is not clear what form of job advertisement this would cover. At present, beyond prohibitions on discrimination, employers and recruitment agencies are free to advertise in whatever medium and manner they see fit (written, oral, online, newspapers, shop notice boards etc.), or to recruit based on word-of-mouth, speculative applications, or from individuals already known to them. To introduce a positive requirement about what must go into a job advert would be a significant change to current practice. Could it catch internal recruitment/promotion? Would it catch word-of-mouth recruitment? If some forms of recruitment are within the rules, and others not, these regulations could act to skew practices as employers seek to minimise legal risk. In practice, it seems unworkable. (7) There will be employers who encourage and are positive towards flexible working as a recruitment aid. We expect that these employers may already make flexible working options known in job adverts and would respond to encouragement to do so. This could hopefully drive market practice towards greater flexibility. Other employers will be less familiar, less open, or simply follow the statutory minimum requirement in respect of flexible working. We consider that those employers may be more likely to pay lip service to any requirement to say “Happy to talk about flexible working” or simply state that their policy aligns with statutory requirements. While it may be helpful for candidates to know this in advance, it may also have an impact on the market, with less flexible employers dissuading applications from candidates who may later seek flexibility, by being less open to it in adverts. They may then have less pressure from employees to become more flexible and so it could polarise positions and slow progress. (8) We note that unlike family leave policies, which broadly apply equally to all employees and operate consistently, flexible working is far more individualised, and there are many variables, which are often not known until an individual makes a request. This flexibility makes it more difficult to summarise an employer’s approach in a job advert. In terms of reporting, we consider that anyone should be able to alert the EHRC to a perceived breach. The EHRC could also take action unilaterally.

C. What should be the penalty for a breach? Please describe.

ELA Response:

Initially, attempts should be made to ensure compliance through issuing notices. Repeatedly failing to comply should result in fines consistent with the penalties for non-compliance with the gender pay reporting obligations. If such a policy is implemented, we consider that the penalty for a breach should be a fixed rate penalty imposed by the EHRC and/or a recommendation/enforcement order in respect of any jobs being advertised going forward.

If individual candidates are also entitled to pursue claims this could have far reaching consequences and lead to complex evidential questions in respect of loss. Even if an award were capped/fixed, the impact on an employer could be significant given that it would not be known at the point of advertising how many candidates could be affected by the advert. We note again that it may be difficult to determine whether a breach has occurred, in particular due to the number of variables in flexible working. It seems unlikely that an employer would advertise a role as “available on part-time hours” if that were not in fact the case, so the more likely breaches may be around providing insufficient information.

Question 14: If a requirement to provide a link to your flexible working policy on the gender pay gap reporting portal was introduced, do you agree that it would be helpful also to ask employers to record whether they had advertised jobs as open to flexible working?

ELA Response:

The provision of this information would be helpful in raising awareness of the issues within businesses and encouraging greater transparency both at the point of advertising specific jobs, and in respect of the gender pay gap statistics. Logistically, tracking this information in every advertisement is likely to be difficult for some organisations. We nonetheless consider that requiring the publication of some information in this regard once per year at the point of gender pay gap reporting would be helpful and would be an appropriate forum. Having consistency with the obligations around transparency only really works if they are all aligned in terms of obligations, accountability and sanctions.

ELA Working Party

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Laura	Christie	The Royal Bank of Scotland	
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