DB&T Call for Evidence: Non Statutory Flexible Working

Response from the Employment Lawyers Association

3 November 2023

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. 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 and regulation or calls for evidence.

2. A Working Party, co-chaired by Clare Fletcher (Slaughter and May) and Louise Taft (Jurit LLP) was set up by the Legislative and Policy Committee of ELA to respond to this call for evidence. Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

4. Rather than answer individual questions aimed at employers or employees, ELA has sought to identify themes in the Call for evidence, and has prepared this paper using our members' experience of working with both employers and employees making and responding to non-statutory requests for flexible working.

EXECUTIVE SUMMARY

5. As the Department of Business & Trade acknowledges in its "Call for evidence: non-statutory flexible working", although statutory flexible working has been available to employees for twenty years, ELA members are aware that employers and employees often negotiate and agree flexible working arrangements outside of the formal flexible working system.

6. ELA members understand that access to formal and informal flexible working arrangements are often essential to assisting employees with performing well and remaining in their jobs.

7. ELA members are also aware that, for many employees, the change in working patterns engendered by the pandemic remains highly-valued. ELA members

understand that some employees continue to prioritise flexibility around both working hours and location over considerations such as pay.

8. In its Call for evidence: non-statutory flexible working, the Department of Business & Trade defines two types of non-statutory flexible working:

   8.1. Non-statutory (ad hoc): flexible working arrangements which are occasional, time-limited and irregular in nature without significant impact on others in the workplace. For example, an individual agrees with their manager to alter the start and end times of consecutive workdays at short notice to enable their attendance at a medical appointment.; and

   8.2. Non-statutory (regular) arrangements: flexible working arrangements which are regular, recurring and/or standardised, but agreed outside the statutory right to request framework. For example, an individual works two days per week from home and works three days in a workplace. This arrangement is generally understood by the individual to reflect either an agreement between themselves and their manager/supervisor or an agreed organisational approach to this way of working.

9. In this response, ELA members offer reflections and best practices on both ad hoc and regular non-statutory flexible working.

10. Guidance from ACAS would assist those employers who do have not access to legal advice.

AD HOC FLEXIBLE WORKING

11. ELA members observe that a key benefit to the provision of ad hoc non-statutory flexible working arrangements is that these arrangements tend to increase employee retention, attraction and motivation.

12. While statutory flexible working and regular non-statutory flexible working arrangements offer employees the ability to implement more standardised flexible working patterns to suit their lifestyles, ELA members understand that ad hoc flexible working arrangements are equally valuable. These one-off or intermittent changes to employees' regular working patterns allow employees to make personal decisions around how they can most effectively deliver their work.

13. For instance, non-statutory ad hoc flexible working arrangements can accommodate requests to work from home or modify working hours on an irregular or as-needed basis in order to, for instance, deal with an unexpected home repair, finish a particular piece of work, accommodate certain caring responsibilities, or attend medical or other personal appointments. Such arrangements offer employees enhanced autonomy, which in turn contributes to increased employee engagement, investment and retention in their roles.

14. Additionally, ELA members understand that employers who offer such flexibility and respect for work/life balance often attract more diverse candidates, as well as those with caring responsibilities who might otherwise need to leave employment. This is

because ad hoc flexible working arrangements can accommodate the less predictable hurdles presented by, for instance, certain disabilities or caring responsibilities.

15. Finally, ad hoc non-statutory flexible working arrangements can be useful for accommodating emergency circumstances, such the death or critical illness of an employee's family member or other loved one. Although there are some statutory rights to leave following the death of a dependent, employees do not have a general right to compassionate leave in the face of traumatic personal circumstances. Further, flexibility can allow an employee to return to the workplace following a short period of compassionate leave but still be able to, for example visit a loved one in hospital during visiting hours or to attend appointments to make funeral arrangements, both of which may clash with normal working hours. Accordingly, offering flexible working arrangements in the face of these difficult circumstances can increase employee retention by providing employees with time to address their personal needs, which in turn may increase the likelihood that the employee feels able to return to work.

16. ELA members are also aware, however, that there is potential for ad hoc flexible working arrangements to be abused. Some employees may overuse any rights they have to ad hoc flexible working arrangements, and ELA members note that some employers have robust policies in place establishing employee rights to both statutory and non-statutory flexible working. This is discussed in more detail later in the paper.

17. ELA members are aware that fairness in considering any ad hoc non-statutory flexible working requests is a key consideration for employees and employers alike. ELA members consider best practice to be that employees follow a clear procedure when making flexible working requests. This can be as simple as an informal discussion with a manager around the flexible working request.

18. ELA members generally recommend that employers should have clear criteria by which they evaluate and record ad hoc flexible working requests. Such criteria often include the following considerations:

    18.1. An employer’s ability to achieve business objectives whilst meeting the flexible working request;

    18.2. An assessment of the employee’s ability to achieve his or her job responsibilities while working flexibly;

    18.3. Any review of an employee’s performance while working flexibly;

    18.4. An assessment of the employee’s ability to maintain certain qualities such as accessibility, transparency, and responsiveness when working flexibly;

    18.5. The ability of employer and employee to comply with any applicable legal regulations;

18.6. An assessment of the potential impact of accommodating a flexible working request on team members, customers, and other key stakeholders.

19. The application of such objective criteria to ad hoc flexible working requests can help managers make reasoned decisions about requests, and minimise claims for unfairness and discrimination.

POLICIES AND PROCEDURES AROUND AD HOC FLEXIBLE WORKING

20. ELA members understand that, in order to provide clarity and consistency amongst the workforce, some employers formalise arrangements around ad hoc non-statutory flexible working by formulating well-written non-contractual policies. ELA members tend to recommend that non-contractual flexible working policies are usually most appropriate, given that they can be updated or amended to accommodate any necessary changes.

21. ELA members consider it to be best practice for employers to produce a comprehensive flexible working policy containing provisions related to ad hoc flexible working. A policy should contain:

    21.1. Clear definitions of any available statutory and non-statutory flexible working arrangements; and

    21.2. Procedures setting out:

        21.2.1. requirements for employees making flexible working requests (including any ad hoc requests);

        21.2.2. criteria by which employers should evaluate and record ad hoc flexible working requests;

        21.2.3. expectations for employees while working flexibly, including accessibility, responsiveness and accountability; and

        21.2.4. consequences for employees if they fail to meet these expectations (such as that the option to work from home could be revoked).

22. ELA members consider that a robust flexible working policy can be beneficial in a number of ways. Firstly, a policy can inform employees of their right to benefit from ad hoc as well as statutory or regular flexible working patterns, but only if a particular procedure is followed. This strategy sets clear boundaries on any right to ad hoc flexible work and may minimise the likelihood of abuse.

23. Further, including criteria by which employers must evaluate even ad hoc flexible working requests can minimise claims for unfairness and potentially even discrimination. If managers can document their consideration of the relevant criteria when assessing a request, they may be better able to refute any claims of unfairness in approving/rejecting ad hoc flexible working requests.

24. Of course, in the case of the death or critical illness of an employee's non-dependent family member or other loved one, ELA members note that it may be more appropriate for employers to utilise a compassionate leave policy (or similar). Such policies should set out an employee's right to flexible working or leave in the face of the death or critical illness of a non-dependent family member or other loved one, including:

    24.1. parameters setting out when any compassionate leave may be available;

    24.2. any restriction on the number of days leave offered and whether this will be paid or unpaid; and

    24.3. clear procedures setting out requirements for making and considering a compassionate leave request.

BENEFITS AND DRAWBACKS OF NON-STATUTORY REGULAR FLEXIBLE WORKING

25. Offering regular non-contractual flexible working arrangements gives both an employer and employee an opportunity to trial a work arrangement before committing to a permanent arrangement through a statutory flexible working request, without a limit on the time such arrangements can be trialled, and without a limit on the number of arrangements that can be trialled. Employer and employee can work together to find mutually beneficial solutions, which the statutory request procedure with permanent contractual change might not achieve. Offering such arrangements also offers flexibility to both parties when dealing with issues are perceived to last for a limited time only (for example a temporary disruption in childcare arrangements), avoiding the need to agree a permanent change to an employee's contract through a statutory flexible working request.

26. In ELA members' anecdotal experience, organisations that are able to offer such flexibility find benefits in terms of staff retention and recruitment. Dialogue around temporary solutions and what is possible on both the employer's and employee's side can prevent an employee resigning and looking for another (more flexible) role or a new recruit choosing a different employer based on their flexibility.

27. The main drawback is the legal uncertainty of how long any such informal arrangement needs to continue before it is legally considered a contractual change through custom and practice. What can be agreed may also be impacted by the Workers (Predictable Terms and Conditions) Act 2023 which is expected to come into force in September 2024 and which introduces a new statutory right for workers to request a more predictable working pattern.

28. Employers need to put extra measures in place to monitor these arrangements (outside any statutory monitoring processes and procedures) so that communication continues, it is made clear that such arrangements are temporary, and arrangements are either converted into a permanent contractual change after an agreed period or they revert to their previous pattern or other arrangement.

29. There are certain challenges for organisations when allowing and implementing non-statutory flexible working requests:

29.1 Where flexible working arrangements are granted on an ad hoc informal basis by different managers, there is risk of inconsistency of decision making across an employer's business (particularly in larger employers). Inconsistency of arrangements could give rise to the risk of discrimination complaints if certain individuals or groups of individuals sharing the same protected characteristics do not get agreement to their requests for informal arrangements when others without that characteristic do. This could happen for example if a practice emerges of granting flexibility on an informal basis to women who are mothers but not to men who are fathers.

29.2 Managers who initially agreed a request on an informal basis may leave the employing organisation without documenting the arrangement. The employee with the informal agreement could be left with a new manager who is not prepared to agree to the same flexibility. This causes particular challenges if the arrangement has been agreed verbally or via WhatsApp, text or telephone rather than via official work channels. This can lead to grievances and employee disputes which can be challenging and time-consuming to deal with.

29.3 Teams may eventually be unable to accommodate any further flexibility if multiple employees make requests which are granted on an informal basis and without full consideration of the business impact of the arrangement. The employer may reach a stage where it is simply not possible to accommodate any further flexibility without there being a serious impact on its ability to service the work which needs to be done. Where for example, lots of employees have been allowed to work part-time between Tuesday to Friday it may not be possible to meet additional requests for Monday as a non-working day. That could create ill-feeling and contribute to poor employee relations. It also presents a challenge to the employer in deciding whether and how it should prioritise requests where employees have competing needs. For example, should employees with disabilities have their requests accommodated above working parents or those with caring responsibilities above those who have requested flexibility for work-life balance reasons. Of course, this is not unique to informal flexible working requests and arrangements: it applies in the context of statutory requests as well.

29.4 Where arrangements are informal, there can be uncertainty about whether the arrangement is contractual or non-contractual. Informal arrangements intended to be non-contractual may become contractual by reason of custom and practice if they have been in place for some time. Where that happens, it can be just as difficult to undo the arrangements as it is for statutorily agreed flexible working arrangements. That can be challenging when business needs change and the employer is no longer able to honour the informal arrangement. An employer in this situation would have to ensure that it acted lawfully in making any contractual changes necessary

for business reasons to avoid the risk of breach of contract and constructive unfair dismissal complaints.

29.5 These situations can adversely impact employees as well as employers. For instance, ELA members have seen situations in practice where a part-time flexible working arrangement has been put in place, but the employee's situation subsequently changes and they want to revert to a full-time working pattern (due to reduced caring responsibilities or increased financial pressures, for example). However, the employer may have taken on other employees to cover the additional hours, or taken other measures which make it difficult to accommodate the employee's request to revert to their full-time working pattern.

29.6 Even if the informal arrangement has not become contractual, it can be challenging to withdraw it if business needs change. An employee may be aggrieved and lodge a formal grievance. In ELA members' experience, it is not unusual for such an employee to have sick absence, often as a result of "work related stress". Both are challenging to manage.

29.7 Although failing to properly deal with non-statutory requests would not give rise to claims under S80H ERA 1996, these failings can give rise to other potential claims under the Equality Act 2010 for indirect discrimination. A non-statutory request could also be a pre-cursor to a formal statutory request under section 80F of ERA 1996. Therefore any detriment short of dismissal would be unlawful where the employee proposed to make a formal application (s.47E ERA 1996). Further, a dismissal where the reason, or principal reason, was that the employee proposed to make a formal flexible working application would be automatically unfair (S.104C ERA 1996), with no minimum service requirement. Therefore, it is still important that non-statutory requests are handled with due care and by the appropriate level of management or HR. This is a point which might not be appreciated by all employers, particularly smaller ones without any dedicated HR resource.

30. From an enforcement perspective:

30.1 It is harder for an employer to monitor requests without a set procedure; and

30.2 It is more challenging for the employee to enforce informal arrangements, particularly where there is a lack of paper trail, than via the statutory process.

31. ELA members have experience of non-statutory flexible working requests being declined. Indeed, such requests are common from employees who have not researched or taken advice on the requirements for a formal request.

CONTRACTUAL VS NON-CONTRACTUAL FLEXIBLE WORKING

32. In ELA members' experience, contractual flexible working arrangements are more likely if agreed at the recruitment stage. Where the flexible working arrangements are long-term, there may also be agreement to a variation to the contract. Written, contractual arrangements are more likely for more permanent arrangements, particularly from the outset of employment, or when an employee changes working hours - from 5 to 4 days a week, for example. This is common following a change of circumstances, such as returning from maternity leave.

33. Sometimes flexible working arrangements can be agreed on a trial or temporary basis. Non-contractual arrangements are more common where the arrangements are temporary, and sometimes when they are agreed informally post-recruitment. Here, there is no express variation of the contract. However if the arrangement continues, it can become contractual due to the principle of 'custom and practice'. In ELA members' experience, uncertainty over the contractual status of informally agreed flexible working can lead to disputes.

ORGANISATIONAL APPROACHES TO NON-STATUTORY FLEXIBLE WORKING

34. In ELA members' experience, the decision makers in terms of whether or not to agree to non-contractual flexible working arrangements are generally an employee's Line Manager, potentially in conjunction with HR depending on the structure of the organisation.

35. Members of the working party have experience of organisations who monitor adherence to their non-statutory policy. In these organisations there is a central review board made up of a cross-section of stakeholders who meet regularly to understand what requests are being made and agreed to, the divisions and countries, and to ensure fairness and consistent application of the policy. This is also helpful for any cross border working arrangements, for example when an employee wishes to work for a short period in a different country or state. This was very useful for when homeworking was widespread during the pandemic. These employers knew the exact location of their employees for legal, tax and regulatory reasons, whereas others who did not monitor such matters often only found out an employee had moved home location after the event.

36. In ELA members' experience, most of our employer clients have at least the statutory process set out in a policy document. Some go further and have introduced a non statutory process (often with a statement that if this voluntary process does not give the desired outcome that the employee may make an application through the statutory process). Many employers who have a voluntary or non-statutory policy tend to state that this is a day one right. It often mirrors the statutory regime though with more flexibility in the process.

37. Employers tend to offer compassionate leave and historically often stated a maximum number of days in a policy document. In our experience, it now becoming common to state that there is a level of management discretion depending on particular circumstances. Some policies go into detail as to other special leave types including public service, e.g. jury duty, volunteering in the armed

forces (reservists) etc. This tends to be more common in public sector environments.

38. Leave for urgent family reasons is often covered in policies, which tend to confirm that the leave is of limited duration and unpaid. Unplanned absences are rarely covered if not of the types covered above.

39. In our experience, planned appointments are often covered in policies. Employees are usually encouraged where possible to take these outside normal working hours, though it is generally accepted that this is not always possible.

40. There are attempts in some organisations to provide management guidelines to give structure to managerial decision making. A number of organisations have reduced hard and fast rules as blanket policies can result in allegations of indirect discrimination and/or a failure to make reasonable adjustments for disabled staff.

41. Whilst handbooks containing policies are available in the workplace, now often on intranets rather than hard copy, it is are relatively unusual to see handbooks of private companies made publicly available. In contrast, most universities publish staff handbooks online. An example of this is Oxford University[1]. In addition a number of local authorities handbooks are published (setting out the "Green Book" collectively agreed policies) along with individual authority handbooks. These contain special leave details including rights in relation to bereavement, medical treatment, jury and witness service, public duties, family and domestic emergencies and reservists.

42. In ELA members' experience, generally organisations do not also provide detailed specific guidance (in policies or procedures) to managers on how to approach/manage these requests. The typical approach is that these requests are managed by the relevant line managers who seek guidance from HR on a case by case basis as they consider appropriate. Where there is guidance, the information is more limited (compared to for example, the statutory flexible working policies/procedures) and includes information such as how the staff member should make the request (e.g. to the line manager and HR) and limited general considerations for the managers (such as typically how long such arrangements should be in place for and consideration of the operational impact).

43. Generally organisations do not have specific written guidance on managing hours/timing/location of work in respect to the situations listed in the Call for evidence at Question 10. Whilst organisations may set out in policies the ability to request relevant changes in some of the situations listed, the further management of hours/timing/location of work tends to be dealt with by the line manager on a case by case basis with guidance from HR (and legal) as appropriate.

44. As noted above, ELA members feel that guidance from ACAS on non-statutory flexible working would assist both employers and employees, particularly those without access to legal advice. Based on our experience advising clients in this area, we suggest that this guidance could usefully cover:

[1] https://hr.web.ox.ac.uk/section-4-academic-related-staff-handbook

44.1 What is meant by "non-statutory flexible working", both ad hoc and regular, adopting the definitions used in the call for evidence;

44.2 How non-statutory flexible working interrelates with the statutory flexible working regime;

44.3 Points for employers to consider when handling requests for non-statutory flexible working (drawing on the points made in paragraph 18 of this response); and

44.4 What should be contained in a policy on non-statutory flexible working (drawing on the points made in paragraph 21 of this response).

Members of ELA Working Party

Clare	Fletcher	Slaughter and May	Co-Chair
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