



Response to Department for Employment and Learning's consultation on flexible working and time to train

October 2009

Introduction

1. The Equality Commission for Northern Ireland ('the Commission') is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. The Commission welcomes the opportunity to respond to the Department for Employment and Learning's ('the Department') consultation on the proposed extension of flexible working legislation and the introduction of a new right to request time to train.
3. Its detailed responses to the specific questions raised by the Department are outlined below. For ease of reference, a summary of its key comments and recommendations is included below.

Executive summary

Extended right to request flexible working

In summary, the Commission:-

- supports the option to extend the right to request flexible working to parents with children aged 16 or under;
- is of the view that there is a strong business case for extending the right to request flexible working to a wider group of employees. Flexible working can also assist employees in balancing their caring and work responsibilities.
- recommends a range of initiatives aimed at improving Departmental guidance on flexible working; including:-
 - the inclusion of a specific section outlining the benefits of flexible working;
 - the inclusion of a wider range of case studies on best practice;
 - the production of a short guide on flexible working specifically aimed at small businesses;
 - inclusion of a specific section stating that employers must not treat an employee less favourably or harass an employee when considering requests for flexible working, by reason of the employee's association with a disabled person;
 - the publication of a short leaflet aimed at employees.
- welcomes the Department's proposal, if the right to request flexible working is extended, to set up a communication strategy aimed at increasing awareness of the new rights and recommends that the Department when promoting these rights;

- uses this opportunity to challenge stereotypical media portrayals of women and of women's roles in the family and society;
 - promotes the benefits of flexible working; particularly targeting sectors and businesses where there is currently limited access to flexible working;
 - promotes the benefits of job sharing at a senior level within both the public sector and the private sector.
- supports increased partnership working between advice giving organisations, including trade unions, in order to maximise opportunities as regards the sharing and dissemination of information, advice and best practice;
 - recommends that the Department, working with key stakeholders, undertakes a range of initiatives designed to support businesses introduce flexible working practices in their organisations;
 - recommends that the flexible working requirements and tests are consistent with those applied under the Sex Discrimination (NI) Order 1976 in relation to indirect discrimination complaints.

Right to request time to train

In summary, the Commission:-

- supports the Department's proposal to allow employees time off work to undertake training;
- recommends that training should not be limited only to nationally recognised and accredited training but should include any training likely to contribute to the employee being more effective and productive at work, improved business productivity and work performance.
- recommends that all employers should be included within the scope of the proposed right.

Comments

Extended right to request flexible working

Arguments supporting an extension of the right to request flexible working

4. The Department has sought views on the arguments supporting an extension of the right to request flexible working. It is clear that there is a strong business case for extending the right to request flexible working to a wider group of employees. Benefits include reduced vacancy costs and increased skill retention; increased productivity, efficiency and profits; reduced absenteeism rates and workplace stress; improved employee satisfaction and loyalty; and improved employee relations.
5. Research undertaken across the UK has highlighted the positive effects of flexible working on businesses¹. In addition, we note from the Department's survey on flexible working patterns that the vast majority of employers in both 2003 (94%) and 2006 (95%) agreed that "people work best when they can balance their work and other aspects of their lives"².
6. We further note that in 2003 and 2006, 68% and 69% respectively of employers said that flexible working arrangements had a positive effect on employee relations and that approximately half of employers were of the view that flexible working practices had a positive effect on labour turnover, absenteeism, productivity and recruitment in both 2003 and 2006.
7. In addition to benefiting employers, flexible working can assist employees in balancing their caring and work responsibilities; for example, it enables parents with children to spend additional time with their families, assisting them with their educational and other needs.

¹ *Flexible working: impact and implementation: An employer survey*, CIPD, 2005, www.cipd.co.uk

² *Flexible Working Patterns: Comparison of Employee and Employer Services conducted in 2003 and 2006*, March 2007, Northern Ireland Statistics and Research Agency, commissioned by the Department for Employment and Learning, www.delni.org.uk

8. Recent research commissioned by the Government Equalities Office ('GEO') in Great Britain ('GB') has also highlighted that in addition to allowing parents to spend more time with their children, other benefits of flexible working include reduced stress, more quality time with their partner and being able to more evenly share family tasks with their partner³.

Arguments against an extension of the right

9. The Department has sought views on arguments against an extension of the right to request flexible working. It is clear from the Department's impact assessment that an extension of the right to request flexible working is likely to result in increased requests for flexible working from employees; with expected increases depending on which category of employees are entitled to the right. We note, for example, that the Department expects that if the right is extended to parents with children aged 16 or under, that this will result in a total of 5,691 requests being accepted by employers.
10. An increase in requests is likely to result in additional costs for employers in terms of dealing with requests (i.e. time taken by both management and employees). We note, however, that the Department is of the view that the changes will not be such as to effect the competitiveness of any particular sector; nor will they be likely to disproportionately effect small to medium sized businesses.
11. We also note that research carried out by the Department for Business, Enterprise and Regulatory Reform ('BERR') in GB,⁴ has revealed that the administrative burdens associated with flexible working have fallen considerably.
12. One further disadvantage of introducing flexible working practices is that the employer will have to ensure adequate cover during periods when the employee working flexible hours is not present. This can, in some circumstances, place extra pressure on remaining staff. The Department's research, for example, indicates that 14% of employers

³ *Flexible working: benefits and barriers, perceptions of working parents*, BMRB commissioned by the GEO, April 2009, www.equalities.gov.uk

⁴ *BERR Employment Law Admin Burden Survey 2008*, Main Report www.berr.gov.uk

identified sections being left short-staffed as the main disadvantage of flexible working practices⁵.

13. Although we recognise that there are disadvantages associated with an extension of the right to request flexible working, the Commission is of the view that, on balance, the benefits, as highlighted above, outweigh the disadvantages. It is important to remember that the Department's proposals relate to a right to *request* flexible working as oppose to a right to flexible working, and there are a wide range of circumstances in which an employer can refuse that right.

Options considered

14. The Department has proposed five options as regards extending the right to request flexible working. The Commission supports the option to extend the right to request flexible working to parents with children aged 16 or under. We agree that this will allow parents to support their children until the end of Key Stage 4 of their secondary education and GCSEs.
15. As highlighted in the Department's equality impact assessment, we believe that the extension of the right to request flexible working to parents with children aged 16 or under will help those parents balance their work and family lives. It will enable parents to provide better supervision and support for their children and assist them in helping their children to achieve better educational outcomes.
16. The Commission is of the view that the extension of the right to request flexible working to parents of older children is in keeping with the aims of the Government's strategy for children and young people in Northern Ireland⁶. The strategy recognises the primary responsibility of parents and carers for promoting children's development and well-being and the need to provide assistance and support to parents and carers.

⁵ *Flexible Working Patterns: Comparison of Employee and Employer Services conducted in 2003 and 2006*, March 2007, Northern Ireland Statistics and Research Agency, commissioned by the Department for Employment and Learning, www.delni.org.uk

⁶ *Our Children and Young People: Our pledge, a 10 year strategy for children and young people in Northern Ireland*, 2006-2016 OFMDFM, www.ofmdfmi.gov.uk

17. We are also of the view that the extension of the right to parents of older children is in keeping with the Executive's aim, as outlined in its *Programme for Government 2008-2011*⁷ to work towards the elimination of child poverty in Northern Ireland by 2020; with an interim target of reducing child poverty by 50% by 2010. It is clear from a recent report by the Women and Work Commission in GB that increasing the number of part-time jobs helps to give women, particularly mothers, a better chance of returning to the labour market and getting out of poverty⁸. It is important to stress however, as highlighted below, the focus should not just be on getting women into lower entry level, part-time positions, but on the quality of these part-time jobs so as to ensure that this does not exasperate the gender pay gap.
18. As regards the option proposed by the Department in relation to the extension of the right to parents with children aged 18 or under, we agree with the findings of the Walsh Review⁹ that it is reasonable to regard a person aged 17 or 18 as a young adult who can be expected to show a good measure of independence and personal responsibility whether as part of further education, a first full time job or vocational training.
19. The Commission is aware that some employees without dependents may want to work flexibly for a variety of reasons; for example, to pursue further educational opportunities. It is also aware that a wide range of employers in Northern Ireland currently allow all employees regardless of child care or other caring commitments, to request flexible working. We further note that a survey conducted by the Chartered Institute of Personnel Development ('CIPD') in 2005 across the UK, found that four in ten organisations enhanced the statutory right to request flexible working, by for example, making it available to careers or all employees¹⁰.

⁷ *Programme for Government 2008-2011*, Northern Ireland Executive, www.pfgbudgetni.gov.uk

⁸ *Shaping a Fairer Future, A review of recommendations of the Women and Work Commission three years on*, July 2009, Women and Work Commission, www.equalities.gov.uk

⁹ *Recommendations of Imelda Walsh's independent review*, commissioned by the Department for Business, Enterprise and Regulatory Reform, www.berr.gov.uk

¹⁰ *Flexible working: impact and implementation: An employer survey*, CIPD, 2005, www.cipd.co.uk

20. In the event, following this consultation, that all employees do not acquire a formal right to request flexible working, the Commission recommends that the Department makes it clear to employers when promoting any changes to the legislation or in its guidance, that it is still open for employers to allow all employees, regardless of whether they have childcare or other caring commitments, to request flexible working, and to highlight the benefits associated with such an approach.

Guidance

21. The Department has sought views on what measures can be taken to improve the guidance available to employers and employees on the right to request flexible working. The Commission notes that the Department has produced a comprehensive guide for employers and employees¹¹ regarding the right for parents of young children and carers of certain adults to request flexible working arrangements.
22. We welcome the fact that, in addition to containing a detailed outline of the legislation, the guidance also contains four case studies of best practice. We note that further information is available online in order to assist employers and employees understand the current legislation, and employees can, for example, access online flexible working application forms.
23. In the event that the right to request flexible working is extended, we recommend the following actions in relation to the Department's guidance and online information.
24. Firstly, we recommend that the guidance includes a specific section at the beginning outlining the benefits of flexible working. In addition, we recommend the inclusion of a wider range of case studies on best practice, including examples from sectors where there is limited access to flexible working; best practice by small businesses; as well as examples illustrating how flexible working has benefited employers during periods of economic downturn.

¹¹ *ER 36 Flexible Working: A Guide for Employers and Employees*, May 2009, Department for Employment and Learning, www.delni.gov.uk

25. We note, for example, that the Equality and Human Rights Commission in GB has recently produced a guide for employers on flexible working with a wide range of examples of good practice¹².
26. The Commission is also of the view that it would be beneficial for the Department to produce a short guide on flexible working specifically aimed at small businesses; outlining the benefits of flexible working, explaining the law and incorporating examples on best practice by small businesses in Northern Ireland. In addition, the publication of a short leaflet aimed at employees will also assist employers circulate information on the new rights to their employees.
27. The Commission further recommends that the guidance makes it clear to employers in the section entitled 'How the right works with other legislation' that under the Disability Discrimination Act 1995, they must not treat an employee less favourably or harass an employee when considering requests for flexible working, by reason of the employee's association with a disabled person.
28. The Department will be aware that the European Court of Justice in the case of *Coleman v Attridge Law*¹³, stated that protection under the Framework Directive¹⁴ from direct discrimination and harassment extends to employees who are associated with a disabled person, and it is not limited only to employees who are themselves disabled. Ms Coleman, who had primary responsibility for the care of her disabled son, alleged that her employer had refused to allow her the same flexibility as regards her working hours and the same working conditions as her colleagues who were the parents of non-disabled children.
29. In November 2008, an employment tribunal in GB confirmed that employees associated with disabled people (such as parents or carers) are entitled to protection under the

¹² *Working Better: A managers' guide to flexible working*, October 2009, EHRC, www.equalityhumanrights.com

¹³ Case C-303/06, 17 July 2008, ECJ

¹⁴ Directive 2000/78/EC

Disability Discrimination Act 1995, as regards less favourable treatment and harassment.¹⁵

Promoting quality part-time and flexible work

Awareness raising campaign

30. The Commission welcomes the Department's proposal, if the right to request flexible working is extended, to set up, in the run up to the introduction of rights, a communication strategy aimed at increasing awareness of the new rights.
31. It is critical that both employees and employers are aware of any extended rights. It is of concern, as highlighted by the Department's research, that although employers have been legally required to consider requests to adopt flexible working practices from parents of young children under the age of 6 since April 2003, by 2006, 44% of employees surveyed were not aware of this right¹⁶.
32. It is also of note that over half (52%) of respondents who were aware of the right found out about this right through their employer. This emphasises the importance of ensuring, in the event of new rights being introduced, that employers effectively communicate these rights to their employees.
33. The Commission recommends that the Department periodically monitors awareness amongst employers and employees of changes to the right to request flexible working; in order to ascertain whether further action is needed to raise awareness of rights and responsibilities.
34. The Commission also recommends that the Department uses this opportunity to challenge stereotypical media portrayals of women and of women's roles in the family and society.
35. It is of note that the UN Committee on the Elimination of Discrimination against Women ('CEDAW Committee') in its

¹⁵ Coleman v Attridge Law, Nov 2008, Case No. 2303745/2005

¹⁶ *Flexible Working Patterns: Comparison of Employee and Employer Services conducted in 2003 and 2006*, March 2007, Northern Ireland Statistics and Research Agency, commissioned by the Department for Employment and Learning www.delni.org.uk

concluding observations on the UK¹⁷ recommended that the Government “encourage men to share responsibility for childcare including through awareness-raising activities and by taking parental leave”.

36. It is therefore essential that the Department, when raising awareness of changes to the flexible working legislation, challenges stereotypical media portrayals about the roles of women and men, seeks to portray a positive image of women and encourages men to share responsibility for the care for children.
37. The Commission recommends that the guidance and other information concerning extended rights are proactively promoted by the Department so that employers and employees are aware of the changes in advance of the implementation date.
38. The Commission further recommends that when raising awareness of rights, the Department promotes the benefits of flexible working; particularly targeting sectors where there is currently limited access to flexible working.
39. We note from the Department’s research on flexible working patterns that there was a marked variation on the availability of flexible working arrangements between male and female employees. For example, in 2006, no males in agriculture, hunting and forestry or electricity, gas and water supply had the opportunity to work part-time. In addition, only 5% of those in construction had the opportunity to work part-time in comparison to 31% in hotels and restaurants, and 21% in health and social work. The research states that the 2006 results may suggest that males working in male dominated sectors are less likely to have flexible working opportunities¹⁸.
40. In addition to targeting particular sectors where there is limited access to flexible working, the Commission recommends that the Department also targets smaller

¹⁷ CEDAW/C/GBR/CO/06, www.2ohchr.org, ibid paragraph 28

¹⁸ *Flexible Working Patterns: Comparison of Employee and Employer Services conducted in 2003 and 2006*, March 2007, Northern Ireland Statistics and Research Agency, commissioned by the Department for Employment and Learning www.delni.org.uk

businesses (with 5 to 9 employees) which are more likely than larger businesses to have no flexible working practices. For example, it is clear from the Department's research that 18% of small businesses (with 5 to 9 employees) had no flexible working practices compared to businesses with more than 50 employees; with 95% of businesses with more than 50 employees in 2006 having flexible working arrangements in use.

41. The Commission also recommends that the Department promotes the benefits of job sharing at a senior level within both the public sector and the private sector. The lack of availability of flexible working in managerial posts can act as a barrier for women, particularly women with responsibility for dependents, accessing managerial posts.
42. In addition to raising awareness of new rights, promotional campaigns should aim to encourage positive attitudes towards flexible working practices by employers and to dispel negative attitudes of employees that may be a barrier to them applying for flexible working. For example, it is clear from the Department's survey on flexible working patterns¹⁹ that in 2006, 35% of employees surveyed thought that working reduced hours would have a negative effect on their career prospects.
43. Finally, the Commission is aware that a range of organisations and bodies provide advice and information in order to promote flexible working by employers and raise awareness of rights and responsibilities in this area. The Commission supports increased partnership working between advice giving organisations, including trade unions, in order to maximise opportunities as regards the sharing and dissemination of information, advice and best practice.

Support for businesses

44. The Commission recommends that the Department, working with key stakeholders, undertakes a range of initiatives

¹⁹ *Flexible Working Patterns: Comparison of Employee and Employer Services conducted in 2003 and 2006*, March 2007, Northern Ireland Statistics and Research Agency, commissioned by the Department for Employment and Learning www.delni.org.uk

designed to support businesses introduce flexible working practices in their organisations.

45. In particular, the Commission recommends that measures are taken to support the training of managers in dealing with flexible working requests. It is essential that frontline managers have the skills and knowledge to effectively deal with flexible working requests.
46. The need for training for managers was recognised in the recent report of the Women and Work Commission, which recommended that the Government work with key stakeholders including the Equality and Human Rights Commission and ACAS to develop a training package for middle managers on flexible working issues, specifically tailored for small businesses²⁰.
47. In addition, we endorse the recommendation of the Women and Work Commission that Government Departments should lead by example by ensuring that all middle managers receive this training.
48. We note that a range of initiatives have been instigated in GB in order to promote flexible working practices by employers in response to the recommendations of the Women and Work Commission²¹. For example, the GB Government established and ran a quality part-time work fund which granted funding to a range of organisations in order to support new initiatives aimed at achieving a culture change, so that more senior jobs-particularly in the skilled occupations and the professions-are more open to part-time and flexible working.
49. We further note that the GB Government through Job Centre Plus employer account management aims to encourage employers to consider working patterns approaches to recruitment and the way in which they deliver training to

²⁰ *Shaping a Fairer Future, A review of recommendations of the Women and Work Commission three years on*, July 2009, Women and Work Commission, www.equalities.gov.uk

²¹ Women In Work Commission: *Shaping a Fairer Future*, 2006

open up their job opportunities to those who need more flexible working patterns.²²

50. Finally, the Commission recommends that the Department takes measures to support the participation of women in the labour market. We endorse the recommendation of the Women and Work Commission that action be taken to ensure increasing access for women to part-time jobs; though ensuring the focus is not just on getting women into lower entry level, part-time positions, but focusing on the quality of these part-time jobs to ensure that this does not exasperate the gender pay gap.

Support by the Equality Commission

51. It should be noted that the Commission has undertaken a range of initiatives in order to promote flexible working arrangements by employers. For example, in order to encourage good practice by employers, it has recommended in its *Unified Guide to Promoting Equal Opportunities in Employment*²³ that employers develop and implement a policy on flexible working which is effectively communicated to staff.
52. The Commission has also recommended that employers provide “flexible working rights” awareness training to all managers so that they understand the employer’s responsibilities in relation to these rights. It further recommends that employers monitor and review the operation of the policy in the course of their wider equal opportunities monitoring and review practices.
53. In addition, the Commission has developed employment equality plans with both private and public sector employers which include actions to identify and implement a strategy for the promotion of work-life balance. A sample employment equality plan has been included in the Commission’s *Unified*

²² *Making Progress: Delivering the Equality PSA*, Government Equalities Office, October 2009, www.equalities.gov.uk

²³ *A Unified Guide to Promoting Equal Opportunities in Employment*, March 2009, Equality Commission for Northern Ireland, www.equalityni.org

Guide and can also be downloaded from the Commission's website²⁴.

54. In order to support employers, the Commission also runs a free training programme aimed at private sector employers which includes an overview of employment and equality law in relation to flexible working, as well as good practice initiatives adopted by employers across Northern Ireland.
55. Finally, the Commission has developed a number of employer networks which operate on a geographical, sectorial or schematic bases. For example, networks have been established for recruitment agencies in the retail sector as well as the education sector, the local government staff commission, the health sector and the Northern Ireland Council for Voluntary Action. These networks have proved a valuable forum for employers to share information, learn about employment best practice and to learn from each other's experience on a range of topics including for example, developing work-life balance strategies.

Compatibility with sex discrimination legislation

56. Although, in general, the Commission welcomes the proposed extension of the right to request flexible working, it is disappointed that the Department has not taken this opportunity to further amend the legislation, in order to ensure that an employer can only refuse a request for flexible working where justifiable.
57. The Department will be aware that an employer can comply with the legislation, provided that it considers the request and the reason for the refusal falls within the eight grounds set out in the Employment Rights (NI) Order 1996. However, the EAT in GB has made it clear in the case of *Commotion Ltd v Ruddy*²⁵, that tribunals can only decide on the factual correctness of the ground for refusing a flexible working request but not its fairness and reasonableness.
58. In contrast, where an employee who is refused a flexible working request alleges indirect sex discrimination, a tribunal

²⁴ www.equalityni.org

²⁵ [2006] IRLR 171

will consider whether such a refusal could be justified by the employer. As evidenced by the GB case of *Webster v Soft Drinks*²⁶, an employee's case relating to a refusal to work flexibly, can fail under the Employment Rights Act 1996, but succeed under the Sex Discrimination Act 1975. The difference in tests and standards applied under the two different pieces of legislation has resulted in confusion and uncertainty both for employers and employees.

59. In summary, in light of the proven benefits of flexible working, as set out in the consultation report, and in order to provide clarity for both employers and employees, it is recommended that the flexible working requirements and tests are consistent with those applied under the Sex Discrimination (NI) Order 1976 in relation to indirect discrimination complaints, and provide that an employer can only refuse a request for flexible working where justifiable.

Right to request time to train

60. The Department has sought views on a new right for employees to ask their employer for time off work to undertake training.
61. The Commission supports the Department's proposal to allow employees time off work to undertake training. We note that employers will not be compelled to pay for the training when they grant a request for time to train. In addition, the right will only be available to employees who have 26 or more weeks of service.
62. The Commission is of the view that the training should not be limited only to nationally recognised and accredited training but should include any training likely to contribute to the employee being more effective and productive at work, improved business productivity and work performance.
63. The Commission recommends that all employers should be included within the scope of the proposed right. It is important to note that it is proposed that employees will have the right to request time off to undertake training rather than a right to

²⁶ 2005, ET/1803942/2004

take time off. In addition, it is proposed that there will be a wide range of business grounds for rejecting a request for time to train which take into account the particular circumstances of businesses, particularly small businesses.

64. The Commission is of the view that the introduction of a formal right to request time to train will encourage more employees to discuss their training needs with their employer. It is also likely to encourage a change in the culture of an organisation so that they proactively consider and identify learning and training opportunities for staff.
65. As indicated in the Department's equality impact assessment, the introduction of a new right to request training is likely to benefit employees with dependents who may otherwise be unable to undertake training outside core working hours. It is particularly likely to have a beneficial impact on women and lone parents who due to caring responsibilities are unable to undertake training outside working hours.