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part-time and flexible working

members' guide

experts at work



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A balancing act



Helping members to balance their working lives with their personal lives is a priority on Prospect's bargaining agenda.

Innovative ways of working that allow employees to manage their working lives without ruining their personal lives do exist. This guide looks at how flexible and reduced patterns of work can help employees to find that work-life balance.

It explains the legal issues, in particular equal rights for part-time workers and the extension (from 30 June 2014) of statutory rights to all employees with at least 26 weeks continuous employment to request flexible working patterns, such as shorter hours or working from home.

However, there are shortcomings in the protection provided by the law. Prospect representatives need to negotiate collective agreements with employers to ensure that members have the right to work flexibly.

This guide can only give an overview of the law. Members should always seek detailed advice from their Prospect representative.

types of flexible working

1

1.1 Different working patterns can be adopted to suit individual employees and different types of job:

part-time work

1.2 Working less than the usual full-time hours for a particular job.

job sharing

1.3 Two people 'sharing' a job that would normally be a full-time post. They will each be employed on a part-time hours basis but share the post between them.

flexible working hours

1.4 Flexible start and finish times to the working day. There will usually be a core time, for example 10am to 3pm, with staff being able to start and finish any time up to two hours before or after this time. Hours can be built up to take time off work.

compressed hours

1.5 Working the total number of hours over fewer days, for example instead of working 40 hours over five days, working ten hours a day over four days.

term-time working

1.6 A form of part-time working where the employee only works during school terms and is off work during the school holidays.

homeworking

1.7 Working predominantly from home, with some time spent in the office.

annual hours

1.8 Where there are set yearly hours rather than weekly hours, and there is flexibility to work at different periods throughout the year.

career breaks

1.9 A period of unpaid leave that can last from a few months to five years. The best schemes guarantee the right to return to a job at the same level and operate a 'keep in touch' policy to ensure continued contact during the career break.

sabbaticals

1.10 A period of paid or unpaid leave, usually to undertake education or research.

benefits of flexible working

2

2.1 Clearly there are benefits for employees in being able to balance their working life with other responsibilities. There is also a sound business case to put to reluctant employers.

2.2 Some employers may be resistant to change, on the grounds that it will be difficult to accommodate new ways of working. But there can be many benefits for the organisation. For example, flexible working practices may:

- attract new employees by enhancing the organisation's reputation as a good employer
- assist in keeping trained and skilled staff
- reduce resources spent on recruitment and training
- enhance performance by helping staff with their work-life balance
- boost staff commitment to the organisation
- improve morale
- help with long-term career planning
- encourage women to return after maternity leave
- reduce sickness absence
- lead to a less stressful working environment
- assist employees to return to work after a period of sick absence or disability leave.
- be a reasonable adjustment required for an employee with a disability.

2.3 Prospect representatives should use the law as a base on which to build for the benefit of all working members.

legal rights

3

3.1 Several areas of employment legislation can be used to help improve members' work-life balance. The law may be a useful tool to achieve good policies and successful outcomes in individual cases, but the best way of improving policies is to negotiate good agreements to suit your workplace (see section 8).

3.2 The following laws may be relevant:

- The Part-Time Workers Regulations provide for equal treatment of part-time workers (see section 4).
- The Employment Rights Act 1996 and the Flexible Working Regulations 2014 provide a right to request a change in hours or location (see section 5).
- The Children and Families Act 2014, Part 8 – gives all employees the statutory right to request a change to their contract terms to work flexibly as long as they have worked for the employer for 26 weeks on the date the application is made. From 30 June 2014, there is no need for an applicant for flexible working to be a carer.
- The Equality Act 2010 – prohibits discrimination on the basis of:
 - age
 - disability
 - gender reassignment
 - marriage and civil partnership
 - pregnancy, maternity, paternity or adoption
 - sexual orientation
 - race
 - religion or belief
 - sex.
- The Maternity And Parental Leave Regulations provide the right to maternity leave and the right to return to the same or similar post after maternity leave; allow for up to 18 weeks unpaid leave to care for a child under the age of 16

(or disabled children under 18); and also provide for time off for dependants. At present, this leave can be taken up to the child's fifth birthday (in April 2015 the age limit will increase to under 18 years)

- The Health and Safety at Work provisions will be relevant to all employees.

3.3 This guide cannot cover all potential legal issues. For more information see Prospect's members' guides, all accessible via www.prospect.org.uk/resources_and_publications/memberguides:

- Health and safety rights at work (5)
- Parental and family leave (12)
- Maternity rights (13)
- Equality at work (17)
- Homeworking (20)
- Working time and the law (25)
- Atypical workers (27).

rights of part-time workers

4

4.1 The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 came into force on 1 July 2000.

4.2 They apply to workers, rather than the narrower definition of employee. This means a wider range of people are covered, including many contractors, freelance workers, casual, agency, home workers and zero-hours contract workers. Only the genuine self-employed are excluded.

4.3 The regulations define a part-time worker as someone who is not a full-time worker, having regard to that employer's custom and practice. For example, if by custom and practice a company employs people on the basis of a 40-hour working week, anyone working fewer hours will be a part-time worker under the terms of the regulations.

4.4 The regulations apply to Crown employees, including parliamentary staff.

comparable full-time workers

4.5 The part-time worker can only claim equal treatment with a comparable full-time worker. So they must be able to identify a comparator.

4.6 The regulations state that for the comparison to apply both workers must:

- be employed by the same employer under the same type of contract, and
- be engaged in the same or broadly similar work, having regard, where relevant, to whether they have a similar level of qualifications, skills and experience, and
- the full-time worker must be based at the same establishment. Or, if there is no-one comparable at that establishment they must be based at another establishment and meet the first two conditions.

4.7 The comparison must be with a full-time worker employed at the time of the less favourable treatment.

changing from full to part-time

4.8 One very important exception to the rule on comparators is where a person changes from full-time to part-time working. Where this happens, or they return on a part-time basis after an absence of up to one year, they will be able to compare their terms and conditions as a part-timer with the old terms that existed for them as a full-timer. In this situation, the worker does not need to be employed on the same type of contract before and after the change. So in this case there should be no need to find another comparator. For example, if as a full-time worker there was an entitlement to participate in a share option scheme, this should continue to apply if the person starts work part-time, although the benefits would be pro rata according to the number of hours worked.

equal treatment

4.9 A part-time worker must not be discriminated against on the grounds of their part-time status unless such treatment can be objectively justified. They must be given equal terms and conditions to a comparable full-time worker. They will of course only be entitled to the same benefits on a pro rata basis.

4.10 The pro rata principle will be applied unless it is inappropriate. For example, bonuses could be paid on a pro rata basis to part-timers, but the provision of a company car might not. In such cases, the employer could only deny the benefit if there was an objective justification for doing so.

guidance

4.11 Government guidance gives several examples of how the provisions for equal treatment should apply:

- pay – part-time workers must be paid the same hourly rate as comparable full-timers. They should have equal access to shift allowances or unsocial hours payments, again pro rata.
- overtime – as established by case law, part-time workers will

only be entitled to premium overtime rates when they have worked the same number of hours as full-time workers.

- training – part-time workers should not be discriminated against in terms of training opportunities. Employers should seek to ensure that training is made available to part-time workers at suitable times.
- contractual sick and maternity pay – calculating rates for sick pay and maternity pay, and the length of service required for these benefits, should be the same for part-time and full-time workers. Payments should be made for the same length of time, pro rata.
- pensions – there must be equal access to any occupational pension scheme.
- annual leave, family leave, career breaks – statutory provisions for annual leave, maternity, paternity, adoption and parental leave apply equally to part-time workers. Contractual leave should be pro-rata to that of full-timers. Career breaks should be equally available to both.
- redundancy – part-timers must not be selected for redundancy first on the grounds of their part-time status.
- promotion – previous or current part-time status should not constitute a barrier to promotion, whether the post is full or part-time.
- financial benefits – part-time staff should be able to participate in profit sharing or share option schemes, unless there are objective reasons for excluding them. Benefits to part-time staff should be on a pro rata basis to full-time staff.
- other benefits – benefits such as health insurance, subsidised mortgages and staff discount schemes should apply equally to part-time workers. Where such benefits cannot be provided on a pro rata basis, that will not automatically be an objective justification for denying it to a part-time worker, and the exclusion will still need to be justified.
- right to a written statement – under the regulations, a part-time worker is entitled to request a written statement from the employer as to the reasons for their treatment. This must be provided within 21 days of the request being made. Employment tribunals will be able to draw an adverse inference from an employer's failure to provide such a

statement, or where it considers the reply to be evasive or equivocal.

unfair dismissal and detriment

4.12 Part-time workers are protected against any detriment, or deliberate failure to act by the employer, on the basis of their part-time status. Employees are protected against being unfairly dismissed. But to be protected, the treatment they complain of must have been on the grounds that they have done one of the following:

- brought proceedings against the employer
- requested a written statement
- given evidence or information in proceedings brought by any other worker
- alleged that the employer is guilty of an infringement
- refused to forego a right.

4.13 Protection also applies where the employer believes or suspects that the worker has done, or intends to do, one of the above acts.

4.14 The worker must make the allegation in good faith to be protected against dismissal and detriment.

employment tribunals and remedies

4.15 Where a worker considers they have been discriminated against or been subjected to a detriment, they can bring a claim to an employment tribunal. An employee could also take a claim for unfair dismissal to the tribunal.

4.16 Applications must be presented to the tribunal within three months of the date of the incident of less favourable treatment, act, detriment or dismissal. Employment tribunal rules were changed in April 2014. All tribunal applications must now be preceded by a claim to ACAS for Early Conciliation.

4.17

Since May 2014, it is mandatory to present a claim to ACAS for Early Conciliation before making the claim to the employment tribunal. This must be done before the usual three-month time

limit expires. Once the early conciliation application is submitted it has the effect of 'stopping the clock' for the tribunal claim. The rules on this are complicated so you should always contact your Prospect negotiator for detailed advice as soon as possible.

4.18 Time limits can only be extended in exceptional cases where it is considered to be just and equitable. If you feel you have been unfairly treated, you should seek advice from your Prospect representative or full-time officer as soon as possible.

4.19 The tribunal has the choice of three remedies for less favourable treatment or detriment:

- a declaration of rights
- an order for compensation
- a recommendation that the employer takes certain action.

4.20 Compensation will be what the tribunal considers just and equitable. But the regulations specifically exclude tribunals from awarding compensation for injury to feelings in these cases.

enhanced opportunities for part-time work

4.21 The European Directive on part-time work requires member states to "identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work, and where appropriate limit them." The UK regulations do not address this point at all, and it is disappointing that the government has not produced a statutory code on this. But the government guidance does go some way in proposing best practice for promoting part-time opportunities.

4.22 The guidance includes the following suggestions for best practice:

- employers should seek to maximise the range of posts designated as suitable for part-time working or job-sharing at all levels of the organisation, including skilled and managerial positions
- employers should seriously consider requests for job sharing. Larger organisations should keep a database of those interested in entering job sharing arrangements
- employers should look seriously at requests to change to part-time working. Where possible they should explore with their staff how this change should be accommodated

- organisations should consider how to make it easier for workers to vary their hours, including transferring between part-time and full-time work, to the benefit of both parties
- wherever possible, training provision should be arranged to ensure that it is conveniently located and scheduled so that part-timers can participate.

right to request flexible working

5

5.1 The right to request flexible working was extended to all employees from 30 June 2014.

5.2 Before 30 June 2014 only parents of children under 18 and carers had this statutory right. But this has now been extended to all employees who have been employed for 26 weeks or more.

flexible working

5.3 Under the legislation, employees can ask for their contracts to be varied to change:

- hours of work
- times or patterns of work
- location of work (for example; in order to work from home, or work at another site).

5.4 As requests are no longer related to family or caring responsibilities, they can be made for any reason and the employer must give them due consideration.

5.5 The right only applies to:

- employees, ie those working under a contract of employment and not to the broader definition of worker
- those with 26 weeks' continuous employment.

5.6 Once a request to change hours or location is agreed under the provisions, it will be a permanent change, with no obligation on the employer to agree to vary the terms later on. For example, if an employee goes part-time in order to care for a young child, there will be no right to revert to full-time hours later on, unless this is contractually agreed with the employer.

applications

5.7 There are strict procedures for making an application to work flexibly. This must be in writing and dated, and state:

- that it is an application under the statutory provisions
- the change applied for
- the proposed date for the change to take effect
- whether a previous application has been made and when
- the impact it would have on the employer
- the employee's proposal on how such an impact could be dealt with.

5.8 The last two points appear to place an unrealistic burden on the employee, as it will be for them to state the expected effect of the change and to propose remedies for the employer. It is unclear how literally tribunals will apply these conditions, but they are likely to put some employees off.

5.9 Once an application is made, whether accepted or not, employees cannot make a further application under the legal provisions for 12 months.

obligations on the employer

5.10 The employer is under a statutory duty to consider the request and to comply with the legal procedures for doing so. But there is no legal right for the employee to challenge the reasonableness of the employer's refusal.

5.11 An employer can only refuse an application if it considers that one or more of the following grounds apply:

- the burden of additional costs
- detrimental effect on ability to meet customer demand
- inability to reorganise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficient work during the periods the employee proposes to work
- planned structural changes.

procedures

5.12 Once the employee has made the application:

- the employer must consider the request in a reasonable manner
- the employer is under a duty to deal promptly with requests
- a final decision must be given within three months of the application being received
- the three month limit can be extended by agreement
- the final decision must be given in writing, specifying a reason. The employer is not required to provide a written explanation for the refusal.

ACAS code

5.13 The conciliation service, ACAS, has produced a code of practice on how employers should deal with requests *Handling requests in a reasonable manner to work flexibly: an ACAS guide* (see http://bit.ly/acas_flexi_requests).

5.14 There is no statutory right to be accompanied at any meeting to discuss the request. However the code does recommend that employees be allowed to be accompanied by a work colleague to the meeting. Prospect representatives should encourage employers to negotiate a policy which includes the right to representation by a union rep.

5.15 There is no statutory right to appeal against a refusal of the request, but the code recommends that employers should allow an appeal.

employment tribunals

5.16 An employee can only bring a complaint to an employment tribunal if:

- the employer has not complied with the procedures, or has not provided a written decision
- the employee considers the employer's decision was made on the basis of incorrect facts
- the employer's grounds for refusal were not one of the

permitted grounds (though with such a wide-ranging list this will be rare).

5.17 The tribunal can award compensation of up to eight weeks' pay and may order the employer to reconsider the request. The tribunal cannot challenge the reasonableness of the employer's decision or order the employer to accept the request.

5.18 Compensation has been set at a low level and there is no scope to recoup the true cost of any loss. The eight weeks' pay is capped at the statutory limit for a week's pay (£475 in 2015).

5.19 The time limit for bringing a complaint is three months from the date the decision, or breach of the procedural duty, was notified. But it is important to consider the impact that Early Conciliation will have on this timeframe (see 4.16). Time can only be extended where it was not reasonably practicable for the employee to make the claim in time. This is the same as for late claims under unfair dismissal law, rather than the slightly more flexible rights under discrimination law (where they can be extended if the tribunal considers it just and equitable).

5.20 There are rights for the employee not to be dismissed or subjected to another detriment for making an application, or for exercising any rights under these provisions.

withdrawal

5.21 Applications to the employer for flexible working will be treated as having been withdrawn where the employee:

- has failed to attend a meeting to discuss the application more than once without 'reasonable cause'
- has refused to provide the employer with information required to assess whether the request should be agreed.

5.22 If this happens, the employer needs to confirm the withdrawal in writing to the employee. There is no mechanism in the regulations for the employee to challenge such a withdrawal. Once an application is deemed to be withdrawn, the employee cannot challenge either the procedures or the reason given for refusal at employment tribunal.

equality act claims

5.23 While the new statutory rules apply to all employees, the right is only to request a change. The Equality Act 2010 provides a much more powerful legal remedy where the request for flexible working is related to a protected characteristic. For example, refusal to allow a woman returning from maternity leave to work reduced hours in order to accommodate childcare commitments may amount to indirect sex discrimination. This could be because the employer is imposing a requirement to work full-time, which would have a disproportionate, adverse effect on woman workers.

5.24 Prospect representatives should consider whether there is a possible claim under the Equality Act (see section 6).

equality legislation

6

6.1 The Equality Act provides a useful route for members to pursue their rights to part-time or flexible working. It is often possible to claim simultaneously under the Act and the part-time and flexible working regulations.

6.2 Equal pay legislation requires that women and men are entitled to the same pay and other contractual provisions where they do:

- like work
- work rated as equivalent, or
- work of equal value.

6.3 An employer can, however, defend an equal pay claim if it can show there is a material factor for the difference that is not tainted by sex discrimination.

6.4 Direct and indirect discrimination on the basis of sex is outlawed. Direct discrimination is where a woman is treated less favourably on the grounds of her sex.

6.5 Indirect discrimination is where the employer applies a provision, criterion or practice that:

- puts, or would put, those who share the employee's protected characteristic at a disadvantage when compared with others
- puts the employee at a disadvantage; and
- the employer cannot show that it is a proportionate means of achieving a legitimate aim (see 6.7).

6.6 There are strict time limits for bringing claims to the employment tribunal. For sex discrimination cases the application must usually be made within three months of the act of discrimination occurring, for example a refusal to work part-time, (notwithstanding the impact of Early Conciliation – see section 4) .

For equal pay cases, the time limit is six months from the end of employment. Please seek advice from your Prospect rep as soon as possible if you think you have been discriminated against.

part-time workers

6.7 Discrimination against part-time workers is also likely to be indirect discrimination on the basis of gender as the majority of part-time workers are women. There has been a growing body of case law on this point over the last 25 years, for example in relation to equal access to pensions, benefits at work and redundancy. If a refusal to allow part-time or flexible working would be to the detriment of more women than men, the employer is required to justify their actions.

6.8 If a man is refused changes to his contract and can show that women would not have been refused, this could also be direct sex discrimination which could be challenged under the Equality Act.

overlap with part-time working regulations

6.9 Claims may be brought under both the Equality Act and the Part-time Workers Regulations. The advantage of using the PTWR is that the principle of equal treatment is automatic, and the often tortuous arguments about indirect sex discrimination will not need to be made. The principle will also automatically apply to male part-time workers. However, because the regulations have been introduced in a fairly restrictive manner, there will be cases where discrimination against part-time workers will need to be brought under the discrimination laws instead of, or in addition to, the PTWR.

6.10 The narrow definition of 'comparable' workers may well mean that the Equality Act, where a hypothetical comparator can be used and where you can compare with a predecessor or successor in the job, will be a more successful route. Also, the failure to allow awards for compensation for injury to feelings may make it more beneficial to use this legislation.

overlap with flexible working regulations

6.11 The Equality Act is wider in scope than the right to request flexible working – there is no qualifying service requirement and it can provide unlimited compensation. Unfortunately the flexible working regulations do not go as far in requiring the employer to

provide a good reason for a refusal. In many cases, Prospect will still need to rely on sex discrimination as the main argument for bringing legal proceedings and negotiating with employers.

returning to work after maternity leave

7

7.1 The law gives women the right to return to the same or similar job after maternity leave. This protects a woman against dismissal on account of maternity by ensuring that her job remains open to her.

7.2 There is no automatic right to return to work on a part-time basis. Many women who worked full-time before taking maternity leave may want to return to work part-time or as a job share. Case law has established that refusing to allow a woman to return part-time may be unlawful indirect sex discrimination.

7.3 Case law has established that a blanket policy of not allowing employees to work part-time is likely to be discriminatory. Cases will usually be decided on the basis of whether the employer is justified in requiring the woman to work full-time. The test of whether it is justified will depend on the individual facts of each case, the needs of the business and the requirements of the job.

negotiating policies

8

8.1 Because of the legal uncertainties and pitfalls that surround part-time and flexible working, Prospect representatives should negotiate good equality and work-life balance policies with employers that will enable staff to work part-time or flexibly.

8.2 Policies should apply to men, same-sex partners, co-parents or adoptive parents to ensure that all workers with family responsibilities can exercise their right to be employed at hours that are fair to them. This includes the right of the mother to work part-time.

8.3 Comprehensive work-life policies should cover a range of issues, including:

- maternity, paternity, adoptive, family and parental leave
- time off for dependants
- special leave for other circumstances (e.g. fertility treatment)
- career breaks
- sabbaticals
- flexible working arrangements
- childcare.

8.4 Prospect produces a range of guides for members and representatives, including working time, homeworkers, maternity rights, family and parental leave (see section 9).

union organisation

8.5 Prospect representatives should ensure that part-time and homeworking staff can be involved in union activities as much as anyone else. Meetings should be arranged at times when as many members as possible can attend and take account of part-time working arrangements. Information circulated to members must be equally available to those who work from home.

information/ advice

9

prospect guides

- Members' Guide to Parental and Family leave (12)
- Members' Guide to Maternity Rights (13)
- Members' Guide to Health and Safety Rights at Work (5)
- Members' Guide to Equality at Work (17)
- Members' Guide to Homeworking (20)
- Members' Guide to Atypical Workers (27)
- Negotiator's Guide to Equal Pay.

You can access all these guides via www.prospect.org.uk/resources_and_publications/memberguides

Other publications and websites

- TUC
www.tuc.org.uk/equality-issues/gender-equality/parents-and-carers
- Working Families
www.workingfamilies.org.uk
- Employers for work-life balance
www.employersforwork-lifebalance.org.uk
- Right to request flexible working
www.acas.org.uk/flexibleworking
- EHRC
www.equalityhumanrights.com

This guide was updated in January 2015. The law in this area is constantly developing and future situations will be tested in the courts. See Prospect briefings and updates for the latest news (library.prospect.org.uk/browse/type/employment-law-briefing) (library.prospect.org.uk/browse/type/employment-law-update).

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