

The Future of UK Work-Family Rights: The Case for More Flexible Working

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Abstract: The Covid-19 pandemic has highlighted both the significant impacts that the UK lockdown rules have had for working women with caring responsibilities, and the potential of flexible working practices to redefine the ways in which people work. This paper will first examine the current UK right to request flexible working and its limitations particularly: the requirement for 26 weeks continuity of employment; the wide discretion that employers have to refuse such requests; the lack of ability to challenge employer's decisions; and the limited ability to make subsequent requests and/or to make temporary changes. The paper will then critically examine the UK Department for Business, Energy & Industrial Strategy's consultation 'Making Flexible Work the Default', which addresses some of these concerns, namely, to change it to a day-one right to request. This examination will consider whether a greater shift to flexible working as the default position, and a redefining of working practices and the work-life paradigm, can have a positive impact for working persons, especially those with caring responsibilities and/or other work-life conflicts. In particular, the paper will critically analyse whether a societal shift to more flexible working can redress the impact of the pandemic for working women with caring responsibilities. In doing so, the paper will reflect on whether this shift represents a challenge to the traditional unburdened worker norm or whether it will continue to reinforce traditional gender roles. Further areas for reform and development will also be identified, including enhanced rights for working fathers and a recognition of new and emerging areas of work-life conflict, such as Menopause in the Workplace, as highlighted by the Women and Equalities Commission's inquiry on this topic.

Keywords: flexible working, work-family rights, Covid-19, working mothers, care

1. Introduction

The Covid-19 pandemic has highlighted both the significant impacts that the UK lockdown rules have had for working women with caring responsibilities, and the potential of flexible working practices to redefine the ways in which people work. This reflects both research undertaken on the impact that lockdown had on those with caring responsibilities and the unprecedented moves to home working that were necessitated by the pandemic. Research undertaken during the pandemic highlighted that the lockdown had a particularly disproportionate impact on working women with caring responsibilities. During the pandemic women were more likely than men to undertake unpaid childcare (Office for National Statistics (ONS), 2021, March 2020: 55% more than men; Sept 2020: 99% more than men); and to be home schooling (ONS, 2021 early 2021: 67% women and 52% men). Working mothers were also more likely than men to agree that they were struggling to balance paid work with care (Fawcett Society, August 2020: Figure 2, 5-6, 48.3% compared with 39.1% of fathers). While this is perhaps not unsurprising given that women already bear the greatest responsibility for care, the pandemic reinforced the challenges that those with caring responsibilities face when trying to combine paid work with caring commitments.

The pandemic also necessitated an almost overnight switch to home working for many. The requirement to work from home has highlighted the potential benefits of greater flexibility and has exposed many more employers and employees to flexible working arrangements. This shift has presented new challenges, not least of all access to technology and the boundaries between work and life, but also new opportunities to redefine how and where people work and what workplaces will look like in the future. However, it is important to bear in mind that the experiences of home working during the pandemic have varied and are different from those in normal circumstances. Indeed, the research referred to above highlights the challenges that women with caring responsibilities faced in combining work with care and schooling in circumstances where external supports for both were largely unavailable. The experiences of home and flexible working are therefore likely to be notably different from those where these supports are available. Nevertheless, there has been a shift in the attitudes of many employers and employees towards flexible working (Global et al, 2021). In order to assess the potential for the right to request flexible working (RTRFW) to redefine how people work, the current right and proposed changes will be examined. It will be argued that these changes can have an impact on not only those with caring responsibilities but also in other areas of emerging boundaries of work-life conflict, such as menopause, which has recently been the subject of a Women and Equalities Committee Inquiry (2021). However, other changes to

the package of work-family rights, particularly enhanced rights for working fathers, are necessary to challenge the focus on maternal care and achieve lasting cultural change.

2. The right to request flexible work

It has been argued that the pandemic has normalised flexible work. Indeed, Liz Truss, MP in her capacity as Minister for Women and Equalities noted that:

‘We should take the opportunity to capitalise on some of those cultural changes that have happened to make it easier for people balancing family and career to work from home, to make it more flexible and to challenge the culture of presenteeism, which has been very alive in business ...’ (Women and Equalities Committee (22 April 2020): response to Q.14).

This would appear to suggest that flexible working is key to enabling working persons with caring responsibilities to engage in paid work. Greater opportunities for flexible working could certainly help redress some of the inequalities experienced by those with caring responsibilities during the pandemic. For instance, greater flexibility could enable more working persons with caring responsibilities to remain in work or to enter the workforce for the first time. However, it is important to remember that there are many jobs, particularly public facing roles, that cannot be undertaken from home, although other forms of flexibility would remain possible. It is first necessary to consider whether the tools to challenge workplace cultures, and to redefine how and where people work, are present within the current RTRFW.

2.1 The current right to request flexible working

The RTRFW enables employees with 26 weeks continuous employment to request a change in their hours, times or place of work (Flexible Working Regulations 2014/1398 (FWR) Reg.3 and s.80F Employment Rights Act 1996 (ERA)). The right was originally enacted in 2002 and was initially only available to working parents of children under the age of 6, later extending to children up to the age of 17 (s.80F(3) ERA before it was repealed and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002/3236 as amended by the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009/595). It was subsequently extended to requests made in respect of adults in need of care (Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006/3314), before being extended to all employees. Despite being available for almost 20 years, research by Working Families (2019: 2) prior to the pandemic shows that the right was underutilised in practice. While most working parents responded that they wanted to work flexibly (86%), just under half did (49%). The main reasons for not doing so related primarily to workplace culture and support: 40% of respondents noted that it was incompatible with their job; 37% reported that it was not available where they worked; and 10% stated that their manager does not like them working flexibly (2019: 2). It is evident that workplace cultures and societal norms have played a large role in how flexible working has been perceived and utilised in practice. This poses the question of whether the shift to home and flexible working during the pandemic has resulted in any cultural or societal changes, making it more likely for employees to successfully make requests. However, more recent research by the Global Institute of Women’s Leadership et al reinforces similar barriers such as: business needs; unsupportive workplace cultures; and lack of knowledge amongst line managers (2021: 21-22), indicating that there may not have been as significant a change in attitudes as initially expected. This can perhaps be attributed to the framework of the RTRFW itself, which can make it difficult for employees to use.

It only applies to employees, meaning that those who do not meet the definition of employee in s.230 ERA are unable to make a request. In addition, they must have 26 weeks continuity of employment (FWR Reg.3 and s.80F ERA). This means that they must have an established connection with the workplace before a request can be made. These employment-related requirements exclude some working persons, particularly those in atypical work. Furthermore, they could act as a barrier to employment for those who require greater flexibility to enter the labour market in the first instance. This requirement highlights the challenges of implementing the recommendation requiring job advertisements to include references to flexibility (HM Government, 2019: 50). This is aimed at increasing the visibility and availability of flexible working when advertising jobs. The merits of this approach were reinforced in research undertaken by Londakova et al (2021) which demonstrated that the inclusion of references to flexibility when advertising jobs made the roles more attractive to both women and men. While this can help normalise flexible work, increase the availability of quality flexible work and facilitate the employment of those with caring responsibilities (Londakova et al, 2021: 7-8), if an individual does not have

a day-one RTRFW then this requirement will have little impact in practice. However, a day-one right to request has been included in the more recent Government consultation on Making Flexible Work the Default (MFWDC) (2021) discussed below.

Where an employee is entitled to make a request, the burden on them is quite onerous. They must make the request in writing, specifying whether they have made a previous request and if so when, and it must be dated (FWR Reg.4). They must ensure that they state that it is an application for flexible working, what the change is that they are requesting and when that change should take effect (s.80F(2)(a)-(b) ERA). They must then explain what impact, if any, granting the request will have for the employer and detail how they think that this impact can be dealt with (s.80F(2)(c) ERA). This last requirement places a heavy burden on the employee to consider the potential impacts of their request on their employer and could create a barrier for those who want to request flexible working.

Furthermore, employees can only make one request per 12-month period (s.80F(4) ERA) and any changes made result in a permanent change to the contract, unless a temporary change was sought in the first instance (Weldon-Johns, 2015: 407). This makes the RTRFW quite inflexible in practice and does not allow for the possibility that the employee's circumstances could change within that period, necessitating a subsequent request or amendments to the original request. Consequently, the RTRFW can be assessed as offering little of substance to employees because of its limitations in practice (Anderson, 2003). Once an employee has made a request, the employer is required to deal with the request in a reasonable manner, notifying the employee of the decision within 3 months and only refusing the application on one of the specified grounds (burden of additional costs; detrimental effect on ability to meet customer demand; inability to re-organise work among existing staff; inability to recruit additional staff; detrimental impact on quality; detrimental impact on performance; insufficiency of work during the periods the employee proposes to work; planned structural changes, and such other grounds as the Secretary of State may specify by regulations) (s.80G(1) ERA). These grounds are quite wide-ranging, consequently, employers have a large degree of discretion to refuse such requests. This again can make it difficult for employees to successfully make requests.

Employees can make a complaint to the Employment Tribunal but only on the grounds that: the employer failed to comply with s.80G(1); the decision was based on incorrect facts; or that the notification of the decision by the employer failed to meet the relevant requirements (s.80H(1) ERA). Consequently, the employee cannot challenge the reasons for refusal themselves, only the procedure. This makes it difficult for the employee to successfully challenge the employer's decision (Anderson, 2003; James 2006: 276-277; James 2009: 277-278). Even where a complaint is successful, the remedies are limited. If the Employment Tribunal upholds the complaint, they 'shall make a declaration to that effect and *may* (a) make an order for reconsideration of the application, and (b) make an award of compensation to be paid by the employer to the employee' (s.80I(1) ERA, emphasis added). The maximum compensation that can be awarded is 8 weeks' pay (FWR Reg.6). Consequently, even where an employee succeeds in their claim this does not require the employer to overturn their decision and grant the request. It does not even guarantee that the employer will be required to reconsider their decision. This offers employees few meaningful remedies.

Given the limitations of the RTRFW, its potential significance as a tool to help redress the inequalities faced by those with caring responsibilities during the pandemic can be questioned. This was initially reinforced by the limited recommendation to increase the visibility of flexible work in job advertisements, which fails to challenge the framework of the right itself. However, proposals to make it a day-one right offer more potential (Mitchell and Weldon-Johns, 2022). However, the MFWDC (2021) does offer greater potential to revise the framework of the RTRFW and make it more effective in practice.

2.2 Making flexible working the default consultation

The MFWDC reflects on the impact of the pandemic (2021: 8-9) and recognises some of the key concerns and limitations of the current RTRFW. However, it is also limited from the outset with its immediate dismissal of the possibility of changing the right from a right to request to a right to have flexible work (MFWDC, 2021: 10). The rationale behind this is ensuring that employers retain discretion to refuse requests (MFWDC, 2021: 10). This is reinforced in the consultation, which considers whether there should be any changes to the grounds of refusal (MFWDC, 2021: 16-18). No recommendations are made to revise these (MFWDC, 2021: 18), and it is clear that there will be no departure from the current levels of discretion afforded to employers. Given this approach, it is

difficult to see how the revised right can achieve, or capitalise on, cultural and societal shifts towards supporting more flexible working practices. Nevertheless, while it would be beneficial from the employee's perspective for the employer's discretion to be limited in some ways, it is perhaps not realistic in practice. Employers should have some discretion to be able to determine if the request can be implemented, recognising that for some roles certain forms of flexibility will be impossible. A more effective change here would be to introduce a right to challenge the reasons given by the employer. This would ensure that the employer makes reasoned decisions and fully and genuinely considers whether the request can be implemented. This approach can be supported by the proposal to consider whether the employer should be required to suggest alternatives if they are unable to grant the request sought (MFWDC, 2021: 19). The rationale behind this is to encourage a dialogue between the employer and employee to try to reach a consensus rather than requiring the employee to submit another request. This could help to normalise flexible work and encourage employers to become more open to accepting requests. This proposal could go some way to supporting a shift in workplace cultures towards flexible working. However, there is also the danger that employers utilise this to limit requests rather than to facilitate them in practice. A presumption in favour of granting the request could help to mitigate this.

The consultation also considers revising the administration process to allow for requests to be made more frequently and to require employers to provide their decisions more quickly (MFWDC, 2021: 21-22). Allowing more than one request per year would recognise that individual circumstances can change. Being able to request changes when this happens, irrespective of when a request was last made, would make the legislation more responsive and effective in practice. This would be a welcome change and would address some of the inflexibility within the existing framework. Reducing the timeframe in which decisions should be made would also be beneficial. Currently employers must respond within 3 months (s.80G(1B) ERA). Requiring employers to respond to requests more quickly would be useful as this will enable the changes to be implemented sooner. Alternatively, where they are refused, it will enable the dialogue between the employer and employee to begin.

The most notable proposal within the consultation is to remove the continuity of employment requirement and provide all employees with a day-one RTRFW (MFWDC, 2021: 15-16). This would enable all employees to request flexible working from the start of their employment, thus underscoring a commitment to greater choice and flexibility for all. This would address the concerns raised above that the RTRFW currently excludes those entering new employment and could help to embed a cultural shift towards greater acceptance of flexible working. This would complement the proposed requirements to include references to flexible working in job advertisements and make this more meaningful in practice. However, it does not address the issue of employment status which continues to limit the right to employees.

The consultation also notes that an employee can currently request temporary arrangements, although it acknowledges that it is not well-used (MFWDC, 2021: 22-23). One reason for this may be a lack of awareness that this is possible (Weldon-Johns, 2015: 407). Amending the legislation to make this clearer may encourage more employees to request such changes. It may also reflect the difficulty in defining the parameters of a temporary request when it is made, since the date on which the change should be effective must be noted in the request itself (s.80F(2)(b) ERA). For instance, if someone requests a reduction in hours to temporarily care for an ill relative, the length of time that they require care is unlikely to be known. Allowing for greater flexibility in how and when requests can be made, as discussed above, could enable more employees to request temporary arrangements instead of making permanent changes. This could enable more working carers, particularly women, to remain in work and/or remain in or return to full-time work.

The MFWDC offers some opportunities to revise the existing framework and make flexible working more accessible and effective for employees, particularly those with caring responsibilities. However, some key barriers are likely to remain, and it is necessary to consider whether the changes are likely to support the kind of flexible working required to support those with caring responsibilities.

2.3 The potential and limitations of flexible work

The proposed areas of change contained within the MFWDC could help to ensure that the RTRFW is more effective in practice, despite its limitations. The greatest challenge is whether any legislative changes will be sufficient to support a cultural change towards flexible working, particularly of the kind that will support those with caring responsibilities. Some of the experiences of flexible working both prior to and during the pandemic highlight that this may be more difficult to achieve.

While more employers and employees have made use of flexible working during the pandemic, it is important to consider what the expectations around flexible working are and what kinds of flexible working have been valued. Quite often the kind of flexibility required by those with caring responsibilities is not valued because it often results in a reduction in paid work to undertake care (Chung and van der Lippe, 2020: 366 and 369-371). In contrast, greater flexibility in terms of working different (often longer and unpaid) hours or working in different places is viewed more positively in terms of career progression (Chung and van der Lippe, 2020: 366 and 369-371). These practices also tend to reinforce traditional gender roles, with women more likely to use the former forms of flexibility to balance paid work with care and men more likely to work flexibly to enhance their career prospects (Chung and van der Lippe, 2020: 366 and 369-371). While many employers and employees have adopted flexible working throughout the pandemic, these different approaches towards flexible work appeared to have been mirrored in the experiences of working parents. ONS (July 2020) data shows that during lockdown fathers spent an average of 45 minutes more per day on paid work than mothers. Coupled with the research noted above on the experiences of working mothers during the pandemic, this reinforces gendered experiences of flexible working. This also suggests that many employees did not necessarily reduce their working hours during the pandemic, but instead worked in a broadly similar way to the way they worked in workplaces, except from home. This reinforces a traditional male model of work rather than the flexibility required to balance work with caring responsibilities. If this is what employers have valued from the experiences of home and flexible working during the pandemic, then it could further reinforce and entrench traditional gender roles.

It is also important to consider whether flexible working, especially home working, can actually enable employees to address work-life conflicts. For instance, Chung and van der Lippe (2020: 368-369) note that studies demonstrate that flexible work, particularly home working, can create more work-family conflict because of competing commitments and blurring of boundaries between home life and paid work. Research by the Working@Home Project (2020) during the pandemic also uncovered the emergence of digital presenteeism, which could make home working more difficult for those with caring responsibilities. This research serves as a reminder that expectations around home and flexible work will have been influenced by the experiences of the pandemic, which have not necessarily departed from traditional male models of work. If this is the case, then the normalisation of flexible work may not meet the needs of working carers. Consequently, it is important to remember that the RTRFW, even with the proposed revisions, is not the panacea for all work-life conflicts and greater consideration also needs to be given to the broader package of work-family rights.

2.4 Flexible working and the future boundaries of work-life challenge

One final consideration is how the proposed changes can impact future boundaries of work-life challenge. The Women and Equalities Committee's inquiry into Menopause and the Workplace (2021) called for evidence on whether current legal frameworks sufficiently addressed the impact of menopause in the workplace. The RTRFW has the potential to support those experiencing the symptoms of menopause at work. For instance, if employees experience disturbed sleep because of hot flushes, being able to request a later starting time could enable them to be more productive. Allowing employees to work from home may support those experiencing heavy bleeding, which would make working in the workplace more difficult (Weldon-Johns, 2021). Changes such as a day-one right to request and greater flexibility in making requests would make it easier for those experiencing the symptoms of menopause to continue to work (Weldon-Johns, 2021). Consequently, when considering these proposed revisions it is important to consider the broader implications beyond the traditional focus on those with (child)care responsibilities.

3. Rights for working fathers

Another issue that has emerged during the pandemic is the role of working fathers. Greater flexibility for fathers as well as mothers has been recommended (Global Institute of Women's Leadership et al, 2001: 32), as has greater recognition of their caring role (Fawcett Society 2020: section 8; Margaria 2021). Working fathers have traditionally occupied a secondary role in childcare given the existing framework of work-family rights, which prioritises the role of working mothers often to the detriment of working fathers (Busby and Weldon-Johns; James 2006 and 2009). Working fathers are entitled to certain rights such as: 2 weeks paid paternity leave (Paternity and Adoption Leave Regulations 2002/2788 (PALR) and Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002/2822); up to 50 weeks of Shared Parental Leave (Shared Parental Leave Regulations 2014/3050 (SPLR) and Statutory Shared Parental Pay (General) Regulations 2014/3051); and 18 weeks unpaid parental leave (Maternity and Parental Leave etc Regulations 1999/3312 (MPLR)). However, all are subject to qualifying conditions, including continuity of employment requirements. This means that

working fathers have no automatic rights to childcare-related leave. In contrast, the right to maternity leave is a day-one right to leave (MPLR, Reg.4). While there are clear justifications for this, the distinction between this and the right to paternity leave, which requires that a working father has 26 weeks' continuity at the end of the week immediately preceding the 14th week before the expected date of childbirth (PALR, Reg.4(2)(a)), reinforces their secondary role. Given that the proposals to amend the RTRFW are revisiting the continuity of employment requirement, now would be an opportune time to also reconsider whether it is necessary for other work-family rights.

Furthermore, the Government previously committed to reviewing the right to shared parental leave (HM Government July 2019: 4-5) given the low utilisation rates (just over 1% of those entitled utilised it in 2017/18, Birkett and Forbes 2018), which would also be welcome. There should be a reconsideration of the dependant nature of the rights, which require the mother to curtail her rights to maternity leave and 'transfer' remaining entitlements to the father to use as shared parental leave (SPRL, Reg.4). Instead, an independent right to childcare leave for working fathers would be preferable (Busby and Weldon-Johns 2019; Atkinson 2017). As would making this a day-one right to leave. Changes such as these would reinforce that caring responsibilities are not optional or negotiable for those who have them. Facilitating this within the workplace will help recruit and retain those with caring responsibilities. It will also help to challenge traditional gender norms around care, which have been exacerbated by the pandemic.

4. Conclusion

The proposals to revise the RTRFW present an opportunity to make the right more effective and meaningful. In particular, the proposals to make it a day-one right and to make it easier to make additional requests could reduce some of the barriers faced by those who want greater flexibility but cannot access it. However, employers will retain a large degree of discretion and there are no proposals to enhance the ability to challenge decisions, which could limit their impact in practice. Consequently, the proposed revisions should be part of a wider revision of the framework of work-family rights which provides a more defined role for working fathers and considers new and emerging boundaries of work-life conflict. It is only by doing so that the proposals have the potential to effect meaningful and lasting change. Nevertheless, they mark a small step forward in renegotiating the boundaries between work-life conflict.

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