



FLEXIBLE WORKING

legal rights and gaps in the law



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Introduction

This guide to the law on flexible working is a companion to the excellent bargaining guide, 'Flexible working: making it work' (see p93 for details). The latter provides a series of best practice examples and tips, checklists and templates for:

- making the business case for individual members
- as part of that, doing an audit of the organisation
- making flexible working a reality across the organisation
- using flexible working as an organising tool

It is far better to make flexible working a generally accepted reality in your workforce and to agree arrangements which suit the member and employer. But it can help to negotiate where you know the underlying legal entitlements. This guide provides a general summary and illustration of the law but it should not be relied on in itself to give advice in individual cases. The exact rules can be very fiddly. You should always take advice through appropriate UNISON channels where legal action may be necessary. Always bear in mind that time-limits are short.

This guide has been written for UNISON's Learning and Organising Services by Tamara Lewis. She is a solicitor who worked for over 20 years for the employment unit of the Central London Law Centre and is both a practitioner and specialist trainer in equality law. She has worked with UNISON on many occasions and is author of UNISON's employment law book, 'The Law and You'.

Thanks to Labour Research Department for extracts from their policy library.

This guide is accurate as at 1 December 2016.

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Please note that the law in this guide applies to England, Scotland and Wales. Thanks to John O'Neill, Thompsons Northern Ireland, for highlighting significant differences in the law in Northern Ireland. These have been marked in the text. For the finer detail, reps in NI should get local advice.

What is flexible working?

In this guide, flexible working has been taken to mean the ability to choose which hours and shifts to work, to work as and when compatible with other life demands, and to take leave for a variety of needs and obligations. The law gives a range of minimum rights, but these are not always adequate to meet the situation. In the future, following Brexit, there is the risk of some of these rights being cut back when no longer protected by EU law. This makes negotiated policies all the more important.

Flexible working can cover arrangements such as

- Part-time working or job-share
- Compressed hours (full-time hours over fewer days)
- Annualised hours (a set number of hours per year to be worked whenever the member wishes, perhaps subject to a number of core hours)
- Term-time working
- Self-rostering
- Shift-swapping
- Staggered hours (normal hours but with different start and finish times)
- Fixed shifts (as opposed to rotating shifts)
- Flexi-time
- Working partly from home
- Unpaid sabbaticals or career breaks

Some Councils have also agreed:

- A voluntary reduction in hours for a temporary period of time traded off for reduced pay.
- Phased retirement:

Flexi-time agreements can be very creative. Here are some examples, which have actually been agreed:

- Normal working hours between 7am and 7pm with no core hours. Set period for lunch between 11am and 2.30pm. Any lunch break over one hour must be agreed by line manager up to a maximum of two hours.

- Full-time employees employed on 37 hours/week must work a total of 148 hours in a 4-week cycle. Subject to operational viability and agreement of the line manager, this can be worked any time between 7.30 am and 7.30 pm with a 30 minute break. There are no core hours, but employees must work at least 3 hours on any day they work. Employees working a 6 hour day or more must take a half hour break between 11 am and 3 pm. A five day week can be spread over 7 days. No more than 48 hours may be worked in a single week. Employees can carry over a maximum excess of 12 hours or shortfall up to 4 hours from any 4 week period. Part-time and temporary employees can also participate in the scheme.

As well as these general arrangements, policies can be negotiated for paid or unpaid time off for a variety of needs which may not be covered adequately by the law, eg

- Home emergencies (gas leaks; fire and flood; burglary; car breakdown)
- Caring / health (looking after children or close relatives for short-term illness or incapacity; accompanying to hospital appointments)
- Compassionate leave (illness or death of close relative or friend)
- Settling children into a new school
- Medical screening
- Study leave

This Guide sets out the main legal entitlements to time off, especially from a family and an equality point of view.

The following is an example of a very positive flexible working policy agreed in the past by a Police force:

‘..... Police is deliberately seeking to create a more diverse workforce. One major impact of this policy, *arising in particular from the very welcome increase in the number of female recruits*, is an increased demand for reduced hours and flexible working hours’ arrangements. Any member of Police can already apply for reduced or flexible hours – in some cases (eg. if you have young children, or you are disabled, or are a sole carer for someone else) you may have a statutory right to be considered. However recent experience has shown that this is not enough – we need to go further than the law requires, and offer more choice and more flexibility, because it’s the right thing to do if we want to retain valuable people.

With immediate effect, therefore, force policy is that all requests for reduced hours and flexible working will be agreed (details tailored by negotiation to meet individual circumstances) if you fall into any of the following categories:

- If you are returning from maternity leave
- If you have children under the age of 6 years, or a disabled child under the age of 18.
- If you are the main carer of a dependent relative of any age
- If you are or become disabled

People who do not fall into one of the specific categories above may still apply, with a presumption that all reasonable requests will be agreed.'

Discrimination law and flexible working: overview

The Equality Act 2010 makes discrimination unlawful in relation to the 'protected characteristics' of age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex, being married or in a civil partnership, and sexual orientation.

The Equality and Human Rights Commission ('EHRC') Code of Practice on Employment is not the law, but a tribunal must take into account what it says on anything relevant when hearing a case. It is therefore a helpful negotiating tool. It is a long document but it has useful guidance on various flexible working issues. It is a good idea to have a copy in the branch office. You can download it from www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/employercode.pdf

Unlike unfair dismissal law and various other statutory rights mentioned in this Guide, discrimination law does not protect only employees. It also protects other workers who are doing a job personally for the employer, job applicants and contract workers. The member would be a 'contract worker' under the Equality Act 2010 if s/he is employed by one organisation, eg Serco, but carrying out work for another organisation, eg a local authority, under a contract between Serco and the local authority. If the local authority discriminates against the member, the member can bring a case against the local authority even though it is not his/her employer.

Also unlike unfair dismissal law, it is unnecessary to have any minimum length of service to be protected by discrimination law.

There are three important kinds of discrimination which are the most relevant to this Guide: direct discrimination, indirect discrimination and victimisation. Direct and indirect discrimination do not apply specifically to pregnancy and maternity discrimination. For disability discrimination, the duty to make reasonable adjustments and discrimination arising from disability are the most important.

Direct discrimination – s13

It is direct discrimination if the employer treats the member less favourably because of a protected characteristic.

For example, the employer allows a female member of staff time off to attend a school play featuring her child, but refuses to allow a male member of time off for the same reason. The employer, consciously or unconsciously, believes it is mothers who should be given that kind of time off, not fathers.

Indirect discrimination – s19

This is the most likely type of discrimination to apply in flexible working cases. It is where the employer applies (or would apply) the same rules to everyone, but the rules cause particular difficulty for women or for others with a particular protected characteristic. Employers have a defence if they can prove their actions or decisions are justified.

For example, an employer unjustifiably insists that all employees work full-time. The member, who is female, is unable to work full-time for childcare reasons. Women on the whole tend to have childcare obligations more than men.

The formal definition of indirect discrimination is that:

1. The employer applies a provision, criterion or practice to the member
2. The employer applies – or would apply – that provision, criterion or practice to other people who do not have the same protected characteristic as the member
3. The provision, criterion or practice puts – or would put – people who have the same protected characteristic as the member at a particular disadvantage when compared with those who do not share the protected characteristic
4. The provision, criterion or practice puts – or would put – the member at that disadvantage, and
5. The employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim. This is sometimes referred to as the ‘justification’ defence.

So, applying the formal definition to the example we gave above:

1. The employer told the member (who is a woman) she must work full-time. (The ‘provision, criterion or practice’ is the requirement to work full-time.)
2. The employer also told – or would tell - male employees they must work full-time

3. The full-time work requirement would put women at a particular disadvantage compared with men. (Remember, this need not apply to all women and it does not matter if some men would also be at a disadvantage. It is a question of which group is more affected.)
4. The full-time work requirement puts the member at a disadvantage because she cannot find childcare to cover her working full-time. (We will talk more about what constitutes a 'disadvantage' later in this Guide.)
5. It is now for the employer to justify its requirement that the member work full-time.

1 - What is a 'provision, criterion or practice'?

A 'provision, criterion or practice' (often shortened to 'pcp') covers virtually anything the employer does, eg imposing certain requirements or following certain practices.

3 - Group disadvantage

The member must show that others with the same protected characteristic as him/herself are put at a particular disadvantage 'compared with' workers without the protected characteristic. For example, in an indirect sex discrimination case, the member who is a woman must show that the provision, criterion or practice puts other women at a particular disadvantage compared with men. NB

- It does not matter if some men would also be put at a disadvantage
- It does not matter if some women would not be put at a disadvantage.
- It is just that the particular provision, criterion or practice would put noticeably more women than men at a disadvantage. This can be proved by statistics or by specialist evidence.

4 - The member's disadvantage

The member must show that the provision, criterion or practice puts him/her personally at a 'disadvantage'.

What is a 'disadvantage'?

A 'disadvantage' might mean an economic disadvantage, losing a job opportunity or promotion, or making it impossible for someone to work altogether. But it need not be so obvious.

The EHRC Code says it could include denial of an opportunity or choice, deterrence, rejection or exclusion. It is something which a reasonable person would complain about.

5 - The justification defence

In flexible working cases, whether the employee wins or loses often depends on whether the employer can prove the justification defence. This is not the same as unfair dismissal law, where it is only necessary for the employer to have acted reasonably. This is discrimination law. The tribunal decides whether the employer's actions were justifiable and it is a high threshold.

Employers must prove:

- a. That their actions were in pursuit of a 'legitimate aim', and
- b. That their actions were a 'proportionate means' of achieving that aim.

It is relatively easy in most cases for employers to prove they had a legitimate aim. It is much harder to prove their decision was proportionate. It is unlikely to be proportionate if there is a less discriminatory way of achieving the same aim. Also, even if there is no other way to achieve the aim, it might still be a disproportionate decision if the impact on the member and others with the same protected characteristic is particularly bad. It is a question of balancing the employer's legitimate aim against the discriminatory effect.

Victimisation – s27

Victimisation takes place if the employer subjects the member to a detriment because the member has done a 'protected act', ie because s/he has done anything in connection with the Equality Act 2010, eg s/he has asked for reasonable adjustments, or because s/he has complained about discrimination on his/her own behalf or on behalf of someone else, eg by

- a verbal complaint
- an informal written complaint
- a formal grievance
- taking a tribunal claim while still employed
- giving evidence in a grievance or tribunal case for a colleague.

For example, the employer makes the member redundant because she has taken out a grievance complaining about the refusal to allow her to work part-time to look after her baby.

A 'detriment' is any disadvantage, eg disciplinary action, lack of promotion, dismissal, redundancy, refusal to provide a reference.

It is not victimisation if the member made a false allegation in bad faith.

Public sector equality duty

Under s149 of the Equality Act 2010, a public authority must in the exercise of its functions have due regard to the need to eliminate discrimination and advance equality of opportunity. This is called the general public sector equality duty. There are also specific duties which are different in England, Scotland and Wales.

The PSED is a useful tool for negotiating better flexible working practices across an organisation as well as in individual cases. A tribunal may also take it into account when considering whether any indirect discrimination is justifiable and whether it is reasonable to make certain adjustments.

Time-limits

The following is a rough guide to time-limits and ACAS early conciliation. You should always take specialist advice as soon as possible.

The member can bring a discrimination claim while s/he is still employed or after s/he leaves. The time-limit is 3 calendar months less 1 day from the discriminatory action. Usually this is the date s/he is told s/he must work hours which s/he cannot manage or when his/her request for flexible working is refused.

If the member makes a further request in the future and is refused again, the time-limit may still be counted from the original refusal. However, the member may be able to count the time-limit from the second refusal if someone different has dealt with the matter or if the original decision-maker has freshly considered the request but still refused.

Where the claim is for failure to make reasonable adjustments, the 3 months is usually counted from the date the employer refuses to make the adjustment or, if the employer says nothing, from the date it does something inconsistent with agreeing the adjustment, or failing that, from the date when the employer might reasonably have been expected to have made the adjustment.

As the ACAS early conciliation procedure applies to discrimination claims (except in NI), ACAS must be notified under the procedure within this time-limit. The date for submitting a tribunal claim will be extended to allow for the time taken under the process.

If the employer carries out several discriminatory actions which all seem part of the same discriminatory state of affairs, it is possible that the time-limit will be counted from the last of those actions. This is sometimes called 'continuing discrimination'. It is also arguable that if the employer maintains a policy of full-time working or a discriminatory shift-pattern, that also counts as continuing discrimination.

Warning: it is extremely risky to rely on continuing discrimination. At all times it is safest to count 3 months from the original decision.

If a claim is late, the tribunal has a discretion to allow it in late on a 'just and equitable' basis. This means you should get specialist advice immediately if the member approaches you when his/her claim is already out of time.

Warning: never rely on the tribunal exercising its just and equitable discretion. Tribunals often say no.

Remedy

If the member wins a discrimination case, s/he may be awarded compensation for any financial loss she has incurred as a result of the discrimination and for injury to feelings. The tribunal also has power to make recommendations, eg that in future, the employer allow the member to work flexibly or that certain in-house procedures are improved.

Discrimination and flexible working

A case can arise either when the employer wants to impose a change in the member's working pattern or when the member wants to ask for a change. Discrimination law overrides the law of contract so that even if the employer is allowed to impose certain hours under the member's contract, it can still be unlawful discrimination to do so.

For more detail on how discrimination law applies in a flexible working context, see the sections in this Guide on age, disability, gender, gender reassignment, and religion.

The statutory right to request flexible working

If the member wants to change his/her hours or work from home for any reason, s/he can simply ask the employer. Alternatively, s/he can make a formal request under the statutory procedure for requesting flexible working (see p54). There is no particular reason to use the formal route as it does not in itself give the member any right to have the request granted. In some cases, you may think it is tactically a good way to approach the request and that it will make the employer more likely to agree. If so, make sure the member does not miss the time-limit for starting any discrimination case.

NORTHERN IRELAND DISCRIMINATION LAW

While the content of and general principles underlying discrimination and employment law in Northern Ireland are generally the same as in GB, it is very important to understand that there are some significant differences including:

- There is no single Equality Act in NI and the various types of discrimination are covered by separate statutes including the Sex Discrimination (NI) Order 1976, the Disability Discrimination Act 1995 and the Race Relations (NI) Order 1997.
- While the various concepts involved in discrimination law including direct discrimination, indirect discrimination, harassment and victimisation are generally the same in GB and NI, it is important to note that the specific definitions to be found in the various NI statutes may vary slightly from each other and from the GB definitions.
- The system of enforcement of employment rights generally in NI is significantly different from GB. In NI there are no tribunal fees or compulsory early conciliation (as at December 2016). It is proposed to introduce compulsory early conciliation through the Labour Relations Agency ('LRA') in NI but no date has yet been fixed for this.
- The Equality Commission for Northern Ireland oversees equality and discrimination law in NI. The EHRC's remit does not extend to NI.

- The EHRC Code of Practice does not apply in NI. There is no single Code of Practice, but The Equality Commission for Northern Ireland and the Labour Relations Agency ('LRA' - the NI equivalent of ACAS) jointly produce various Codes and Guides including 'Flexible Working: The Law and Good Practice – A Guide for Employers'. Guides do not have the same status as a statutory Code of Practice.
- The equivalent duty to the GB public sector equality duty is the 'Equality of Opportunity' duty under Section 75 of the Northern Ireland Act 1998 which requires public authorities in carrying out their functions to have due regard to the need to promote equality of opportunity on 9 grounds including gender and persons with dependants.
- Time Limits – as noted above there is no early conciliation scheme in NI and the normal 3 month time limit applies – please note that in NI within 3 months means exactly 3 months (not 3 months less one day as in GB) except in relation to Disability Discrimination where it is 3 months less 1 day (as it is UK legislation).
- The relevant NI legislation for the various discrimination areas is:
 - **Sex discrimination**
Sex Discrimination (NI) Order 1976
 - **Political/religious discrimination**
Fair Employment and Treatment (NI) Order 1998
 - **Race discrimination**
Race Relations (NI) Order 1997
 - **Disability discrimination**
Disability Discrimination Act 1995
 - **Sexual orientation**
Employment Equality (Sexual Orientation) Regulations (NI) 2003
 - **Age discrimination**
Employment Equality (Age) Regulations (NI) 2006
 - **Gender reassignment**
Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999.

- In the Sex Discrimination (NI) Order 1976, direct discrimination is at article 3(1)(a), indirect discrimination is at article 3(1)(b) and victimisation is at article 6. The numbering varies slightly in each of the other pieces of legislation.

Age and flexible working

In a nutshell

Imposing unworkable flexi shifts on older workers (whether male or female) with obligations to care for older relatives or refusing to allow such workers to adjust their hours for caring purposes may be indirect age discrimination under the Equality Act 2010 (or NI equivalent) unless the employer can justify its actions. There have been few such cases. Less frequently, direct discrimination and victimisation law may apply.

Before reading the following, first see the overview of discrimination law on p8.

The legislation and Codes

- Equality Act 2010
- EHRC Code of Practice on Employment

Northern Ireland legislation, guides and Codes

- Employment Equality (Age) Regulations (NI) 2006
- The NI Equality Commission's 'Age discrimination in NI: A Guide for Employers' and other guides (NB these do not have the status of a Code)

Eligibility

- Job applicants, employees, former employees, those working on a contract personally to carry out work and 'contract workers'
- No minimum service requirement
- Age means any age, whether younger or older

Indirect age discrimination

Indirect age discrimination is where the employer unjustifiably applies a rule which tends to disadvantage workers of a certain age group. It is not necessary for every worker of that age group to be disadvantaged. It also does not matter if some older or younger workers are also disadvantaged. It is a question of who is *more* affected.

For example, an employer making redundancies applies the criterion of 'last in first out'. This is likely to disproportionately target younger workers who have had less time to build up long service. Of course it is possible that some older workers have been recruited fairly recently.

It is also possible that some young workers joined the employer when very young and have acquired fairly long service by the time of the redundancy exercise. On the whole, however, it is likely that this selection criterion will adversely affect far more young workers than older workers.

It is important to look at the stages of the legal definition in section 19 of the Equality Act 2010, so that you understand which factors affect whether a member is likely to win an indirect age discrimination case.

THE LEGAL DEFINITION : INDIRECT AGE DISCRIMINATION

1. The employer applies a provision, criterion or practice to the member
2. The employer applies – or would apply – that provision, criterion or practice to people of a different age group
3. The provision, criterion or practice puts – or would put – people of the member's age group at a particular disadvantage when compared with people not of that age group
4. The provision, criterion or practice puts – or would put – the member at that disadvantage, and
5. The employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

For NI, there is a similar definition in art 3(1)(b) of the Employment Equality (Age) Regulations (NI) 2006.

1 and 2 - What kind of provisions, criteria or practices?

In the context of flexible working, difficulties may arise if a member wants to change or reduce his/her hours so that s/he can provide care to a partner or older relative on a regular basis, or have occasional time off or flexibility to do shopping for a relative or take them to medical appointments.

The type of provision, criterion or practice would therefore be the employer insisting the member:

- work full-time
- work on particular days of the week
- work particular hours which clash with caring obligations
- work at all times at the workplace as opposed to from home
- does not take time-off to take an older relative to medical appointments
- does not take time off actually to provide care to a sick dependant

For these last two situations, see the comments at p33 in relation to indirect sex discrimination. The same arguments would apply to indirect age discrimination.

3 – Group disadvantage

The member must show that others of his/her age group are put at a particular disadvantage 'compared with' younger or older workers. According to the 2011 census, one in five people aged 50 – 64 are carers. This affects workers of either sex although older women are particularly affected, raising potential issues of indirect age and sex discrimination. The 2011 census shows that women are much more likely than men to be caring in middle age. One in four women as against one in six men have caring responsibilities when aged 50 – 64.

The peak age of caring often coincides with the peak of an individual's career in their 40s- 60s. National opinion polling for Carers UK's Caring & Family Finances Inquiry showed that middle-aged people with caring responsibilities were more likely than carers of other ages to have given up work, reduced working hours and to have seen a negative impact on their work, like stress and tiredness. In particular, women aged 45-54 were more than twice as likely as other carers to have reduced working hours as a result of caring responsibilities.

For more on the impact of caring, see indirect sex discrimination below (p32). Also see Carers UK's Policy Briefing, May 2014, at [facts-about-carers-2014.pdf](#)

4 – The member's disadvantage

The member must show that the provision, criterion or practice puts him/her personally at a 'disadvantage'. The member is likely to be at a disadvantage if s/he is required to work hours which interfere with his/her ability to look after an older relative.

The disadvantage is particularly obvious if there is no practical or affordable alternative for providing the necessary care. The position is less clear where there are alternatives, but ones which the member finds unsatisfactory, or where there are other relatives who would have equal responsibility for the caring, but who are unwilling to help. There have been few cases testing this kind of situation. We would argue that if the member feels a sense of obligation to help with caring because of his/her relationship with the person needing care, it should be considered a disadvantage if s/he is unable to do so in a way which s/he considers acceptable for the cared for person. For further comments, see p33 on similar issues in relation to childcare.

5 – Can the employer justify imposing the provision, criterion or practice?

It is not enough for the member to show that s/he needs an adjustment to her hours. The key issue in most indirect age discrimination cases is whether the employer can justify insisting on full-time working or the particular hours in question.

As explained on p11, it is not enough for the employer to have a good reason. The employer must prove that the required hours (or that working away from home) are a proportionate means of achieving a legitimate aim.

It is usually easy for employers to show they have a 'legitimate aim'. This can be factors such as maintaining work continuity, the difficulty of covering the member's absence, not overburdening other employees, work efficiency.

It is harder for employers to show refusing the member's request is 'proportionate'. For this, the tribunal will consider:

- whether there are other acceptable ways of meeting the employer's aim
- even if there is no other way, how important the employer's aim is, when balanced against the discriminatory effect.

Direct age discrimination

Most flexible working cases in relation to age rely on indirect age discrimination law.

Direct discrimination is generally explained on p8. It is potentially direct age discrimination to treat the member less favourably because of his/her age. For example, an employer refuses the request of a 62 year old worker to work shifts starting 1 hour later each day so that she can get her elderly mother up and breakfasted before going to work. The employer thinks that if the worker cannot manage, she has the option of retiring early. Had the worker been younger, the employer would not have held that view and would have agreed the request.

Unlike direct discrimination in relation to the other protected characteristics, there is a potential defence for employers in direct age discrimination cases if they can justify their actions as a proportionate means of achieving a legitimate aim. This is the same wording as the defence for indirect discrimination in respect of all the protected characteristics. However, in relation to direct age discrimination, the employer's legitimate aim must be of a public interest nature consistent with social policy objectives as opposed to a reason specific to the employer's individual interests.

Victimisation

Victimisation law is explained at p11. For example, the member is made redundant after she has taken out a grievance complaining that she had not been allowed to alter her hours to enable her to care for her elderly father. It will be necessary to prove that the redundancy was because of the member's grievance as opposed to her having been genuinely scored lower on the redundancy selection criteria.

Time-limits for taking an employment tribunal case

Discrimination time-limits are set out on p12.

The right to request flexible working

We explain this right on p54. It is often misunderstood. It is not a right to have the request granted. It is simply a right to have a request properly considered. If the request is refused, the member's main legal rights usually depend on discrimination law in the Equality Act 2010 (or NI equivalent).

Disability and flexible working

In a nutshell

Where a disabled member has difficulty working certain hours or at a particular location or carrying out certain duties because of his/her disability, the employer must make *reasonable* adjustments.

Before reading the following, first see the overview of discrimination law on p8.

The legislation and Codes

- Equality Act 2010
- EHRC Code of Practice on Employment

Northern Ireland legislation, guides and Codes

- Disability Discrimination Act 1995
- NI Equality Commission: Disability Code of Practice: Employment and Occupation

Eligibility

- Job applicants, employees, former employees, those working on a contract personally to carry out work and 'contract workers'
- No minimum service requirement

Disability – who is 'disabled' under the Equality Act 2010?

The definition in section 6 of the Equality Act says the member is 'disabled' if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities. In NI, the definition is in s1(1) of the Disability Discrimination Act 1995.

The definition of 'disability' under the Equality Act is very wide and far more workers are covered than many people realise. The member may have a visible or invisible disability; it may be physical or mental; it may be life-long or a temporary injury which may only last 12 months.

Those with cancer, HIV infection, multiple sclerosis or certified as blind, partially sighted or sight-impaired are automatically considered disabled. In all other cases, the legal definition applies and you cannot say that any particular impairment is always a 'disability'. It depends on the precise effects in each person's case.

For example, a member with back pain or depression may or may not have sufficiently severe and long-term effects to be considered disabled.

If the effect of the member's impairment is reduced by medication, an aid or other medical treatment, the test is the effect on the member without such assistance.

For more guidance on the definition of disability, see the UNISON guide in Sources, p92.

Reasonable adjustments

The general rule

The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act. The EHRC Code deals with reasonable adjustments in chapter 6.

In NI, the duty is set out in sections 4A and 3A(2) of the Disability Discrimination Act. The NI Disability Code of Practice deals with reasonable adjustments in section 5.

The duty applies when the member is put at a substantial disadvantage compared with non-disabled workers by -

1. a provision, criterion or practice applied by the employer. This covers almost anything the employer asks the member to do or any rules the employer applies to the worker, eg job duties; hours and work location; eligibility rules for training, promotion and overtime; procedures for disciplinaries and grievances.
2. a physical feature of the workplace, eg stairs, poor lighting, heavy doors.
3. the lack of an auxiliary aid, eg specialist equipment.

The important point is that the member's disadvantage is caused by his/her disability and not by other factors, eg

- The employer requires the member to make data entries accurately. The member, who has a visual impairment, makes mistakes. A reasonable adjustment is required if the mistakes are because the member cannot clearly see the screen. A reasonable adjustment is *not* required if the mistakes are only because the member is a careless worker.

- The employer changes the member's shifts so that s/he has to start at 6 am instead of 9 am. The member constantly arrives late. A reasonable adjustment is required if the reason the member is late is that the effect of her disability is that she cannot function well in the early morning. A reasonable adjustment is *not* required if the member is simply one of those people who does not like getting up early.

A reasonable adjustment can be any step at all which it is reasonable for the employer to take. The EHRC Code set out examples such as adjusting premises, providing information in accessible formats, acquiring or modifying equipment, adjusting hours, reallocating duties, allowing home-working, allowing some time off for medical treatment. The NI Equality Commission Disability Code sets out similar examples.

How much is an employer expected to do? The Employment Code, paragraph 6.28, sets out factors which the tribunal will take into account, ie the extent to which the adjustment would prevent the disadvantage, the practicality of making the adjustment, the employer's financial and other resources, the availability of financial assistance, eg from Access to Work, and the cost and disruption involved. The employer can't require the member to pay the cost of any adjustments. In NI this is set out in paragraph 5.27 of the Disability Code.

NB

- An employer should start by properly assessing what adjustments are needed. It is not in itself a failure to make a reasonable adjustment not to do the assessment, but it is likely to lead to such a failure.
- It is for the tribunal to decide what adjustments should be made. Unlike unfair dismissal, it is not simply a matter of what an employer could reasonably decide.
- Just because the member is put at a disadvantage due to his/her disability, does not mean the employer has to make every possible adjustment. The employer only needs to do what a tribunal thinks reasonable.
- The fact that the employer has made some adjustments, does not necessarily mean it has done enough.
- The duty to make adjustments is a very strong requirement on the employer.

The House of Lords in Archibald v Fife Council said this:
'The duty to make reasonable adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.'

Employers do not have any duty to make adjustments if they do not know and cannot be expected to know that the member has a disability and that s/he is likely to be placed at a disadvantage as a result. If the member shows signs of being seriously unwell or having an impairment, the employer should get medical advice. However, employers cannot hide behind occupational health reports which state there is no disability. They need to ask OH the right questions and then make up their own mind, eg does the member have an impairment, what day-to-day activities does it effect, are the effects likely to be long-term?

Reasonable adjustments and flexible working

The effect of the member's disability may mean that s/he needs certain adjustments to his/her hours or to work partially at home. For example:

- A worker with ME / chronic fatigue syndrome gets very tired. A reasonable adjustment might be to shorten her hours and allow these to be worked flexibly over the week, so she can take frequent short breaks when she feels they are necessary.
- A worker with diabetes needs to control when he eats and when he takes his insulin injections. A reasonable adjustment would be to avoid putting him on variable shifts, particularly overnight, as these might disrupt timing of meals and injections and provide irregular stress levels.
- A worker with a mobility impairment finds it difficult to stand on crowded public transport. A reasonable adjustment might be to adjust her hours so that she can travel to and from work outside rush hour.
- A worker with a learning disability has a contract to work 9 am – 5 pm. He needs to start later because the friend who accompanies him on the journey to work is no longer available before 9 am. (This example is given at paragraph 17.12 of the EHRC Code.)

REASONABLE ADJUSTMENTS CHECKLIST

- Do the current (or any proposed) arrangements cause the member a difficulty because of his/her disability as opposed to because of other factors?
- Is the difficulty a 'substantial' (ie more than trivial) disadvantage?
- Are there any reasonable adjustments which might solve the particular difficulty?

Thompson v ACAS (Leeds Employment Tribunal)

Ms Thompson was a conciliation officer and helpline adviser for ACAS. Ms Burton was the senior helpline manager.

Ms Thompson was disabled with a serious and distressing condition known as single rectal ulcer syndrome. The condition required her to have ready and immediate access to a toilet. She found her travel to work particularly difficult and was often late. Her request to work from home was refused. ACAS said there was no 'strong evidence' that homeworking would help with the management of her condition, since the OH report had stated only that it *may* help but was not a recommendation. Also, ACAS felt that Ms Thompson lacked the 'personal qualities' needed for homeworking.

The tribunal upheld Ms Thompson's claim for failure to make a reasonable adjustments. It said the requirement to be office-based placed Ms Thompson at a substantial disadvantage, by having to make the journey to and from the office, and indeed by being in the office and having to use the disabled toilet facilities and facing the embarrassment of colleagues. Her condition also increased her amount of sickness absence and lateness, putting her at risk of disciplinary proceedings. There was, therefore, a duty to make reasonable adjustments.

Ms Thompson's suggestion of homeworking would have a good prospect of removing the disadvantage. The tribunal commented: 'We find it surprising that a manager of Ms Burton's seniority in an organisation like the respondent could not grasp that the adjustment which Ms Thompson was proposing had at least a prospect of helping her manage her condition.'

The employer's main objection to Ms Thompson working from home related to 'personal qualities' and Ms Burton's view that she would not be able to "work without supervision or be relied upon to keep in touch with (her) manager', despite the line manager's statement that 'the claimant was fully effective on all core competencies, could work without direct supervision and showed initiative'. The tribunal said, "The respondent has failed to convince us that the 'personal qualities' of this long-serving, experienced and competent employee in any way precluded home working."

Discrimination arising from disability ('DAFD')

Under section 15 of the Equality Act, it is unlawful to treat the member unfavourably because of something arising in consequence of his/her disability. For example, to dismiss the member because she is unable to work full time due to her disability.

The employer's actions are not unlawful if it can prove they were a proportionate means of achieving a legitimate aim. This is the same wording as the defence to indirect discrimination (see p11 for more detail). In the above example, the employer would have to prove

1. it had a legitimate aim in wanting the member to work full-time
2. dismissing the member was proportionate, balancing factors such as the impact on the member, the fundamental importance of not discriminating, the employer's own needs and whether there were any alternative solutions.

The employer's defence is unlikely to succeed if there are reasonable adjustments which should have been made.

DAFD is not unlawful if the employer can prove it did not know and could not reasonably have been expected to know the member had a disability.

In most situations where DAFD applies, the law of reasonable adjustments also applies.

DAFD does not apply in NI. Instead there is 'disability-related discrimination' in s3A(1)(A) of the Disability Discrimination Act. Disability-related discrimination used to apply in GB too before the Equality Act replaced it with DAFD. It is a far more limited concept.

Direct disability discrimination

Direct disability discrimination is less likely to apply in practice to flexible working issues, but it is possible.

For example, a manager refuses to allow the request of the member, who is disabled, to change his hours, but has agreed a similar request by a non-disabled colleague. To be direct discrimination, the reason for the different treatment must be that the member is disabled. The manager is likely to come up with a different reason, eg that there is less cover for the time when the member wants off than for the time his colleague wants off; or that the member has particular skills or duties which are required at certain times.

Remember: even if the member cannot prove direct discrimination, if s/he needs to change his/her hours because of his/her disability, s/he will still have a potential claim for DAFD and failure to make reasonable adjustments.

Victimisation

Victimisation law is explained at p11. For example, the member is subjected to performance management procedures after she takes out a grievance complaining that certain reasonable adjustments have not been made. It will be necessary to prove that the grievance triggered the performance management procedures as opposed to the timing being coincidental. It may be difficult if the employer had already shown dissatisfaction with the member's performance before the grievance was taken.

Flexible working to care for a disabled child or relative

It is unlawful for an employer to directly discriminate against the member because s/he has a disabled child, eg the employer allows a worker with a non-disabled child to work flexible hours to help with child care, but does not allow the same flexibility to the member whose child is disabled. To be direct discrimination, the reason the employer refuses the member must be because his/her child is disabled.

In most situations, direct discrimination law does not help a member in this situation, because the employer would not allow any employees to have flexible hours for childcare, regardless of whether the child is disabled.

Nor does reasonable adjustment law help. There is no duty to make adjustments to enable the member to care for someone else who is disabled. The duty to make reasonable adjustments applies only to making adjustments for the disabled person, not for someone else.

In this situation, the member will need to rely on other legal rights, for example indirect sex discrimination law.

Time-limits for taking an employment tribunal case

Discrimination time-limits are set out on p12. Be very careful in disability cases where the member is not dismissed not to get drawn into long negotiations and unfulfilled promises so that the time-limit is missed.

The right to request flexible working

We explain this right on p54. It is often misunderstood. It is not a right to have the request granted. It is simply a right to have a request properly considered. If the request is refused, the member's main legal rights usually depend on discrimination law in the Equality Act 2010 (or NI equivalent).

Gender and flexible working

In a nutshell

Imposing flexible shifts on women with childcare or refusing to allow women to adjust their hours for childcare reasons will usually be indirect sex discrimination under the Equality Act 2010 (or NI equivalent) unless the employer can justify its actions. Less frequently, direct discrimination and victimisation law may apply.

Before reading the following, first see the overview of discrimination law on p8.

The legislation and Codes

- Equality Act 2010
- EHRC Code of Practice on Employment

NI legislation, guides and Codes

- Sex Discrimination (NI) Order 1976
- NI Equality Commission Code of Practice: Removing sex bias from recruitment and selection
- NI Equality Commission and LRA's 'Flexible Working: The Law and Good Practice – A Guide for Employers' (NB This does not have the status of a Code)

Eligibility

- Job applicants, employees, former employees, those working on a contract personally to carry out work and 'contract workers'
- No minimum service requirement

Indirect sex discrimination

Indirect sex discrimination is where the employer unjustifiably applies a rule which tends to disadvantage female workers more than male workers (or vice versa). It is not necessary for every female worker to be disadvantaged. It also does not matter if some male workers are disadvantaged. It is a question of who is *more* affected.

For example, if the employer required all job applicants to be 6 foot or taller. It does not matter that some women are 6 foot or taller and that many men are less than 6 foot. It is still a rule which puts women at a particular disadvantage compared with men.

In the context of flexible working, a general rule that staff must work full-time would tend to disadvantage women more than men because of childcare, even if some women have no childcare obligations and some men do have childcare obligations.

It is important to look at the stages of the legal definition in section 19 of the Equality Act 2010, so that you understand which factors affect whether a member is likely to win an indirect sex discrimination case.

THE LEGAL DEFINITION : INDIRECT SEX DISCRIMINATION

1. The employer applies a provision, criterion or practice to the member who is a woman
2. The employer applies – or would apply – that provision, criterion or practice to men
3. The provision, criterion or practice puts – or would put – women at a particular disadvantage when compared with men
4. The provision, criterion or practice puts – or would put – the member at that disadvantage, and
5. The employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

For NI, there is a similar definition, with slightly more restricted wording, in art 3(1)(b) of the Sex Discrimination (NI) Order 1976.

1 and 2 - What kind of provisions, criteria or practices?

In the context of flexible working, the type of provision, criterion or practice which may be problematic is the employer insisting the member:

- work full-time
- although working part-time, come in for some hours each day
- start at a particular time or leave at a particular time
- work weekends or night shifts
- work different shift times at short notice
- work at all times at the workplace as opposed to from home
- does not take time off to take a child or other dependant to a hospital appointment
- does not take a few days or weeks off to look after a child or other dependant who is ill

3 – Group disadvantage

The member must show that other women are put at a particular disadvantage 'compared with' men (or vice versa). It is generally recognised that full-time work requirements are a particular difficulty for carers, who the statistics show are disproportionately women. Constant change of shift times also pretty obviously interferes with childcare arrangements. Similarly, rigid start and finish hours which are close to school/nursery opening times are likely to give carers particular problems.

It is less obvious whether weekend or night shift working is a widespread difficulty for women as opposed to men, even if it is in the member's particular case. On the one hand, childcare is less available at those times. On the other hand, a woman's partner (unless she is a lone parent) is more likely to be available and she may even prefer these shifts. Nevertheless, it is still likely that such hours put some women because of childcare at a specific disadvantage. The argument may work best where in the member's own workplace fewer women than men can work weekends or nights. Otherwise it may be difficult to argue that it is a general problem for women more than men.

According to the 2011 census, 58% of carers are female. This covers childcare as well as care for older relatives. Also, one in four women in the age group 50 – 64 have caring responsibilities, so this could raise issues of indirect age and sex discrimination. Carers UK says women aged 45-54 are more than twice as likely as other carers to have reduced working hours as a result of caring responsibilities.

Caring can have a long-term impact on ability to work, as a loss of skills, knowledge, experience and confidence make returning to work when caring ends extremely challenging. Evidence from Carers UK's Caring & Family Finances Inquiry indicates that former carers, who are of working age, remain significantly less likely to be in work than non-carers of working age. The loss of earnings, savings and pension contributions can mean carers face long-term financial hardship into retirement. Caring also affects the type of work which carers are able to take on. Many find local, flexible, often low-skilled and low-paid work which can fit around caring, and give up promotion opportunities because more hours are required.

When asked why they have reduced working hours, given up work or find combining the two so stressful, carers are most likely to talk about the practical support from care services they receive. Services which are inflexible and cannot fit with working hours or are unreliable can make work impossible, but carers also describe being unable to find suitable care services to meet the needs of the person needing care, or find they are simply too expensive.

Of respondents to Carers UK's State of Caring 2013 survey, 21% said they had given up work because of workplace issues around getting flexible hours or a lack of understanding from their employer. Working carers often struggle to get time off to co-ordinate care services or attend medical appointments, 38% had used their annual leave to care and 22% had been forced to use sick leave.

For the above and more detail of the impact of caring, see Carers UK's Policy Briefing, May 2014, at [facts-about-carers-2014.pdf](#)

4 – The member's disadvantage

The member must show that the provision, criterion or practice puts him/her personally at a 'disadvantage'. A case is easier to win if it is impossible for the member to work certain days or hours, eg because she is unable to find childcare or no one else is available to pick up her children from school or the childminder.

However, it should not be necessary for the member to show it is impossible for her to work the days / hours required by the employer. She only needs to show some kind of 'disadvantage'. This should cover situations where failure to adjust the member's hours would cause her large additional expense, excessive tiredness, or stress at home.

The case law has been inconsistent about what a 'disadvantage' means. We would argue that, in the case of a request for part-time working, it should be enough simply that the member feels she ought as a mother to spend more time bringing up her child.

Employers (and tribunals) often grill women on their precise domestic arrangements, so the member should be prepared for this.

5 – Can the employer justify imposing the provision, criterion or practice?

It is not enough for the member to show that she needs an adjustment to her hours. The key issue in most indirect sex discrimination cases is whether the employer can justify insisting on full-time working or the particular hours in question.

As explained on p11, it is not enough for the employer to have a good reason. The employer must prove that the required hours (or that working away from home) are a proportionate means of achieving a legitimate aim.

It is usually easy for employers to show they have a 'legitimate aim'. This can be factors such as maintaining work continuity, the difficulty of covering the member's absence, not overburdening other employees, work efficiency.

It is harder for employers to show refusing the member's request is 'proportionate'. For this, the tribunal will consider:

- whether there are other acceptable ways of meeting the employer's aim
- even if there is no other way, how important the employer's aim is, when balanced against the discriminatory effect.

Women will often have a strong argument that inflexibility by their employer is not 'proportionate' given the strong evidence of the discriminatory effect which we mention above. Nevertheless, the particular facts in every case will decide whether the member wins or loses. The following are a few examples of real tribunal cases where the employers could not justify their requirements. For some examples where employers were able to justify imposing certain shift patterns, see the examples for indirect religious discrimination.

Brett v Royal Mail Group PLC (Ashford Employment Tribunal)

Royal Mail decided to merge Ms Brett's department with another department because of a decline in profitability. Ms Brett was Head of Regulation. She worked part-time for childcare reasons. However, all the posts in the new merged department were designated full-time.

Royal Mail's overall reasons for deciding that Ms Brett's part-time status could not be accommodated in the new structure were that part-time working and job-sharing was not economic, since the postholders in the new structure had more work to do by virtue of the merger, and that job-sharing interfered with lines of accountability.

The tribunal upheld Ms Brett's claim for indirect sex discrimination. It said the Royal Mail applied a provision, criterion or practice that employees must work full-time in the new department. That provision, criterion or practice put women at a particular disadvantage compared with men. It also put Ms Brett at a disadvantage because she lost her job. The Royal Mail had been unable to prove the full-time work requirement was justifiable. The tribunal said it could not understand why clear lines of accountability could not be established in the case of a shared managerial post, either by taking care to ensure that each of the job sharers had full awareness of, and responsibility for, each member of staff reporting to him/her, or by establishing separate lines of accountability to each of the two postholders. The tribunal accepted that a merger of departments will lead to some surplus employees and more work for those employees who remain, but said it did not follow that remaining work could not be done by part-time employees. The tribunal said that, while there are some additional costs in employing staff part time, those costs cannot, of themselves, justify the detrimental treatment of part-time workers by the taking away of their jobs. In any event, cost considerations alone do not justify indirect discrimination

Griffin v West Midlands Police Authority (Birmingham Employment Tribunal)

Ms Griffin, a civilian scene of crimes officer (SOCO), worked on a jobshare basis, all day Monday, Tuesday, and Wednesday morning. In 1999, the employer sought to impose a new working arrangement, which would have required Ms Griffin to work one shift per week of 12 noon to 8pm, rather than 9am to 5pm, and to work one weekend in four. Ms Griffin sought unsuccessfully to resolve the problem internally and eventually resigned.

The employment tribunal upheld the claim for indirect sex discrimination. Ms Griffin could not work the new shifts because of her childcare arrangements. 10% of female SOCOs in the West Midlands could not do such shifts compared with none of the male SOCOs.

The tribunal found that the employer had failed to justify the imposition of the requirement. It had made no attempt to assess the potential discriminatory impact of the arrangements on Ms Griffin. She was not consulted before the local agreement on working arrangements was signed. The employer failed to consider whether Ms Griffin could work ordinary office hours without this having a serious impact on the provision of the service; whether she could be redeployed to a five-person operational command unit (OCU) where there would be more flexibility; or whether there could be an exchange with a SOCO working at an OCU. There was no realistic attempt to balance the employer's needs with the reasonable requirements of Ms Griffin.

Rothwell v Noble t/a DC's Chuckwagon and Pizza Pie (Employment Tribunal in Wales)

Ms Rothwell, a general assistant in a restaurant, needed to leave work 15 minutes early at 2.45 pm to collect her child from school in term time. She was allowed to do this for a while, but the restaurant stopped her because the other staff were unhappy that she finished earlier than them.

The tribunal said this was indirect sex discrimination and the restaurant had not proved sufficient justification.

Days off and short-term requirements

A very problematic area is where the employer refuses the member just one day off to take a child or other dependant to a hospital appointment, or a few days off to look after a sick child. As discussed later in this guide, parental leave and dependant leave do not usually cover this kind of situation unless UNISON has negotiated a more beneficial local policy, eg under the general heading of 'compassionate leave'.

It may be possible to argue the refusal is indirect sex discrimination but there have been few cases testing this type of argument. The member would need to prove that she was personally at a disadvantage if the request was refused. This might be difficult if another relative or neighbour was willing to attend the hospital appointment or provide the care. However, in some situations where the matter is serious or frightening for the dependant in question, it should be possible to argue that the member would be at a disadvantage if not allowed to attend the appointment / provide the care herself. There is also some uncertainty regarding whether tribunals would regard the employer's refusal as justifiable if the employer had a good reason for not granting the time off, even on an unpaid basis, and there are other people who could look after the dependant.

The real problem is a practical one. These are short-term emergency situations.

There is no time to take a grievance, let alone a tribunal case. That is why it is best already to have a policy in place which the member can call on.

Direct sex discrimination

Most flexible working cases rely on indirect sex discrimination law. But occasionally direct discrimination might apply. Direct discrimination is generally explained on p8. It is direct sex discrimination to refuse the member's request because she is a woman (or, equally, because the member is a man). This can occur due to conscious or unconscious stereotypes in the employer's mind about male and female roles and likely future behaviour. There may also be direct discrimination against workers because of other protected characteristics. For example:

- An employer refuses to allow a male employee to work part-time for childcare reasons. The employer would have agreed if he was female.
- An employer decides not to put a woman who has young children in charge of organising a major conference because it assumes she will not have the time and energy to do all the overtime working involved. The employer would not have made that assumption about a father who had young children.

- An employer refuses to recruit a young Asian woman because it assumes she will soon get married and have children. The employer would not have made that assumption about a white woman.

Walkingshaw v The John Martin Group (Edinburgh Employment Tribunal)

Neil Walkingshaw was employed as a senior technician. He and his wife decided that his wife's job was of more benefit to the household than Mr Walkingshaw's and that he should be the one to seek part-time employment.

Mr Walkingshaw's request to work part-time was refused because it was 'too complicated'. Mr Walkingshaw discussed the matter with his wife and they decided he should resign and look for a part-time job.

The Group had never had a female technician, but they had received, and had always agreed to requests from other female employees to work part-time to allow them time for family responsibilities, including a management accountant, a quality manager/internal auditor and an employee in personnel administration. They were conscious of the need to avoid sexually discriminatory conduct in regard to females.

The tribunal upheld Mr Walkingshaw's claim for direct discrimination. It noted that the Group had allowed women in jobs of equal importance to work part-time. It commented, 'We have no doubt that, had Mr Walkingshaw been female, the request for reduced hours would have been examined closely and . . . the operational requirements of the respondents would have been examined in some depth, and that the Group would, on a balance of probabilities, have granted such a request'.

Victimisation

Victimisation law is explained at p11. For example, the member takes out a grievance complaining that the refusal to allow her to leave early to collect her child from school is indirect sex discrimination. As a result, her manager becomes angry and starts excluding her from the best work opportunities.

It will be necessary to prove that she really is being left out of the best work and that the reason is because she brought her grievance. It would be useful if the member could prove that prior to her grievance, she was given an equal share of the best work opportunities and that all her colleagues are still getting a fair share.

Treatment of part-timers

If the member is allowed to work part-time but is treated less favourably for that reason, this may be indirect sex discrimination under the Equality Act 2010 (or NI equivalent) or breach of the Part-time Workers Regulations (see p52).

Time-limits for taking an employment tribunal case

Discrimination time-limits are set out on p12.

The right to request flexible working

We explain this right on p54. It is often misunderstood. It is not a right to have the request granted. It is simply a right to have a request properly considered. If the request is refused, the member's main legal rights usually depend on discrimination law in the Equality Act 2010 (or NI equivalent). Paragraph 17.11 of the EHRC Code gives an example where an employer has refused flexible working after following the correct procedure, and the member needs to rely on indirect sex discrimination law.

Gender reassignment and flexible working

In a nutshell

A member must not be discriminated against in relation to gender reassignment. S/he must have at least the same rights to time off for gender reassignment as s/he would for sickness and, if reasonable to make the comparison, other absence.

Before reading the following, first see the overview of discrimination law on p8.

The legislation and Codes

- Equality Act 2010
- EHRC Code of Practice on Employment

NI legislation, guides and Codes

- Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999
- NI Equality Commission's 'Guide to the Sex Discrimination Gender Reassignment Regulations' (NB this does not have the status of a Code)

Eligibility

- Job applicants, employees, former employees, those working on a contract personally to carry out work and 'contract workers'
- No minimum service requirement

Gender reassignment – who is covered by the Equality Act 2010

The member has the protected characteristic of gender reassignment if s/he is undergoing, proposing to undergo, or has undergone a process, or part of a process, for reassigning his/her sex by changing physiological or other aspects of sex. It is not necessary that such a process is under medical supervision.

Discrimination in relation to absence – s16 Equality Act 2010

The Equality Act does not say how much time must be allowed for absence because of gender reassignment. The EHRC Code at paragraph 9.33 says it is good practice for employers to discuss with trans workers how much time they will need to take off for the gender reassignment process and to accommodate those needs within their normal practice and procedure.

It is discrimination to treat the member less favourably in relation to time off for gender reassignment than if the absence was for sickness or injury. The member's absence will be 'for gender reassignment' if it is because s/he is undergoing, proposing to undergo, or has undergone the process, or part of the process mentioned above.

The EHRC Code gives these examples:

- A trans worker who takes time off to attend a gender identity clinic as part of the gender reassignment process receives less sick pay than he would have received had he been off sick. (Paragraph 9.31.)
- A worker undergoing gender reassignment needs to take some time off for medical appointments and surgery. The employer records these as absences under the attendance management policy. However, when a colleague breaks his leg skiing, the employer does not record the absences because 'it wasn't really sickness and won't happen again'. (Paragraph 17.27.)

In addition, it will be discrimination *unreasonably* to treat the member less favourably in relation to time off for gender reassignment than if the absence was for some reason other than sickness or injury.

For example, an employer refuses the request of a trans worker to take an afternoon off as annual leave to attend gender reassignment counselling. There are sufficient staff members on duty that afternoon to cover for the worker. If a non-trans colleague had asked to take annual leave for another reason, eg to see a relative visiting from abroad, it would have been allowed if there was sufficient staff cover.

Direct gender reassignment discrimination

Direct discrimination is generally explained on p8. It is direct discrimination to treat the member less favourably because of gender reassignment.

Victimisation

Victimisation law is explained at p11. For example, the member takes out a grievance complaining that her manager is being very uncooperative about letting her have normal time off to attend appointments connected with gender reassignment.

As a result, her manager becomes angry and starts making petty criticisms of the member's work performance. It will be necessary to prove that such criticisms are being made, that they are petty and that they would not have been made if the member had not brought her grievance. The manager might say they are normal day-to-day management observations or that any criticisms are valid and justified. It would be useful if the member could prove that her work performance has not changed, but no criticisms were made before she brought her grievance or that colleagues are making the same kind of small mistakes and nothing is being said to them.

The right to request flexible working

We explain this right on p54. It is often misunderstood. It is not a right to have the request granted. It is simply a right to have a request properly considered. If the request is refused, the member's main legal rights usually depend on discrimination law in the Equality Act 2010 (or NI equivalent).

Religion and flexible working

In a nutshell

Insisting the member works on days which clash with religious holidays or rest days may be indirect religious discrimination under the Equality Act 2010 (or NI equivalent) unless the employer can justify its actions. Less frequently, direct discrimination and victimisation law may apply.

Before reading the following, first see the overview of discrimination law on p8.

The legislation and Codes

- Equality Act 2010
- EHRC Code of Practice on Employment

NI legislation, guides and Codes

- Fair Employment and Treatment (NI) Order 1998
- NI Equality Commission Code of Practice: Fair employment in Northern Ireland (refers to recruitment and selection)

Eligibility

- Job applicants, employees, former employees, those working on a contract personally to carry out work and 'contract workers'
- No minimum service requirement

Indirect religious discrimination

Indirect religious discrimination is where the employer unjustifiably applies a rule which tends to disadvantage people of the member's religion more than others. It is not necessary for every person of the member's religion to be disadvantaged. It also does not matter if some people not of that religion are equally disadvantaged.

It is important to look at the stages of the legal definition in section 19 of the Equality Act 2010, so that you understand which factors affect whether a member is likely to win an indirect religious discrimination case.

THE LEGAL DEFINITION: INDIRECT RELIGIOUS DISCRIMINATION

1. The employer applies a provision, criterion or practice to the member who is of a particular religion
2. The employer applies – or would apply – that provision, criterion or practice to people who are not of that religion
3. The provision, criterion or practice puts – or would put – people with the member’s religion at a particular disadvantage when compared with people who do not have that religion
4. The provision, criterion or practice puts – or would put – the member at that disadvantage, and
5. The employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

For NI, there is a similar definition, with slightly more restricted wording, in art 3(2)(b) Fair Employment and Treatment (NI) Order 1998.

1 and 2 - What kind of provisions, criteria or practices?

In the context of flexible working, the type of provision, criterion or practice which may be problematic is the employer insisting the member:

- work or attend training during a religious holiday
- work on a religious Sabbath or rest day
- work till the end of his/her shift when a religious holiday or Sabbath starts in the late afternoon.

At paragraph 17.38 of its Code, the EHRC points out that requiring all employees to take leave during an annual closure and not at any other time could create problems for workers needing time off for religious holidays.

3 – Group disadvantage

The member must show that others of the member’s religion are put at a particular disadvantage ‘compared with’ workers who are not of that religion. It is not necessary that everyone sharing the member’s religion would feel the same disadvantage. People have different levels of religious observance and different views on how they ought to behave. It is enough that at least some people sharing the religion would feel they ought not to be working on the particular occasion.

4 – The member’s disadvantage

The member must show that the provision, criterion or practice puts him/her personally at a ‘disadvantage’. It is sufficient that the member feels that his/her religion requires him/her not to work on the particular occasion. It does not matter if there are different views within the religion on this point. As the **Fhimba** case below illustrates, it is a common problem in indirect religious discrimination cases, that employers do not understand that employees of the same religion may genuinely have different views as to how strictly observant they ought to be.

5 – Can the employer justify imposing the provision, criterion or practice?

It is not enough for the member to show that s/he needs an adjustment to his/her hours. The key issue in most indirect religious discrimination cases is whether the employer can justify insisting on the particular hours in question.

As explained on p11, it is not enough for the employer to have a good reason. The employer must prove that the required hours (or that working away from home) are a proportionate means of achieving a legitimate aim.

It is usually easy for employers to show they have a ‘legitimate aim’. This can be factors such as maintaining work continuity, the difficulty of covering the member’s absence, not overburdening other employees, work efficiency.

It is harder for employers to show refusing the member’s request is ‘proportionate’. For this, the tribunal will consider:

- whether there are other acceptable ways of meeting the employer’s aim
- even if there is no other way, how important the employer’s aim is, when balanced against the discriminatory effect.

In religious discrimination cases, article 9 of the European Convention on Human Rights is also helpful. Tribunals should interpret the Equality Act (or NI equivalent) consistently with Convention rights so far as possible. Article 9 says:

‘Everyone has the right to freedom of thought, conscience and religion ... Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

Under article 9, it is not necessary for the member to prove group disadvantage. Therefore, when it comes to the justification defence in an indirect religious discrimination claim, when considering what is ‘proportionate’, the fact that the particular member is at a disadvantage should be fully taken into account even if others sharing his/her religion are not at a disadvantage (because of their different beliefs as to what the religion requires. This was confirmed in the **Mba** case, which provides a good example on issues around justification of indirect religious discrimination (below).

Mba v The Mayor and Burgesses of the London Borough of Merton
[2013] EWCA Civ 1562

Ms Mba was a residential care worker at a registered children’s home. The home provided short residential breaks for children with serious disabilities and complex care needs. There were five members of staff and four vacant positions which were filled by agency staff. Staff worked in shifts and three staff members would be on duty at any one time. Weekend days were worked on a rota. It cost more for agency staff than permanent staff to work weekends.

Ms Mba was a practising Christian and believed she should not work on Sundays. For some time, she was allowed to work Saturdays rather than Sundays. But from July 2009, she was scheduled to work two weekends in three in accordance with the normal rota. This involved Sunday working. When she refused to do so, she was given a final written warning and she resigned.

The Council accepted that the requirement to work Sundays put Ms Mba and at least some other Christians at a disadvantage. The question was therefore whether the requirement was justifiable. The tribunal said that it was.

First, the tribunal accepted the Council had a **legitimate aim**, ie ensuring (a) an appropriate gender balance on each shift, (b) an appropriate seniority mix on each shift, (c) a cost-effective service in the face of budgetary constraints, (d) fair treatment of all its staff, and (e) continuity of care in staff looking after the children at the home. If Ms Mba did not work Sundays, other staff would have to do so disproportionately. It was also more expensive to employ agency staff on Sundays and they were less well trained.

The tribunal also thought it was **proportionate** for the Council to insist on Ms Mba participating in the Sunday rota. It weighed up the discriminatory impact on Ms Mba against the reasonable needs of the Council. Although it accepted that the requirement impacted on Ms Mba's genuine and deeply held religious views, it noted that the Council had made efforts to accommodate her for about two years, and also that it was prepared to arrange shifts so that she could attend church each Sunday. The tribunal also said it was relevant that it was not a core belief of Christianity that someone should not work Sundays.

Ms Mba appealed. The Court of Appeal said it was irrelevant that the Council had allowed Ms Mba to avoid Sundays for two years. It was requiring her to work Sundays now. It was also irrelevant that it would arrange shifts so she could attend church, since Ms Mba believed she should not be working Sundays at all. Finally, it was irrelevant that not working Sundays was not a core belief of Christianity. The point was that Ms Mba believed she should not work Sundays.

However, it was still considered proportionate on the particular facts for the Council to insist Ms Mba work Sundays. The appeal therefore failed.

Unlike **Mba**, this is a case where the indirect religious discrimination was not justified.

Fhima v Travel Jigsaw Ltd (Manchester Employment Tribunal)

Ms Fhima applied for a role in a car hire call centre. As an orthodox Jewish person, she could not work on the Sabbath, ie from sundown Friday to sundown Saturday.

The employer operated a shift system across seven days a week. Its preferred shift system was for an employee to work one full weekend a month, have a full weekend off and work either Saturday or Sunday on the other two weekends in the month. Ms Fhima's job application was turned down as the employer said it was looking for people who were 'flexible enough to work on Saturdays'.

The tribunal upheld Ms Fhima's claim for indirect religious discrimination. It said that the employer applied a provision, criterion or practice that employees work some Saturdays, which put Ms Fhima at a substantial disadvantage because of her religious beliefs.

Regarding justification, the tribunal had to balance the competing needs of the business against the discriminatory effect of the provision, criterion or practice. The employer said it needed a pool of 34 employees to operate the shift system, but staffing had not been at that level when Ms Fhimba applied, and at that time two employees were allowed to work flexibly and avoid Saturdays. Also, there was a lower call volume for a Saturday than any weekday. Furthermore, the employer had not canvassed the views of existing staff as to whether they would prefer to work Saturday rather than Sunday. In addition, there was no evidence as to why new employees could not operate on a different shift pattern which did not include the policy of one weekend off in every four and would allow the Ms Fhimba to work Sundays rather than Saturdays.

As well as loss of earnings and injury to feelings, the tribunal awarded compensation for aggravated damages because the employer had accused Ms Fhimba of lying because other Jewish employees did not mind working Saturdays.

Abdulle v River Island Clothing Company (London South Tribunal)

Ms Abdulle was a sales adviser. From the start of her employment in January 2008, until August 2009, there had been no problem with her having time off in the form of short breaks and lunch breaks to accommodate her needs for prayer. In August 2009, a Ms Thorpe was acting as the deputy manager as the usual manager was off sick.

Ms Thorpe found she was short staffed and asked Ms Abdulle to work the whole day rather than finish at her usual time on that day of 1pm. Ms Abdulle said she needed to be away in the middle of the day for prayers. Ms Thorpe's response was that 'the needs of the business must take priority'. Ms Abdulle later brought a tribunal claim which included a claim that this refusal was indirect religious discrimination.

The employment tribunal upheld the claim. The provision, criterion or practice was that Ms Abdulle remain at work during her time for prayer. This put Muslims in general and Ms Abdulle in particular at a disadvantage. The employer did not try to justify the instruction.

The tribunal accepted that Ms Thorpe's comment that the business must take priority was not said because of any conscious or unconscious bias against Muslims, but arose simply because she was under stress to staff the store. She was under pressure and flustered. The tribunal criticised the company who, as a large employer, 'is partly at fault for not having acceptable procedures and processes to deal with this situation'. It said: 'It is all too easy for an employer to say words to the effect that 'we have a multinational force in many of our branches and they work out these things for themselves'. It is when staffing levels are stretched and staff are under stress and pressure that these arrangement or lack of arrangements are shown up.'

It added, however, that in general it did not accept that an employee who is Muslim, or of any other faith, 'is entitled to a 100% cast iron right to a particular time off every day', and that employees of any faith would accept that where there is a crisis situation at work, a routine arrangement has to be varied. It stressed that if a simple clause to that effect had been agreed, 'then when somebody like Ms Thorpe was in the unfortunate situation of having to face a potential conflict between a person's religion and the needs of the shop, there is a convenient code of practice or local agreement to resolve the situation

Hussain v J H Walker Ltd

This is an old case for indirect race discrimination, before the law against religious discrimination was introduced. The finding could equally have been for indirect religious discrimination.

Mr Hussain and 16 other Muslim workers of Indian background were employed as production workers. Muslim workers amounted to about half the workforce. To reduce its losses, the company introduced a new rule that non statutory holidays would no longer be allowed from May - July, the busiest months. In 1992, Eid fell on 11th June, but management would not vary the rule, even though the Muslim workers said they would work additional hours to compensate. The 17 workers took the day off anyway and on their return to work, they were given a final written warning.

The employment tribunal found indirect discrimination. The rule put the Muslim workers at a particular disadvantage compared with others not of their religion. The company had a genuine business reason for the ban on holidays, but nevertheless, it was not justifiable. Although some delay in production and loss of profit would be caused by absence of half the workforce for one day, had the company planned in advance, this would have been minimal. Also, the workers were willing to make up the hours.

Direct religious discrimination

Most flexible working cases in relation to religion rely on indirect religious discrimination law. But occasionally direct discrimination might apply. Direct discrimination is generally explained on p8. It is direct discrimination to treat the member less favourably because of his/her religion.

For example, the member, who is Muslim, asks to take a particular day as annual leave as it falls on an important religious holiday. Her manager refuses. A colleague, who is not Muslim, asks to take a particular day as annual leave because she has tickets for the Wimbledon semi-final. Her manager agrees. In both cases, there was a similar level of staff cover on the particular day. If the reason for refusing the Muslim worker was because she is Muslim, it would be direct discrimination. Of course the reason needs to be proved.

The manager is likely to say the decision was nothing to do with religion, but it was for example because the Muslim worker gave less notice or there were staffing problems or that the other worker had used up less of her annual holiday entitlement.

Victimisation

Victimisation law is explained at p11. For example, the member takes out a grievance complaining that his manager's refusal to allow him to take time off for a religious holiday is religious discrimination. The manager becomes annoyed and soon after calls him for disciplinary action on a petty matter which would normally have been overlooked. It will be necessary to prove that the disciplinary action would not have been instigated had the member not brought his grievance. It would be useful if the member could prove that colleagues are behaving in the same way and not being disciplined, or that he carried out the same conduct before his grievance and his manager took no action.

Time-limits for taking an employment tribunal case

Discrimination time-limits are set out on p12.

The right to request flexible working

We explain this right on p54. It is often misunderstood. It is not a right to have the request granted. It is simply a right to have a request properly considered. If the request is refused, the member's main legal rights usually depend on discrimination law in the Equality Act 2010 (or NI equivalent).

Part-time workers regulations

In a nutshell

These Regulations do not give anyone the right to work part-time or flexibly but they ensure that those who do work part-time are not *unjustifiably* discriminated against in pay or other treatment. Indirect sex discrimination law also gives this protection, but the definition is legally more complicated to prove. Also the Part-time Workers Regulations protect men as well as women. On the other hand, if there is no full-time worker to make the comparison with, the member will need indirect sex discrimination law.

The legislation and Codes

- The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

NI legislation, guides and Codes

- The Part-time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000

Eligibility

- Employees or individuals working personally for the employer
- Male or female
- No minimum service

The legal right

A part-time worker must not be treated less favourably than a comparable full-time worker because s/he is a part-timer in respect of contract terms or by being subjected to any other detriment. There must be a comparison. The member cannot just say, 'if I was a full-timer, I would be treated better'.

The comparison is with someone who was employed by the same employer at the time of the relevant treatment under the same kind of contract and on broadly similar work. Alternatively, if the member originally worked full-time, s/he can compare his/her treatment with how s/he was treated before s/he became part-time.

It is not unlawful if the employer can prove the less favourable treatment was objectively justified. This is basically the same defence as is available to employers in indirect sex discrimination cases.

A part-timer can ask the employer for a written statement giving the reasons for any treatment which s/he believes was less favourable. It is unlawful to subject the worker to a detriment or to dismiss him/her because s/he asked for such a statement or because s/he claimed any rights under the Part-time Workers Regulations.

Examples of less favourable treatment unless justified:

- A lower hourly rate of pay. However, it is not necessary to pay an overtime rate until the part-timer has worked a full-timer's normal hours.
- A less favourable formula for sick pay entitlement.
- Exclusion from training opportunities.
- Overlooking for promotion.
- Selecting first for redundancy.

The case of **Brett v Royal Mail** on p34 succeeded in a claim for breach of the part-time workers regulations as well as indirect sex discrimination. If Ms Brett had been a man, she could still have claimed breach of the part-time workers regulations (though not indirect sex discrimination).

The right to request flexible working

In a nutshell

A formal procedure by which employees can ask to work flexibly, but no substantive right to have the request accepted. It doesn't matter why the member wants to change his/her hours or work from home.

The legislation and Codes

- Employment Rights Act 1996, s80F – s80I
- Flexible Working Regulations 2014
- ACAS Code: Handling in a reasonable manner requests to work flexibly

NI legislation, guides and Codes

- Employment Rights (NI) Order 1996, article 112F
- Flexible Working (Procedural Requirements) Regulations (NI) 2003
- Flexible Working (Eligibility, Complaints and Remedies) Regulations (NI) 2003
- Equality Commission for Northern Ireland and LRA's 'Flexible Working: The Law and Good Practice – A Guide for Employers' (NB This is not a Code)

Eligibility

- Employees
- At least 26 weeks' continuous service
- Only 1 application may be made in any 12 months

The legal right

The member can apply to his/her employer to change his/her hours, time of work or to work partly or wholly from home. For example, arrangements can cover part-time working, job-share, staggered hours, annualised hours, compressed hours, term-time only, slightly reduced hours, homeworking and phased retirement.

The right to request flexible working initially applied only to requests for childcare purposes. Now the reason no longer matters, and it does not need to be for caring purposes.

The member must make a written application which contains the following information:

- The date of the application
- The date of any previous applications or confirmation there have been none
- A statement that the application is made under the statutory right to request flexible working
- The flexible pattern applied for and the date it is to come into effect
- An explanation of what effect, if any, the member thinks the proposed change will have on the employer and suggestions how to deal with it.

The employer must deal with the application in a 'reasonable' manner and notify the member of the decision within 3 months of the application or any permitted appeal. The ACAS Code sets out what is 'reasonable' – basically, discussing the request with the member, giving a written decision as soon as possible and allowing an appeal. (In NI, the steps which the employer must take are set out.)

The employer can only refuse the application on one of the following grounds: additional costs; detrimental effect on customer demand; inability to recruit additional staff or reorganise work among existing staff; detrimental effect on quality or performance; insufficient work during the periods when the member proposes to work; or planned structural changes.

The member can only bring a tribunal case under the flexible working procedure if:

- The refusal did not fall within one of those grounds or was based on incorrect facts
- The employer did not deal with the application in a reasonable way
- The employer did not give a decision within 3 months or any agreed extension.

If the member wins such a case, the tribunal can only order the employer to reconsider and award up to 8 weeks' pay.

If the refusal to agree a flexible working request amounts to some form of discrimination under the Equality Act 2010 (or equivalent NI legislation), the member will have a better case and will be entitled to proper compensation if s/he is successful.

FAQs

Q: Does the member have the right to have his/her flexible working request agreed?

A: Not under this procedure. If employers correctly follow the procedure, they can refuse. However, the member may have other legal rights, most obviously if discrimination law applies. We discuss this elsewhere in this guide.

Q: Does the member have a right to a trial period?

A: No, not under this bit of law. The member does not have the right to a trial period or to a permanent agreement. The fact is that the member does not really have any rights at all except to have his/her request considered. However, there is nothing to stop the member and the employer agreeing to do a trial period.

Q: Is it compulsory to go through the flexible working procedure before bringing any discrimination claim?

A: Not at all. The member can just make an informal request for whatever adjustment is necessary. Sometimes it is a good tactic to go through this formal procedure, but it is important not to miss tribunal time-limits for any discrimination claim if the request gets refused.

Q: If the employer agrees to a change in hours, can the member later ask to return to his/her previous arrangement?

A: It all depends on the original agreement. If a permanent change was agreed, the member will have no right to go back.

Q: Can the employer later change his/her mind?

A: Again, it all depends on the original agreement. If the employer agreed a permanent change, s/he can't later change her mind. That is a slightly simplified answer, though, because at any time an employer might try to change any member's contract, and the member's legal rights in that situation are complicated.

Q: Can the employer agree the request but make it subject to review every 12 months?

A: Such a right of review sounds like the employer is only agreeing for 12 months at a time and reserving the right to insist the member return to his/her original hours after 12 months. The procedure does not prevent the employer imposing a 12 month review because the employer does not have to agree the request in the first place. However, discrimination law may apply. If the member needs to work part-time for child-care reasons, for example, and those reasons still apply after 12 months, the employer would have to show in any indirect sex discrimination case why it is justifiable to change his/her mind. A lot may depend on how well the arrangements have worked during the preceding 12 months.

Q: Does the member have to have a good reason for his/her request?

A: No, although it may make the employer more likely to agree. The reason will also affect whether the member is able to bring a discrimination claim if the employer refuses. However, no particular reason is needed to use this procedure. It used to be available only for childcare purposes, but that is no longer the case.

For negotiating tips to encourage employers to agree the request, see the UNISON Guide, 'Flexible working: making it work' (see Sources, p92).

Pregnancy

Pregnancy discrimination

In a nutshell

It is unlawful to dismiss the member or treat her unfavourably because she is pregnant or for a pregnancy-related reason.

The legislation

- Equality Act 2010, s18
- Employment Rights Act 1996, s99
- Maternity and Parental Leave etc Regulations 1999, regs 19 and 20

NI legislation, guides and Codes

- Sex Discrimination (NI) Order 1976, article 5A
- Employment Rights (Northern Ireland) Order 1996, article 131
- Maternity and Parental Leave etc Regulations (NI) 1999

Eligibility

- Job applicants, contract workers, employees, other women working personally for the employer
- No minimum length of service is required

The legal right

Women must not be treated unfavourably because of their pregnancy or for a pregnancy-related reason, eg sickness caused by pregnancy. It is not necessary to compare how the member was treated with a man in 'comparable' circumstances, eg a sick man.

This rule applies during the member's 'protected period', ie from when she becomes pregnant until the end of her statutory maternity leave. It also applies to a decision taken during her protected period which is only put into effect after its end.

If the employer treats the member badly after the end of her protected period, but the reason is that she had been pregnant or for a pregnancy-related reason, the member can claim sex discrimination. She must then prove she was less favourably treated than a man in similar circumstances.

FAQs

Q: What if the member is dismissed because she can't return to work after her maternity leave because of post-natal depression or other pregnancy-related illness?

A: She can claim sex discrimination. She must prove that a sick man with an equivalent amount of sickness would not have been dismissed. Her time off during maternity leave must not be counted. If her sickness is serious and likely to last 12 months, she may have a disability and be able to claim disability discrimination.

Q: Is the member entitled to time off for IVF treatment?

A: This is a difficult question which has not been fully tested in the case law. The cases to date suggest that a woman is only considered 'pregnant' once the fertilised eggs have been implanted in her uterus. At that point, she should become protected in the same way as any other pregnant woman, and would therefore be entitled to time off for antenatal care and not to be discriminated against because of pregnancy. If the IVF fails, she ceases being in the protected period two weeks after the failure is discovered. It is probably also sex discrimination to dismiss a woman because she is undergoing IVF treatment during the period between follicular puncture and implantation immediately afterwards. If a woman is dismissed at an earlier stage because she is undergoing IVF treatment, this is probably not sex discrimination unless a man in an equivalent position (whatever that might be) would also have been dismissed.

What if the employer discriminates against the member?

The member can bring an employment tribunal claim for pregnancy, sex or disability discrimination (as applicable) within three months of the act of discrimination. ACAS early conciliation applies (except in NI). See p12 for more detail of discrimination time-limits and compensation.

NEGOTIATING BETTER RIGHTS - FERTILITY TREATMENT

The following are examples taken from negotiated local authority and fire service policies:

- Up to five days' paid leave to cover each course of fertility treatment.
- Time off with pay for fertility treatment (no limit specified)
- Reasonable authorised paid absence to attend hospital appointments to undergo fertility treatment where the appointments cannot be made outside of working time. Partners who need to accompany may request annual, flexi or unpaid leave. Confidential discussion with you and your Line Manager should take place to assist in overcoming workplace difficulties. On proof of treatment, a continuous period of up to two weeks' paid leave of absence may be granted to the female partner after embryo implantation has taken place whether or not pregnancy has been confirmed.

Time off for antenatal care

In a nutshell

Pregnant women are allowed time off during working hours to attend appointments for antenatal care. Prospective fathers and/or partners of the mother have a more limited entitlement to accompany the mother to two appointments.

The legislation

- Employment Rights Act 1996, s55 and s57ZA – s57ZI.

NI legislation

- Employment Rights (Northern Ireland) Order 1996, articles 83 and 85ZA-85ZD

Eligibility

- Employees, no minimum length of service is required
- Agency workers, who have been placed for at least 12 weeks

Paid or unpaid

The prospective mother is entitled to have paid time off. Prospective fathers and partners of the mother are entitled only to unpaid time off.

The legal right

A pregnant employee must not be unreasonably refused time off during working hours to attend an appointment for antenatal care advised by a midwife, medical practitioner or health visitor. There is no limit on how much time off.

Apart from the first occasion, if asked by the employer, the mother must produce a certificate from the midwife etc and a document proving the appointment has been made.

An employee who is the partner of a pregnant employee or, if different, the father of the child, has the right to unpaid time off during working hours to accompany the pregnant employee while she attends her antenatal appointment.

The partner / father is allowed to attend on a maximum of two occasions for a maximum of six and a half hours each time (including travel and waiting time).

If the employer of the partner/father so requests, the latter must produce a written statement confirming the date and time of the appointment; his/her relationship to the pregnant employee or child; and confirming the appointment was made on the advice of a midwife etc

There is a BIS guide for employers: 'Time off to accompany a pregnant woman to antenatal appointments'. The guide has no legal status. It is available at

www.gov.uk/government/uploads/system/uploads/attachment_data/file/361292/bis-14-1063-time-off-to-accompany-a-pregnant-woman-to-ante-natal-appointments-employer-guide.pdf

There is no equivalent guide in NI.

FAQs

Q: Is antenatal care only for medical appointments?

A: Unfortunately the exact scope of the right to have time off for antenatal care has never been tested in any appeal court. The government's website says antenatal care does not only cover medical appointments, but also covers antenatal classes and parenting classes. An early employment tribunal case thought it covered relaxation classes, but employment tribunal level cases do not establish the law. The EHRC Employment Code at paragraph 17.26 says antenatal care 'can include' relaxation and parenting classes.

Q: Can employers require the member to make up the time taken for antenatal appointments?

A: No. The EHRC Employment Code gives an example at paragraph 17.26.

Q: Does the right to accompany mean the father and the mother's partner have a right to attend antenatal care, even if the mother objects?

A: No. It is only a right as against the employer to have time off to accompany the mother if she so wishes. It is up to the mother whether she wants her partner / the father to attend at all.

What if the employer refuses this time off?

The member can bring an employment tribunal claim within 3 months of the relevant antenatal care appointment. Except in NI, ACAS early conciliation applies.

Compensation is double the member's usual pay for the time s/he should have been allowed.

It is automatic unfair dismissal to dismiss the mother for taking time off for antenatal care. If the member is dismissed for accompanying the mother as his/her partner, you need to check the latest legal position.

It is unlawful to subject an agency worker to a detriment for attending antenatal care or accompanying his/her partner to antenatal care.

NEGOTIATING BETTER RIGHTS – ANTENATAL CARE

- (For the avoidance of doubt) leave to include relaxation and parental craft classes.
- Paid leave for the mother's partner to accompany.
- Leave for the father / mother's partner not limited to two occasions.

Health and safety suspension

In a nutshell

Employers must carry out a risk assessment once notified a woman is pregnant and take steps to remove any risks which are identified, including altering duties or, as a last resort, offering a paid suspension.

The legislation

- The Management of Health and Safety at Work Regulations 1999
- Employment Rights Act 1996 s66 – s68
- EU Pregnant Workers Directive, Annexes I and II

NI legislation

- The Management of Health and Safety at Work Regulations (NI) 2000
- Employment Rights (Northern Ireland) Order 1996, articles 98-100
- EU Pregnant Workers Directive, Annexes I and II

Eligibility

- Employees
- No minimum length of service is required

Paid or unpaid

Paid

The legal right

As part of their general duty to carry out work place risk assessments, where the workplace has women of childbearing age and the work could involve a risk to mother or baby, the general assessment must cover that risk.

Once a woman has notified her employer in writing that she is pregnant, has given birth in the previous six months or is breast feeding, the employer must carry out a specific risk assessment for her. Failure to carry out a risk assessment might be sex discrimination if the work is of a kind which could put the woman at risk.

If any risk is identified on the assessment, the employer must alter the woman's working conditions or hours. If that is not reasonable or if it would not remove the risk, the woman has the right to a paid health and safety suspension, though she should first be offered any suitable alternative vacancies which exist.

The risks may be physical, chemical or biological. They include

- Extreme temperatures
- Prolonged exposure to loud noise
- Manual handling of loads
- Tight fitting work stations
- Excessive mental or physical pressure causing stress or anxiety
- Tiredness from standing
- Travel

Examples:

The member's job is a social worker. Two of her patients are particularly aggressive and cause her a great deal of stress and anxiety. Care of those patients should be reallocated during her pregnancy.

The member's job involves standing all day. She should be given more breaks and/or a chair to sit on.

The member is a nurse and as part of her job, she has to help patients in and out of bed when they need to go to the bathroom. If this becomes difficult for her, she should be allowed not to do this activity.

Maternity leave

In a nutshell

Women who are employees are entitled to one year's statutory maternity leave.

There are various notification rules which they must be careful to follow correctly. These are summarised below but should be checked carefully.

The legislation

- Employment Rights Act 1996
- Maternity and Parental Leave etc Regulations 1999

NI legislation

- Employment Rights (Northern Ireland) Order 1996
- Maternity and Parental Leave etc Regulations (NI) 1999

Eligibility

- Employees
- No minimum length of service is required

Paid or unpaid

Unpaid, unless the member's own contract of employment says she should be paid.

However, women who meet certain qualifying conditions can claim statutory maternity pay ('SMP') for 39 weeks of their leave. This is paid at 90% of the member's average pay subject to a weekly maximum after the first 6 weeks which goes up every April. Women who do not qualify for SMP may be eligible for the lower maternity allowance. Details are on line at www.gov.uk/maternity-pay-leave/pay

The legal right

All female employees are entitled to 12 months' statutory maternity leave. The first 26 weeks are called 'ordinary maternity leave' ('OML'). The second 26 weeks are called 'additional maternity leave' ('AML').

Whatever happens, the member must take at least 2 weeks leave after the birth (4 weeks for certain factory workers). This is called 'compulsory maternity leave'.

The member must give notice no later than the end of the 15th week before her expected week of childbirth ('EWC') or, if that's not reasonably practicable, as soon as reasonably practicable afterwards of

- her pregnancy
- her EWC
- (in writing if requested) the date she intends her OML to start. This cannot be earlier than the 11th week before the EWC.

If requested, the member must produce a medical or midwife's certificate stating the EWC.

The member must give at least 28 days' notice if she wants to change the date she goes onto leave.

If the member has not yet started her statutory maternity leave, her leave will be automatically triggered the first time she has a pregnancy-related absence in the last 4 weeks before the EWC. If that happens, she must notify her employer as soon as reasonably practicable afterwards that she is absent due to pregnancy and the date her absence began.

AML runs on immediately from OML. The member does not need to give any extra notice before going onto AML. It is assumed that she will take the full 12 months statutory maternity leave unless she says otherwise.

What happens during leave?

The member must not be discriminated against because she is on maternity leave, eg by failing to inform her of job vacancies or to consult her in a redundancy or reorganisation exercise.

She is entitled to the benefit of her terms and conditions except for remuneration (pay). This probably includes benefits such as use of a car or private medical insurance. The member must be given the benefit of any pay rise awarded before or during her leave. She must not be excluded from any performance-related pay assessment because she is absent. There are special rules regarding pensions.

Generally-speaking, the member continues to accrue statutory holiday entitlement during her leave and can carry over any leave which she is unable to take.

The member or the employer can make reasonable contact from time-to-time during leave, eg by phone, email or letter, to discuss what's happening in the workplace or arrangements for return.

Also, an employee can carry out up to 10 days work or training during her statutory maternity leave without bringing her leave to an end. These are called 'keeping in touch' ('KIT') days.

KIT days are completely optional on both sides. It's also up to the employer and employee to agree any payment for those days.

It's unlawful to subject the member to a detriment and automatic unfair dismissal to dismiss her because she has refused to do any KIT days.

The right to return

Within 28 days of receiving the member's notification of when she wants to take leave, the employer must notify her of the date when her maternity leave will end (ie giving 12 months' leave). If the member wants to return earlier, she must give at least 8 weeks' notice.

If the member can't come back on the notified date due to sickness, the normal sickness procedures at her workplace will apply.

When the member does come back, she must not be discriminated against because she has been on leave. For example, appraisal and redundancy selection scores must make appropriate adjustments so that she is not penalised because she has been away from work on maternity leave.

The member is entitled to return after OML (the first 26 weeks) to the job in which she was employed before her absence on no less favourable terms and conditions than if she had not been absent. This means getting any pay rise which happened during her absence.

If the member only returns after AML (ie having taken the full 52 weeks maternity leave), and it is not reasonably practicable to return to the same job, then the member only has the right to return to another job which would be suitable and appropriate for her in the circumstances.

Redundancy during maternity leave

Regulation 10 of the Maternity and Parental Leave etc Regulations 1999.

If during maternity leave it is not practical for the employer to continue to employ the member on her own contract of employment because of redundancy, she must be offered any suitable available vacancy.

The terms and conditions must not be substantially less favourable than had she continued under the previous contract.

NB

- In a reorganisation situation where the employer has made everyone redundant and told them all to apply for a reduced number of their own jobs, it is uncertain whether reg 10 would apply. However, for an example where it did apply, see **Sefton BC v Wainwright** (below).
- Reg 10 only applies when the member is made redundant while she is on maternity leave. It does not apply if she is made redundant while she is pregnant.
- If the member is made redundant while she is *pregnant*, she has the usual unfair dismissal rights if she has at least 2 years' service. If she can prove the reason she was made redundant was her pregnancy, she can claim automatic unfair dismissal and pregnancy discrimination. She does not need any minimum service for these claims.

Sefton Borough Council v Wainwright UKEAT/0168/14

Ms Wainwright was Head of Overview and Scrutiny. Mr Pierce was Head of Member Services, an equally graded post. Ms Wainwright was on maternity leave from 16 July 2012 – July 2013. On 26 July 2012, the Council wrote to Ms Wainwright and Mr Pierce telling them their posts were to be deleted as part of a restructuring and they were 'at risk' of redundancy. Their posts were to be replaced by a new joint position of Democratic Service Manager for which they were both qualified. Either of them could just have been slotted in, but as there were two, they had to compete with each other. Interviews were held in December 2012 and Mr Pierce was successful. On 8 January 2013, Ms Wainwright was given three months' notice of redundancy. No other suitable vacancies came up and her employment came to an end on 15 April 2013.

The employment tribunal said Ms Wainwright's dismissal was automatically unfair. Her position was redundant when she was told she was 'at risk' on 26 July 2012. She was already on maternity leave and a suitable available vacancy existed, ie that of DSM. It was clearly suitable because the Council had said Ms Wainwright could just have been slotted in had Mr Pierce not also been displaced. As Ms Wainwright was redundant while on maternity leave and was not offered an existing suitable available vacancy, her dismissal was automatically unfair as regulation 10 was breached.

The EAT confirmed the tribunal's decision on this point. It was clear from when Ms Wainwright and Mr Pierce got the 'at risk' letters that nothing was going to stop their previous jobs disappearing. This amounted to a redundancy situation, and from then on, Ms Wainwright was entitled to be offered a suitable available vacancy.

The EAT said the protection is afforded to women on maternity leave because of the particular disadvantage that they suffer in engaging in a redundancy selection process and competing for whatever jobs remain.

Indeed the EAT said the point was graphically illustrated in this case when Ms Wainwright had to attend the DSM interview at a time when she had three young children under the age of three including one babe in arms.

What if the employer does not allow the member to return after maternity leave?

The member can bring a claim for unfair dismissal, if she has sufficient length of service.

If she can prove the reason she was not allowed to return is because she has taken maternity leave, she can claim automatic unfair dismissal and/or sex discrimination. She can also claim automatic unfair dismissal if reg 10 (redundancy during maternity leave) applies. No minimum service is required for these claims.

NEGOTIATING BETTER RIGHTS

- Full pay while on maternity leave
- Full pay if taking shared parental leave (see below)
- Paid or unpaid leave for grandparents taking leave to help with the baby during the 12 months or during the first month.
- (As negotiated in one police authority) All requests for reduced hours and flexible working will be agreed (details tailored by negotiation to meet individual circumstances) if you are returning from maternity leave

SEE ALSO

Adoption and surrogacy leave – p75-77.

Shared parental leave – p71.

Paternity leave – p78.

Rights related to pregnancy – p58.

Shared parental leave

In a nutshell ...

A mother can share her statutory maternity leave and pay with 'P', who is the father of the child or, if different, the mother's partner. We refer to the mother and P as 'the parents' below. The rules are detailed and complicated, and must be checked precisely in any case. The following is only a rough summary.

For more detail, see

- the ACAS Good Practice Guide at www.acas.org.uk/media/pdf/h/d/Shared-Parental-Leave-a-good-practice-guide-for-employers-and-employees.pdf
- the BIS Technical Guide at www.gov.uk/government/uploads/system/uploads/attachment_data/file/417505/bis-14-1329-Employers-technical-guide-to-shared-parental-leave-and-pay-1.pdf
- the SPLASH website at www.sharedparentalleave.org.uk/
- in NI: the LRA Shared Parental Leave: a good practice guide for employers and employees at www.lra.org.uk/publications/agency-publications/advice-and-guidance-on-employment-matters/advisory-guides/shared-parental-leave-a-good-practice-guide-for-employers-and-employees

The legislation

- The Shared Parental Leave Regulations 2014

NI legislation

- The Shared Parental Leave Regulations (NI) 2015

Eligibility

Each parent needs to qualify separately.

- Employees
- At least 26 weeks' continuous service with the employer by the end of the 15th week before the expected week of birth
- Still employed by that employer until the week before any period of shared parental leave ('SPL') is taken
- Must share responsibility for care of the child
- The other parent must meet an employment and earnings test

- The mother must have cut short her entitlement to statutory maternity leave. (There are specific rules if the mother was entitled to statutory maternity pay or maternity allowance, but not to statutory maternity leave.)

Paid or unpaid

Unpaid. But employees who meet certain qualifying conditions may be entitled to shared parental pay. This is paid at 90% of the member's normal pay subject to a weekly maximum which goes up every April. It is the same as for statutory maternity pay except that the weekly maximum applies from the outset. Details are available on line at www.gov.uk/shared-parental-leave-and-pay/what-youll-get

The legal right

The total amount of available SPL is 52 weeks (from the date of birth) less the number of weeks' statutory maternity leave already taken by the mother. The mother must take her two (or four) weeks' compulsory maternity leave after birth. After that, leave can be shared by the parents. Leave can be taken in one continuous period or broken up into one or more whole week segments (called discontinuous leave).

Each parent must give their employer a written 'notice of entitlement' at least 8 weeks before they intend to take the first period of SPL with various compulsory details including when they plan to take SPL, though they need not stick to this. They must also provide a signed declaration and one from their partner.

An employer can request a copy of the child's birth certificate and the name and address of the other partner's employer.

At the same time or later, each parent must give their employer a booking notice (also known as a 'period of leave' notice) which provides at least 8 weeks' notice of the first dates requested for leave. If the notice asks for one block of continuous leave, it cannot be refused. If it asks for discontinuous leave, eg 4 weeks on, 4 weeks off, an employer has two weeks within which to accept or refuse. There are various rules if the employer refuses. Only three booking notices can be accepted in total.

ACAS has devised a series of forms to help ensure that employees make the correct notifications.

Versions applicable to adoption and parental order surrogacy are included. These are all available via links on its website at www.acas.org.uk/index.aspx?articleid=4911

What happens during leave?

The rules are similar to those applicable for statutory maternity leave (see p65).

The right to return

The right to return is similar to that for statutory maternity leave, depending on the length of SPL taken and whether other leaves were added on.

It is automatic unfair dismissal to dismiss an employee because s/he took or sought to take SPL or because s/he refused to work on SPLiT (similar to KIT) days. It is also automatic unfair dismissal to make an employee redundant during SPL if there is a suitable alternative vacancy.

FAQs

Q: Can the parents take leave at the same time?

A: Yes, they can take leave at the same time or at different times or a mixture.

Q: What happens if the mother splits up with P during the shared parental leave period? Can she go back to statutory maternity leave?

A: Only in very limited circumstances. If there is a risk of this, the mother should get careful advice.

Q: What if the mother has a right to full pay during maternity leave under her contract? Will she also get full pay if she takes shared parental leave?

A: Not necessarily. Branches should negotiate so that any contractual right to full maternity pay also applies to shared parental leave.

Grandparents

There are no official leave rights aimed at grandparents and this is another area where negotiated policies would be useful. In certain circumstances, a grandparent – especially one who lives with his/her grandchildren – could claim dependant leave.

The government has announced its plans to extend shared parental leave to working grandparents so that the parents can return to work earlier if they wish to. It says nearly 2 million grandparents have given up work, reduced their hours or taken time off work to help families who cannot afford childcare costs. Of working grandparents who have never taken time off work to care for grandchildren, around 1 in 10 have not been able to do so because they have either been refused time off by their employer, or simply felt that they weren't able to ask. The government has said it will consult on this proposal with a view to introducing the new rights in 2018.

Where a grandparent has taken on or shares caring responsibility for his/her grandchildren, s/he may be able to claim indirect age discrimination or indirect sex discrimination in a similar way to claims made by mothers who need shifts/hours compatible with caring for their children. There have been very few if any reported tribunal claims of this kind. The biggest difficulty in such a case would probably arise from the issue as to whether the member had a sufficient degree of obligation to provide the care him/herself.

Adoption

Statutory adoption leave and pay

In a nutshell

An employee's rights during adoption leave and on return are virtually identical to those for statutory maternity leave.

The legislation

- Employment Rights Act 1996
- Paternity and Adoption Leave Regulations 2002

NI legislation

- Articles 107A and 107B of the Employment Rights (NI) Order 1996
- Paternity and Adoption Leave (NI) Regulations 2002

Eligibility

- Employees
- No minimum length of service is required
- Where a couple adopts, only one parent has this entitlement. The other partner can only take paternity leave or shared parental leave.

The legal right

For a standard UK adoption, the prospective parent is entitled to 52 weeks statutory adoption leave (26 weeks Ordinary Adoption Leave and 26 weeks Additional Adoption Leave). The leave starts up to 14 days before the child starts living with the adopting parent. There are various notification requirements.

The main adopter can also claim statutory adoption pay if eligible. This is available for up to 39 weeks at 90% normal pay, and subject to an upper limit which goes up each year.

Adoption appointments

Eligibility

- Employees, no minimum length of service is required
- Agency workers, who have been placed for at least 12 weeks.

Paid or unpaid

The main adopter is entitled to have paid time off. The other adopter is entitled only to unpaid time off.

The legal right

A prospective adopter must not be unreasonably refused time off during working hours to attend up to 5 occasions for up to six and a half hours each in connection with the adoption or to spend time with the child.

If two people are adopting as a couple, the second prospective adopter is entitled to take unpaid time off on up to 2 occasions for up to six and a half hours each. It is not permitted for one of the prospective parents to take both paid and unpaid time off.

The appointments must have been arranged by or at the request of the adoption agency and take place before the placement starts. If the employer, temporary agency or hirer (as applicable) so requires, the prospective parent must produce a document showing the date and time of the appointment; that it is at the request of or arranged by the adoption agency; and, if part of a couple, whether the paid or unpaid entitlement is chosen.

The right to attend adoption appointments ceases once the child has been placed. Also, once a prospective parent has taken the paid entitlement to time off, s/he is no longer entitled to one or two weeks' paternity leave when the child is placed.

Surrogacy

In a nutshell ...

Between them, parental order parents now have rights to adoption and paternity leave.

The legislation

- Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014

NI legislation

- Paternity, Adoption and Shared Parental Leave (Parental Order Cases) (Northern Ireland) Regulations 2015

Eligibility

- Employees
- No minimum length of service required
- Having or applying for a parental order

The legal right

A surrogate mother, ie the birth mother, is entitled to take full maternity leave even if she does not continue to have contact with the child after birth.

The intended parents now have rights if they have obtained a parental order or intend to apply for one within 6 months of the child's birth. The 'parental order parents' need to agree who will be 'Parent A'. Parent A will have the right to take adoption leave.

The other parental order parent will be eligible for statutory paternity leave if s/he is the partner, civil partner or spouse of Parent A when the child is born (see p78).

Parental order parents are also eligible for shared parental leave (see p71).

It is arguable that both parental order parents are entitled to take time off to accompany the surrogate mother to antenatal appointments.

Paternity leave

In a nutshell

Qualifying employees are entitled to one or two weeks unpaid leave within 56 weeks of birth.

The legislation

- Employment Rights Act 1996
- Paternity and Adoption Leave Regulations 2002

Eligibility

- Employees
- Continuously employed for 26 weeks by the end of the 15th week before the EWC

Paid or unpaid

Unpaid. However, employees who meet certain qualifying conditions can claim statutory paternity pay at 90% of the member's average pay subject to a weekly maximum which goes up every April. Details are on line at www.gov.uk/paternity-pay-leave/overview

The legal right

The father of the child or the spouse or partner of the child's mother is entitled to paternity leave if s/he has responsibility for the child's upbringing. The entitlement is to one week's leave or two consecutive weeks' leave. It cannot be taken in single days.

Leave must be taken within 56 weeks of birth or, if the child is born prematurely, of the EWC. It cannot start before the birth.

At least 15 weeks before the EWC, the employee must give the employer notice of intention to take paternity leave, specify the EWC, length of leave and start date. The start date need not be an actual date. For example, the employee can say 'on the date of birth' or 'one week after the date of birth'. The employee must give 28 days' notice if s/he wants to change the date.

Employees cannot have paternity leave if they have taken any shared parental leave.

NEGOTIATING BETTER RIGHTS – PATERNITY LEAVE

- Paid leave
- Leave permitted in single days or periods less than one week blocks
- Shorter notice requirements
- More than two weeks allowed in total as a separate right from shared parental leave
- Some of the leave can be taken prior to the birth

Parental leave

In a nutshell

This is a total of up to 18 weeks' leave for parents to spend time with each child. There need not be any health or caring issue. This must not be confused with the similarly named 'shared parental leave' (p71), which is about sharing statutory maternity leave.

The legislation

- Maternity and Parental Leave etc Regulations 1999, reg 13.

NI legislation

- Maternity and Parental Leave etc Regulations (NI) 1999, reg 13.

Eligibility

- Employees
- Continuously employed for at least 1 year at the date of leave
- Must have or expect to have parental responsibility for the child

Paid or unpaid

Unpaid.

The legal right

If eligible, the member can take up to 18 weeks' parental leave while his/her child is under 18 years old. Check your local policy is not out-of-date. This entitlement used to be only 13 weeks and only for children under 5 (except in the case of disability).

A part-time worker's entitlement is pro-rata.

Both parents are entitled to parental leave. If she wants, a mother can ask to take parental leave immediately following her statutory maternity leave.

The leave must be 'for the purpose of caring for a child'. This is not restricted to looking after the child when s/he is sick. According to the GOV.UK website, it also covers the member taking time off in order to spend more time with his/her children, including taking them to see wider family members, eg grandparents, and time to look for new schools or settle a child into new childcare arrangements.

A collective agreement which is incorporated into employees' individual contracts may set out the details of how the leave can be taken. If no such agreement has been negotiated, a default scheme applies.

The default scheme

Unless the child is disabled, leave can only be taken in whole weeks (or part-time equivalent), not as individual days. For example, a full time employee can take two weeks as a block, but cannot take three days in a row.

No more than 4 weeks' leave can be taken in any year.

The member must give the employer at least 21 days' notice of the leave, setting out its start and end dates. Notice need not be given in writing, though that is always a good idea to prove the request was made.

If it is the father who wants to take leave as soon as the baby is born, the notice needs to specify the expected week of childbirth and the duration of leave, and it must be given at least 21 days before the start of the expected week of childbirth.

Where the child is to be adopted, the member's notice must specify the week in which the placement is expected to occur and the duration of the leave, and it must be given at least 21 days before the start of that week or if that is not reasonably practicable, as soon as is reasonably practicable.

The employer can ask for proof of the member's parental responsibility or the expected date of birth or adoption.

Employers can postpone the leave if they consider the operation of the business would be unduly disrupted, provided they agree to allow the member a period of leave of the same length within 6 months of the original date. Within 7 days of the member's original request, the employer must give written notice of the alternative date and an explanation of the reasons for the delay.

The employer cannot postpone leave where it would take it beyond the child's 18th birthday or where the leave has been requested by the father to follow on from the birth or by a parent to follow on from adoption.

What if the employer refuses parental leave?

As stated above, the employer can postpone parental leave in certain circumstances and if s/he makes the correct notifications of an alternative date. If the employer fails to follow the rules altogether, the member can bring a tribunal claim'

It is automatically unfair to dismiss the member for a reason connected with the fact that s/he took or tried to take parental leave. It is also unlawful to subject the member to a detriment because s/he took or tried to take parental leave. There is no minimum service requirement for making such a claim.

FAQs

Q: What if the member took some of her parental leave entitlement with a previous employer, but has now moved to the current employer?

A: This is not explicitly dealt with in the legislation, but the wording suggests that the member remains entitled to 18 weeks in total. Therefore, once she has acquired 1 year's continuous service with her new employer, she can take the balance of the 18 weeks (though no more).

NEGOTIATING BETTER RIGHTS – PARENTAL LEAVE

- Leave can be taken as individual days. Or can be taken as individual days if for certain purposes, eg to take someone to hospital or help with an unexpected illness.
- More than 4 weeks can be taken per child in any one year.
- Paid leave.
- More relaxed notification requirements.
- More restrictions on the employer's right to postpone. Especially if the leave is requested in connection with immovable dates such as going to hospital or starting school.
- Guaranteed one day's paid leave for child's first day at school.

Dependant leave

In a nutshell

This is often thought of as emergency leave, although it is a little more complicated than that. The emphasis is generally on time off to make care arrangements rather than to do the caring yourself.

The legislation

- Employment Rights Act 1996, s57A

NI legislation

Employment Rights (Northern Ireland) Order 1996, article 85A

Eligibility

- Employees
- No minimum length of service is required

Paid or unpaid

Unpaid.

The legal right

Provided s/he is eligible, the member is entitled to take a reasonable amount of time off during working hours to take action which is necessary in any of the following situations:

- a. To provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted.
- b. To make arrangements for the provision of care for a dependant who is ill or injured.
- c. In consequence of the death of a dependant.
- d. Because of the unexpected disruption or termination of arrangements for the care of a dependant.
- e. To deal with an incident which involves the member's child and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him/her.

A dependant is a husband, wife, civil partner, child, parent or someone who lives in the same household as the member except as his/her tenant, lodger or employee – eg a grandparent or unmarried partner.

In situations (a) or (b), a dependant is also anyone who reasonably relies on the member for help on an occasion when s/he falls ill or is injured or assaulted or to make arrangements for the provision of care in the event of mental or physical illness or injury. Depending on the circumstances, this could be a friend, relative or neighbour.

As soon as reasonably practicable, the member must tell the employer the reason for his/her absence and how long s/he expects to be absent for (unless it isn't possible to get in touch until s/he has returned to work). Once s/he has informed the employer of this, there is no requirement to update his/her employer on a daily basis.

What if the employer refuses the time off?

The member can bring a tribunal claim about the refusal, although it is uncertain how much compensation a tribunal will award if there has been no financial loss.

The member can also bring a claim if s/he is dismissed or subjected to a detriment because s/he took or tried to take dependant leave. There is no minimum service requirement for making such a claim. Be careful – if the member is given a warning or dismissed because s/he took dependant leave without permission, s/he will only win the case if s/he was entitled to take dependant leave in the first place. For example, the member will be unprotected if s/he took the leave without notifying his/her employer of the reason for his/her absence as soon as reasonably practicable, or if s/he took time off in circumstances which are not covered.

If the law on dependant leave does not help because it covers such restricted situations, other legal rights may be more applicable, eg where the member needs time off for childcare, the law on parental leave (p80) or indirect sex discrimination (p30). The member can also make a formal request for flexible working where s/he has ongoing caring commitments (p54).

FAQs

Q: How much is 'reasonable' time off? What would be considered 'necessary'?

A: There is no fixed rule. A tribunal would take account of the nature of the incident which has occurred; the closeness of the relationship between the carer and the dependant and the extent to which anyone else is available to help out. If the situation has arisen because the member has a child who repeatedly falls sick, an employer can take into account the number and length of previous absences.

Q: Can the employer refuse the time off because it is at an exceptionally inconvenient time?

A: No. Any disruption or inconvenience to the employer's business is irrelevant.

Q: Does dependant leave give the member a right to take time off actually to provide the care for a dependant?

A: Not beyond the reasonable amount of time necessary to enable him/her to deal with the immediate crisis. This is likely to be quite short. The member may be able to claim indirect sex discrimination or indirect age discrimination if such time off is refused in certain circumstances, although that is difficult. (See p30 and p17 for more detail.) Another possibility would be if the time could be taken as parental leave (assuming the dependant is the member's child). The problem is that an employer can postpone dates requested for parental leave.

Q: What if the member's child has an underlying medical condition which is likely to cause regular relapses? Can the member take dependant leave each time?

A: Probably not. Dependant leave provides a reasonable amount of time to take the necessary action in unforeseen situations, eg when a child falls ill unexpectedly. Exactly how unforeseeable a dependant's illness needs to be involves looking at the circumstances of the particular case.

Q: Can the member take time off to take a dependant to hospital appointments?

A: This is difficult. Planned hospital appointments do not seem to fit within the description of situations covered by dependant leave.

Dependant leave is more likely to apply if the dependant suddenly falls ill or is injured and needs taking to hospital, or if other arrangements made to take the dependant to a planned hospital appointment suddenly fall through. If the member needs time off for planned hospital appointments, s/he could try to take it as parental leave. The difficulty with that is that parental leave can only be taken in one week blocks, unless the employer agrees otherwise, and also that the employer can postpone the requested date. Another possibility is that refusal of such a request for time-off may be indirect sex discrimination or indirect age discrimination (see p30 and p17). The inadequacy of the law in granting time off, paid or unpaid, in this situation is a strong reason to negotiate special policies.

Q: What happens if a childminder gives the member a few weeks' notice that s/he cannot look after the member's child on a particular day? That's not really an emergency.

A: That's where it gets misleading to think of dependant leave as emergency leave. The question is whether it is 'necessary' to take the time off because of the 'unexpected' disruption of the childcare arrangements. The test is whether the disruption was 'unexpected' at the time the member was told it was going to happen. So even if the member was given a few weeks' notice, the childminder's unavailability on the particular date may have been unexpected. However, if the member was given loads of advance notice, s/he may find it hard to prove it was 'necessary' for her to take time off. That will all depend on how much effort s/he has made to make other arrangements and what the alternatives were. It is quite possible that only a few weeks was not long enough and taking the time off was therefore necessary.

Q: How much time off is the member allowed to grieve over the death of a dependant?

A: Dependant leave is not a form of compassionate leave. It allows time to make arrangements, deal with the funeral and probate, but it does not give time off to grieve.

NEGOTIATING BETTER RIGHTS – EMERGENCY AND COMPASSIONATE LEAVES

The following examples are taken from real negotiated policies with local authorities, police authorities and fire authorities. They go further than the statutory dependant leave but in many cases are discretionary, which makes them unreliable. Also remember that if a situation does fall within the description of statutory dependant leave, there is no pre-set limit on the number of days which can be taken.

- Paid or unpaid leave to deal with personal crises such as serious illness of a partner or dependant, an urgent childcare problem, or home emergencies such as fire or burglary. Managers able to authorise up to 10 days paid leave in a rolling 12 month period with discretion to grant further paid or unpaid leave in exceptional circumstances.
- When employees require time off to attend unexpected domestic emergencies, such as accidents to relatives, burglary or fire, up to 5 days paid absence may be granted in a twelve month period. In exceptional circumstances up to a further 10 days unpaid leave may be granted.
- Up to 5 days compassionate leave may be granted when an employee is facing a personal emergency. Examples of personal emergencies include death or serious life-threatening illness of a family member or housing emergencies such as serious flooding/fire which leaves an employee's house uninhabitable. More leave may be granted in exceptional circumstances.
- Up to 10 days per annum paid time off for serious illness and/or bereavement of family members and certain personal and domestic situations. Includes marriage, household removal, attendance as a witness in court, attendance at examinations of an academic or educational nature.
- Up to five days leave with pay in the event of acute illness of a family member or other family crisis or emergency. Each application to be assessed on its own particular circumstances.

- Time off to care for terminally ill spouse or partner. Up to 52 weeks' leave for staff with at least one year's service. The leave is 8 weeks on full pay, 8 weeks on half pay, 8 weeks at 25% and the remainder unpaid
- Up to 1 day's unpaid leave or flexitime where available may be granted for dealing with a domestic emergency, such as burst pipes, house burglary, car theft.
- Up to two weeks paid leave on compassionate grounds.
- Managers are allowed the discretion to authorise up to one month Compassionate Special Leave (of which a maximum of 8 days will be paid leave) for bereavement of a close/immediate relative. Any extension to this must be authorised by the Director. The Director has discretion to extend the period in exceptional circumstances but this will be unpaid.
- Compassionate/Family Leave can include Bereavement of a near relative, serious illness of a near relative, acute domestic distress, illness of an employee's child and the caring for a child with a disability. Family Leave/Compassionate Leave is granted by the service at its discretion and may be paid or unpaid. Under certain circumstances a combination of both paid and unpaid special leave may be appropriate. Each case will be treated individually.
- Up to 5 days paid leave on the death of a member of the employee's immediate family (i.e. husband, wife, partner, parent, child, sibling, parent-in-law, father/mother of partner). In deciding the number of days to be granted account will be taken of the closeness of the relationship, whether the employee is responsible for making funeral arrangements and/or attending to the deceased's affairs and the distance to be travelled to attend the funeral. Policy also covers the serious illness of a member of the employee's immediate family (as defined above).

Zero hours contracts

In a nutshell

These are contracts with no guaranteed minimum hours. Members will have employment rights only if the arrangement is such that the member legally counts as a worker or an employee. To have unfair dismissal rights, the member must be an employee, which may well not be the case.

Legal rights

There is no legal definition of a 'zero-hours contract', but it is usually understood to mean a contract where no minimum hours are guaranteed.

Exclusivity clauses

Employers are not allowed to put 'exclusivity clauses' into a zero hours contract, ie a clause which prohibits the worker from working for anyone else or which says the worker must get permission before doing so.

It is automatic unfair dismissal to dismiss an employee and unlawful to subject a worker to a detriment if the reason or principal reason for dismissal is that s/he has breached an exclusivity clause. No minimum length of service is required for this protection.

Employment rights generally

The employment rights of individuals working on zero hours contracts depend on the exact agreement and set-up. In particular, they depend on whether the individual is considered to be an employee or a worker or self-employed, since each of these categories has different employment rights. For example, only an employee can claim unfair dismissal and TUPE protection, but workers all have rights to rest breaks, the minimum wage, paid annual leave etc.

To use the formal procedure for requesting flexible working (see p54) it is necessary to be an employee. However, there is nothing to stop a non-employee simply asking informally for particular arrangements. Also, discrimination law may still apply (see below).

It is often difficult to know if the member is an employee or only a worker in these situations. If the employer is not obliged to offer any work at all and the member is not obliged to accept any work which is offered, there is no 'mutual obligation to offer and perform work'. In this situation, the member is not an employee. However, despite appearances, the member may still be an employee because:

- The employer is obliged to offer at least some small amount of work.
- The written contract does not accurately represent the reality of what was agreed locally. Some jobs, eg in care, obviously require a committed relationship, whatever it says on paper.
- The member is an employee at least for the duration of each assignment/roster.

Unfair dismissal and zero-hours contracts

The member can only claim unfair dismissal if s/he was an employee for at least two years continuously. It may be possible to argue that even if the member was not an employee overall, s/he was an employee for the duration of each assignment and that the breaks between assignments can be added in because of the special rules about breaks in service. This is a complicated area needing specialist advice.

As for compensation if the member wins his/her case, the tribunal will decide how many hours s/he would be likely to have worked for that employer had s/he not been dismissed. Any alternative casual earnings s/he now can or should obtain elsewhere will be deducted.

Discrimination law and zero-hours contracts

Discrimination law under the Equality Act 2010 (or NI equivalent) protects more people than unfair dismissal law, and it is easier for a zero-hours worker to be eligible. No minimum service is required and it is only necessary to be a job applicant, or employed on a contract to work personally (see p8 for details.) The following issues for example could arise for zero-hours workers:

- Offering a woman fewer opportunities because she has become pregnant.
- Failing to make reasonable adjustments for a disabled worker.
- Not offering much work to a Muslim worker because of his religion.
- Unjustifiably refusing to adjust a woman's shift hours so she can leave in time to collect her child from school.

Annual leave

Workers are entitled to at least 5.6 weeks' paid annual leave under the Working Time Regulations 1998, calculated according to how many days they work per week. The position with workers on zero hours contracts has not been fully tested. It is thought likely that they are entitled to a calculation based on an average of the hours they have previously worked. Exactly how the average should be calculated is uncertain – possibly over the previous 12 weeks, substituting earlier weeks for any weeks where the member did not work at all.

Government guidance

There is government good practice guidance at www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers

This is not legally enforceable, but may be a useful negotiating tool.

Sources

Web-sites

UNISON
www.unison.org.uk

Equality and Human Rights Commission
www.equalityhumanrights.com

Books

- **Employment Law - An Adviser's Handbook** by Tamara Lewis
Published Legal Action Group. Tel: 020 7833 2931. Edition 11 (2015).
Updated every two years. For workers and their advisers in unions /
voluntary sector. Guide to law, evidence, tactics and procedure, with
comprehensive check-lists and precedents. Covers all areas of
employment law with large discrimination section. Updated
approximately every 2 years.
- **The Law and You: a UNISON guide to key employment rights**
UNISON's employment law book, with large discrimination content and
cross-references to other UNISON and general publications. 5th
edition (2012). ISBN: 978 0 904198 22 5

Updates and periodicals

- **UNIMAG**
Popular quarterly electronic legal update for UNISON branch officials
written in accessible and educational style. Cross-refers to latest edition
of 'The Law and You' and helps keep it up to date. Discrimination cases
are reported in most issues. Now in its 8th year. Published by Diversity
Works Ltd. Case reports written by Tamara Lewis. For sample publicity
copy and subscription details, email unimag@diversityworks.co.uk
- **Equal Opportunities Review**. Published every month by Michael
Rubenstein Publishing. Tel: 0844 800 1863. News, policy features on
HR initiatives, legal analysis and law reports in the equal
opportunities field.

UNISON Guides:

- **Flexible working: making it work**
Practical negotiating and campaigning guide, available at www.unison.org.uk/content/uploads/2014/09/On-line-Catalogue225422.pdf
- **Negotiating for working parents**
Bargaining guide available at www.unison.org.uk/content/uploads/2016/05/Negotiating-for-working-parents.pdf
- **Proving disability and reasonable adjustments** (November 2014)
An update of long-running guides for the EHRC, specially designed for UNISON. Practical advice on how 27 different impairments fit within the law. Available at www.unison.org.uk/get-help/help-with-problems-at-work/discrimination/disability-discrimination/all-articles/
- **Race and Sex Discrimination: A practical guide to identifying unlawful discrimination** 4th edition (December 2013)
Guide to law and checklists for interviewing members and looking for evidence. Available at www.unison.org.uk/content/uploads/2013/12/On-line-Catalogue220872.pdf
- **Gender Identity: An introductory guide for trade union reps supporting trans workers**
Published by UNISON and the Scottish Transgender Alliance. Available at www.unison.org.uk/content/uploads/2015/11/Guide-for-reps-supporting-trans-members-2015.pdf
- **Identifying Legal Cases in the Workplace** 6th edition (2015)
Order through Learning and Organising Services email LearningAndOrganising@unison.co.uk and quote Code ACT172.

Legal materials

- **Equality and Human Rights Commission Employment Code of Practice**
Available on the EHRC website.
- **Statutes and Regulations** are available on the Office of Public Sector Information website (formerly HMSO) at www.legislation.gov.uk
- **On the public sector equality duty:**

Equality Act 2010 (Specific Duties) Regulations 2011 SI No 2260

Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 SI No 1064 W.155.

Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012
SI No 162

Northern Ireland

While employment law in NI is generally the same as in GB, it is to be found in different legislation and there are some minor differences. The above materials therefore need to be used with some care.

For NI specific guides and Codes see the following websites:

- Equality Commission of NI www.equalityni.org/Home
- Labour Relations Agency www.lra.org.uk/

Other sources of assistance

Your UNISON officials. Ensure you follow the correct union procedures to get advice and help.