

*Draft Regulations laid before Parliament under section 236(3) of the Employment Rights Act 1996,
for approval by resolution of each House of Parliament*

DRAFT STATUTORY INSTRUMENTS

2002 No.

TERMS AND CONDITIONS OF EMPLOYMENT

The Flexible Working (Procedural
Requirements) Regulations 2002

Made - - - - 2002
Coming into force - - 6th April 2003

Whereas a draft of the following Regulations was laid before Parliament in accordance with section 236(3) of the Employment Rights Act 1996(1) and approved by a resolution of each House of Parliament:

Now, therefore, the Secretary of State, in exercise of the powers conferred on her by section 80G(2) and (3)(2) of that Act, hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Flexible Working (Procedural Requirements) Regulations 2002 and shall come into force on 6th April 2003.

Interpretation

2.—(1) In these Regulations—

“the 1996 Act” means the Employment Rights Act 1996;

“application” means an application under section 80F of the 1996 Act (statutory right to request a contract variation);

“contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

“contract variation” means a change in the terms and conditions of a contract of employment of a kind specified in section 80F(1)(a) of the 1996 Act;

(1) 1996 c. 18; section 236(3) was amended by paragraph 42 of Part 3 of Schedule 4 to the Employment Relations Act 1999 (c. 26) and paragraph 49 of Schedule 7 to the Employment Act 2002 (c. 22).
(2) Section 80G was inserted by section 47 of the Employment Act 2002.

“electronic communication” means an electronic communication within the meaning of section 15(1) of the Electronic Communications Act 2000(3);

“employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment;

“employer” means the person by whom an employee is (or, where the employment has ceased, was) employed;

“worker” means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

- (a) a contract of employment, or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

“writing” includes writing delivered by means of electronic communication.

(2) For the purposes of these Regulations, unless the contrary is proved, an application is taken as having been made on the day the application is received.

(3) The reference in paragraph (2) to the day on which an application is received is a reference—

- (a) in relation to an application transmitted by electronic communication, to the day on which it is transmitted,
- (b) in relation to an application sent by post, to the day on which the application would be delivered in the ordinary course of post.

(4) For the purpose of these Regulations, unless the contrary is proved, a notice is taken as being given—

- (a) in relation to a notice transmitted by electronic communication, on the day on which it is transmitted,
- (b) in relation to a notice sent by post, the day on which the notice would be delivered in the ordinary course of post.

The meeting to discuss an application with an employee

3.—(1) Subject to paragraph (2) and regulation 13, an employer to whom an application for a contract variation is made shall hold a meeting to discuss the application with the employee within 28 days after the date on which the application is made.

(2) Paragraph (1) does not apply where the employer agrees to the application and notifies the employee accordingly in writing within the period referred to in that paragraph.

(3) A notice under paragraph (2) shall specify—

- (a) the contract variation agreed to, and
- (b) the date from which the variation is to take effect.

4. Where a meeting is held to discuss an application the employer shall give the employee notice of his decision on the application within 14 days after the date of the meeting.

5. A notice under regulation 4 shall—

- (a) be in writing,

- (b) (i) where the employer's decision is to agree to the application, specify the contract variation agreed to and state the date on which the variation is to take effect,
- (ii) where the decision is to refuse the application, state which of the grounds for refusal specified in section 80G(1)(b) of the 1996 Act are considered by the employer to apply, contain a sufficient explanation as to why those grounds apply in relation to the application, and set out the appeal procedure, and
- (c) be dated.

Appeals

6. An employee is entitled to appeal against his employer's decision to refuse an application by giving notice in accordance with regulation 7 within 14 days after the date on which notice of the decision is given.

7. A notice of appeal under regulation 6 shall—

- (a) be in writing,
- (b) set out the grounds of appeal, and
- (c) be dated.

8.—(1) Subject to paragraph (2), the employer shall hold a meeting with the employee to discuss the appeal within 14 days after the employee's notice under regulation 6 is given.

(2) Paragraph (1) does not apply where, within 14 days after the date on which notice under regulation 6 is given, the employer—

- (a) upholds the appeal, and
- (b) notifies the employee in writing of his decision, specifying the contract variation agreed to and stating the date from which the contract variation is to take effect.

9. Where a meeting is held to discuss the appeal, the employer shall notify the employee of his decision on the appeal within 14 days after the date of the meeting.

10. Notice under regulation 9 shall—

- (a) be in writing,
- (b) (i) where the employer upholds the appeal, specify the contract variation agreed to and state the date from which the variation is to take effect, or
- (ii) where the employer dismisses the appeal, state the grounds for the decision and contain a sufficient explanation as to why those grounds apply, and
- (c) be dated.

11. The time and place of a meeting under regulation 3(1) or 8(1) shall be convenient to the employer and the employee.

Extension of periods

12.—(1) An employer and an employee may agree to an extension of any of the periods referred to in regulations 3, 4, 6, 8, 9 and 13.

(2) An agreement under paragraph (1) must be recorded in writing by the employer.

(3) The employer's record referred to in paragraph (2) must—

- (a) specify what period the extension relates to,
- (b) specify the date on which the extension is to end,

- (c) be dated, and
- (d) be sent to the employee.

13. Where the individual who would ordinarily consider an application is absent from work on annual leave or on sick leave on the day on which the application is made, the period referred to in regulation 3(1) commences on the day the individual returns to work or 28 days after the application is made, whichever is the sooner.

Right to be accompanied

14.—(1) This regulation applies where—

- (a) a meeting is held under regulation 3(1) or 8(1), and
- (b) the employee reasonably requests to be accompanied at the meeting.

(2) Where this regulation applies the employer must permit the employee to be accompanied at the meeting by a single companion who—

- (a) is chosen by the employee and is within paragraph (3),
- (b) is to be permitted to address the meeting (but not to answer questions on behalf of the employee), and
- (c) is to be permitted to confer with the employee during the meeting.

(3) A person comes within this paragraph if he is a worker employed by the same employer as the employee.

(4) If—

- (a) an employee has a right under this regulation to be accompanied at a meeting,
- (b) his chosen companion will not be available at the time proposed for the meeting by the employer, and
- (c) the employee proposes an alternative time which satisfies paragraph (5),

the employer must postpone the meeting to the time proposed by the employee.

(5) An alternative time must—

- (a) be convenient for employer, employee and companion, and
- (b) fall before the end of the period of seven days beginning with the first day after the day proposed by the employer.

(6) An employer shall permit a worker to take time off during working hours for the purpose of accompanying an employee in accordance with a request under paragraph (1)(b).

(7) Sections 168(3) and (4), 169 and 171 to 173 of the Trade Union and Labour Relations (Consolidation) Act 1992(4) (time off for carrying out trade union duties) shall apply in relation to paragraph (6) above as they apply in relation to section 168(1) of that Act.

Complaint to employment tribunal

15.—(1) An employee may present a complaint to an employment tribunal that his employer has failed, or threatened to fail, to comply with regulation 14(2) or (4).

(2) A tribunal shall not consider a complaint under this regulation in relation to a failure or threat unless the complaint is presented—

- (a) before the end of the period of three months beginning with the date of the failure or threat,
or

(4) 1992 c. 52.

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where a tribunal finds that a complaint under this regulation is well-founded it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks' pay.

(4) Chapter 2 of Part 14 of the 1996 Act (calculation of a week's pay) shall apply for the purposes of paragraph (3); and in applying that Chapter the calculation date shall be taken to be the date on which the relevant meeting took place (or was to have taken place).

(5) The limit in section 227(1) of the Employment Rights Act 1996 (maximum amount of a week's pay) shall apply for the purposes of paragraph (3) above.

Detriment and dismissal

16.—(1) A person has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he—

- (a) exercised or sought to exercise the right under regulation 14(2) or (4), or
- (b) accompanied or sought to accompany an employee pursuant to a request under that regulation.

(2) Section 48 of the 1996 Act shall apply in relation to contraventions of paragraph (1) above as it applies in relation to contraventions of certain sections of that Act.

(3) A person who is dismissed shall be regarded for the purposes of Part 10 of the 1996 Act as unfairly dismissed if the reason (or, if more than one, the principle reason) for the dismissal is that he—

- (a) exercised or sought to exercise his right under regulation 14(2) or (4), or
- (b) accompanied or sought to accompany an employee pursuant to a request under that regulation.

(4) Sections 108 and 109 of the 1996 Act (qualifying period of employment and upper age limit) shall not apply in relation to paragraph (3) above.

(5) Sections 128 to 132 of the 1996 Act (interim relief) shall apply in relation to dismissal for the reason specified in paragraph 3(a) or (b) above as they apply in relation to dismissal for a reason specified in section 128(1)(b) of that Act.

(6) In the application of Chapter 2 of Part 10 of the 1996 Act in relation to paragraph (3) above, a reference to an employee shall be taken as a reference to a worker.

Withdrawal of application by the employee

17.—(1) An employer shall treat an application as withdrawn where the employee has—

- (a) notified to him whether orally or in writing that he is withdrawing the application,
- (b) without reasonable cause, failed to attend a meeting under regulation 3(1) or 8(1) more than once, or
- (c) without reasonable cause, refused to provide the employer with information the employer requires in order to assess whether the contract variation should be agreed to.

(2) An employer shall confirm the withdrawal of the application to the employee in writing unless the employee has provided him with written notice of the withdrawal under paragraph 1(a).

2002

Minister of State for Employment Relations,
Industry and the Regions,
Department of Trade and Industry

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations relate to the new statutory right to request a contract variation to change the terms and conditions of an employee's contract of employment to allow for flexible working. This new right is provided for in the Employment Act 2002 and the relevant provisions are incorporated by that Act into the Employment Rights Act 1996 ("the 1996 Act").

The Regulations elaborate on the new section 80G of the 1996 Act, by setting out the manner in which an employer should deal with an application for a contract variation under made by an employee under new section 80F.

Regulations 3-5 set out the employer's obligations in respect of a request for a contract variation and provide that the employer must either hold a meeting to discuss the application or agree to the contract variation in writing within 28 days from the date on which the application is made. The employer must notify the employee in writing of his decision within 14 days after the date of the meeting.

Regulations 6-11 set out the employee's right to appeal against his employer's decision. The employee must appeal in writing, setting out the grounds of appeal, within 14 days after the date on which the notice of the decision is given. The employer must hold a meeting to hear the appeal within 14 days after the date on which the notice of appeal is given. The employer must notify the employee in writing within 14 days after the appeal hearing of his decision.

Regulation 12 provides for various periods in the Regulations to be extended by agreement.

Regulation 13 provides that where the individual who would normally consider the application is on sick leave or annual leave the period commences on the day the individual returns or 28 days after the application is made, whichever is the sooner.

Regulations 14-16 provide that an employee has the right to be accompanied by a companion at the meeting to discuss the application or the appeal. The companion must be a fellow worker employed by the same employer. The employee may bring a complaint to the employment tribunal that his employer has failed or threatened to fail to allow a companion to accompany him to the meetings. Both the companion and the employee are protected against detriment or dismissal attributable to the fact that he took or sought to have a companion present or to act as a companion.

Regulation 17 sets out when an employer should treat an application as withdrawn.

A Regulatory Impact Assessment of the costs and benefits of these regulations to business has been placed in the libraries of both Houses of Parliament. Copies are available to the public from the Employment Relations Directorate, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET. The Assessment is also accessible at the Directorate's website www.dti.gov.uk/er.