

Disability Rights UK

Response to Right to Request Flexible Working Consultation 2021

Disability Rights UK is a national organisation led by disabled people. Our vision is a world where disabled people have equal rights, opportunities and access to power. Our work is rooted in the lived experience of disabled people. We are a membership organisation and work closely with organisations led by disabled people, across the UK.

I. Making flexibility the norm

A key strength of the consultation is that it creates a universality to requesting flexible working, making flexible working the norm. At present flexible working is seen as inaccessible for many disabled people, with only 48% of employed Disabled people agreeing or strongly agreeing that their employer is flexible and makes sufficient reasonable adjustments for disabled people (UK Disability Survey).

For disabled people who choose not to share their disability with their employer, the right to request flexible working provides a route for individuals to seek adjustments. The right to request flexible working also assists people who are temporarily disabled and who therefore do not fall under the definition of disability under the Equality Act.

To maximise the positive outcomes from this proposal, the definition of flexibility must be as broad as possible. Flexibility should cover when you work, where you work, how you work and what work you do (how tasks are allocated/clustered in roles). We recommend that this wider definition should be used in any guidance that accompanies legislative change, to encourage employers to think more broadly.

- ***We recommend that the definition of flexibility is as broad as possible and is covered in all guidance that supports the legislation.***

II. The framing of the consultation and missed opportunities to highlight the benefits for Disabled people

Flexible working is one of the key adjustments that some Disabled people request to enable them to work. In particular, people with fluctuating, energy-limiting conditions such as fibromyalgia, ME/CFS and Long Covid, say that working from home, working part-time and having flexible working hours are the key adjustments needed to enable them to enter, or remain in, the labour market. People living with mental health challenges say that having greater autonomy about when and where they work can help them to manage their condition and achieve work outcomes alongside accessing any support they may need (for instance, provided by the growing Individual Placement and Support services that enable people with mental health problems to get and keep work). However, this consultation fails to consider the benefits of flexible working for Disabled people, mentioning Disabled people only three times in the entire document. Instead, the consultation is focused largely on the benefits that will be created for parents and carers. The actions taken following the consultation should be more holistic and give prominence to the benefits to certain groups of Disabled people., Flexible working should be framed as something that benefits us all.

Earlier this year, the National Disability Strategy was published which contains a number of actions to reduce the disability employment gap and make the world of work more inclusive and accessible to Disabled people. The strategy states that there are 7 million working-age people with a disability or long-term health condition in the UK and that only a little over half are in work. In light of the Disability Strategy and the unacceptably high disability employment gap, the right to request flexible working as well as the promotion of flexible working under the Equality Act, must be used to improve work opportunities for Disabled people. Also, this year the Health and Disability Green Paper (2021) posed the question 'How can we support people who have fallen out of work to identify and consider

suitable alternative work before their Work Capability Assessment?'. For many disabled people out of work, knowing in advance that flexible working arrangements are on offer would act as an encouragement to give work a try. Many who become disabled and lose work also lose their confidence, and if job adverts stated that roles were open to flexible working that would help the aims of the Green Paper to encourage people to feel more confident to consider applying.

- ***We recommend that actions that follow the consultation highlight the positive outcomes that flexible working brings for recruiting and employing Disabled people.***
- ***We recommend that in light of the National Disability Strategy and the Health and Disability Green Paper, the right to flexible working should be promoted in ways that support the closing of the disability employment gap, complementing other actions in the Disability Strategy.***

III. Removing the 26-week rule

We agree with the proposal made in the consultation to remove the condition that an employee must have worked for 26 continuous weeks before they are able to request a flexible working arrangement. The current minimum time period of 6 months bars many Disabled people from seeking employment, as they would be unable to work without provisions for working from home, and/or working flexible hours to accommodate a fluctuating condition. Additionally, the six month rule makes it extremely difficult for many Disabled people to change jobs or employers, as they need flexibility from day one. The abandonment of the six month rule is essential in supporting disabled people seeking employment.

- ***We strongly agree that the need to work 26 continuous weeks prior to requesting flexible working arrangements must be removed.***

IV. 'Day one' is not soon enough

Despite being titled 'Making Flexibility the Default' the consultation does not offer employees any form of flexible working arrangements until after they have started their job. Creating a right to request flexible working on day one of a job, does not mean that the employee will be granted their request. Instead, employees may have to wait some time before flexibility is built into their role, if it is approved at all.

We strongly suggest that 'day one' is not soon enough to consider flexible working requests. Instead, the discussion of flexible working and the ability to request it should take place at recruitment and selection stages, and flexibility should be promoted during advertising. In doing so, employment opportunities will be created that benefit both disabled people and the business. This upfront discussion before the job starts would be positive for all job seekers and employers. One in three disabled people of working age in the UK experiences an energy limiting condition. If flexibility, in the form of working shorter hours or working from home to reduce energy spent travelling, was built into roles at advertisement stage, this would encourage those with energy limiting conditions to consider joining the workforce.

- ***We recommend that 'day one' is not soon enough to consider flexible working arrangements and instead flexibility should be built into the recruitment and selection processes, beginning at the job design and advertisement stages.***
- ***We recommend that the proposals in the consultation go even further and that employers are encouraged to build flexibility into job roles and introduce discussions on flexibility during the advertising, recruitment and selection processes.***

V. Reasonable Adjustments: the stronger of the two pathways

Under sections 20 – 21 of the Equality Act, employers are placed under a duty to make reasonable adjustments for those who are classified as disabled under section 6 of the act. The duty to make reasonable adjustments arises in three situations:

- a) Where a provision, criterion or practice applied by or on behalf of the employer,
- b) Where a physical feature of premises occupied by an employer, or
- c) Where a lack of an auxiliary aid

places a disabled person at a substantial disadvantage compared with people who are not disabled.

Under the Equality Act, Disabled people are able to request flexible working to meet their needs.

This is a stronger right than that set out in the consultation. The Government needs to be very clear that rights under the Equality Act are promoted at the same time as the right to request flexible working. Employers must not be confused by the new provisions and or neglect their duties under the Equality Act. It is therefore imperative that any subsequent actions following the consultation fully recognise the duty to make reasonable adjustments under the Equality Act.

The government must work to ensure that employers understand both the Equality Act provisions in respect of reasonable adjustments and the right to flexible working. While it would be beneficial were flexible working to become the norm, it is important to recognise that the rights that Disabled people have under the Equality Act are strong and must be upheld.

We suggest that someone with substantial working knowledge of the Equality Act as it applies to disabled people has a place on the Flexible Working Taskforce. It is also imperative that Disabled People's led Organisations are represented on the flexible working taskforce.

- ***We recommend that any actions emerging from the consultation recognise and promote the duty to provide reasonable adjustments under the Equality Act.***
- ***We recommend that someone with substantial working knowledge of the Equality Act as it applies to Disabled people has a place on the Flexible Working Taskforce and that Disabled people's led Organisations are also represented.***

VI. Rethinking the eight business reasons to deny a request

At present, if a flexible working request is turned down by an employer, they must state one of the eight business reasons for doing so:

- a) it will cost too much
- b) they cannot reorganise the work among other staff
- c) they cannot recruit more staff
- d) there will be a negative effect on quality
- e) there will be a negative effect on the business' ability to meet customer demand
- f) there will be a negative effect on performance
- g) there's not enough work for you to do when you've requested to work
- h) there are planned changes to the business, for example, your employer plans to reorganise or change the business and thinks the request will not fit with these plans

Focusing solely on reasons why an employer ought not to grant the flexible working request, reinforces negative preconceptions about flexible working arrangements. Research by the Trades Union Congress in 2019 found that one in three requests for flexible working were being turned down, with employers selecting reasons from the above list.

To reflect the clear benefits that flexible working can offer, we suggest that immediately preceding the section in the relevant documentation on the reasons why employers might turn down requests for flexible working, there should be a statement listing the positive benefits of providing flexible working, thus encouraging the employer to think carefully about their decision. For example, a positive reason to approve a request may be due to the staff member having a particular skill or ability or due to shortages in the labour market. These reasons should be balanced to encourage employers to consider the benefits rather than defaulting to denying the request.

Additionally, we believe that it is not enough for an employer to solely state a reason why an employee should not be granted their request but instead this needs to be demonstrated and evidenced, and open to challenge or appeal.

- ***We recommend that immediately preceding the section in the relevant documentation on the reasons why employers might turn down requests for flexible working, there should be a statement listing the positive benefits of flexible working.***
- ***We believe that employers must provide evidence which demonstrates the validity of the reason for denial of a flexible working request so that it is open to challenge by the employee.***

VII. Reconsidering the time period for the employer's decision

We strongly recommend that the three-month period be shortened to two weeks, mirroring the same time period as recommended by the Disability Employment Charter for employers responding to requests for reasonable adjustments, and that decisions relating to flexible working arrangements be made as a priority to ensure that employees are able to access the flexibility they need.

- ***We recommend that the three-month time period for an employer to reach a decision be reduced to two weeks.***

VIII. Encouraging temporary requests

We strongly recommend that the ability to request temporary arrangements for limited time periods should be created as part of this change. About 15 million people in England have a long-term health condition, many of which will fluctuate. For example, over a million people are currently experiencing symptoms of Long Covid which reduce their capacity for work. This condition fluctuates and the prognosis is uncertain. It is vital that for those with fluctuating conditions or short-term issues, that there is the capacity to create a temporary flexible arrangement to respond to changing levels of need.

- ***We recommend that employees should be granted the right to request temporary flexible working arrangements.***

Disability Rights UK

29 November 2021.