



Brachers Bitesize

Returning to the Office and Flexible Working

Tuesday 11 February 2025

Presented by:
Colin Smith, Partner

Brachers
With you all the way



Welcome

Brachers
With you all the way

Presenters



Colin Smith

Partner, Employment

e: colinsmith@brachers.co.uk

t: 01622 776451

Contents

- 01** What is gaining traction in the return to office debate and research
- 02** What is the legal position on return to work
- 03** Flexible working requests where are we now



Poll



Statistics

Trends

- Office of National Statistics:
- [Who are the hybrid workers? - Office for National Statistics](#)

Trends

- Worked from home in the last 7 days:

Yes, all of the time	15%
Yes, some of the time	26%
No, I am not able to work from home	34%
No, I have not worked from home although I am able to	10%
Not worked in the past seven days	15%

Trends

16 to 29	Yes, all of the time	7%
16 to 29	Yes, some of the time	21%
16 to 29	No, I am not able to work from home	50%
16 to 29	No, I have not worked from home although I am able to	8%
16 to 29	Not worked in the past seven days	15%

30 to 49	Yes, all of the time	22%
30 to 49	Yes, some of the time	34%
30 to 49	No, I am not able to work from home	26%
30 to 49	No, I have not worked from home although I am able to	9%
30 to 49	Not worked in the past seven days	9%

Trends

Male	Yes, all of the time	16%
Male	Yes, some of the time	26%
Male	No, I am not able to work from home	32%
Male	No, I have not worked from home although I am able to	12%
Male	Not worked in the past seven days	14%

Female	Yes, all of the time	14%
Female	Yes, some of the time	25%
Female	No, I am not able to work from home	36%
Female	No, I have not worked from home although I am able to	9%
Female	Not worked in the past seven days	16%

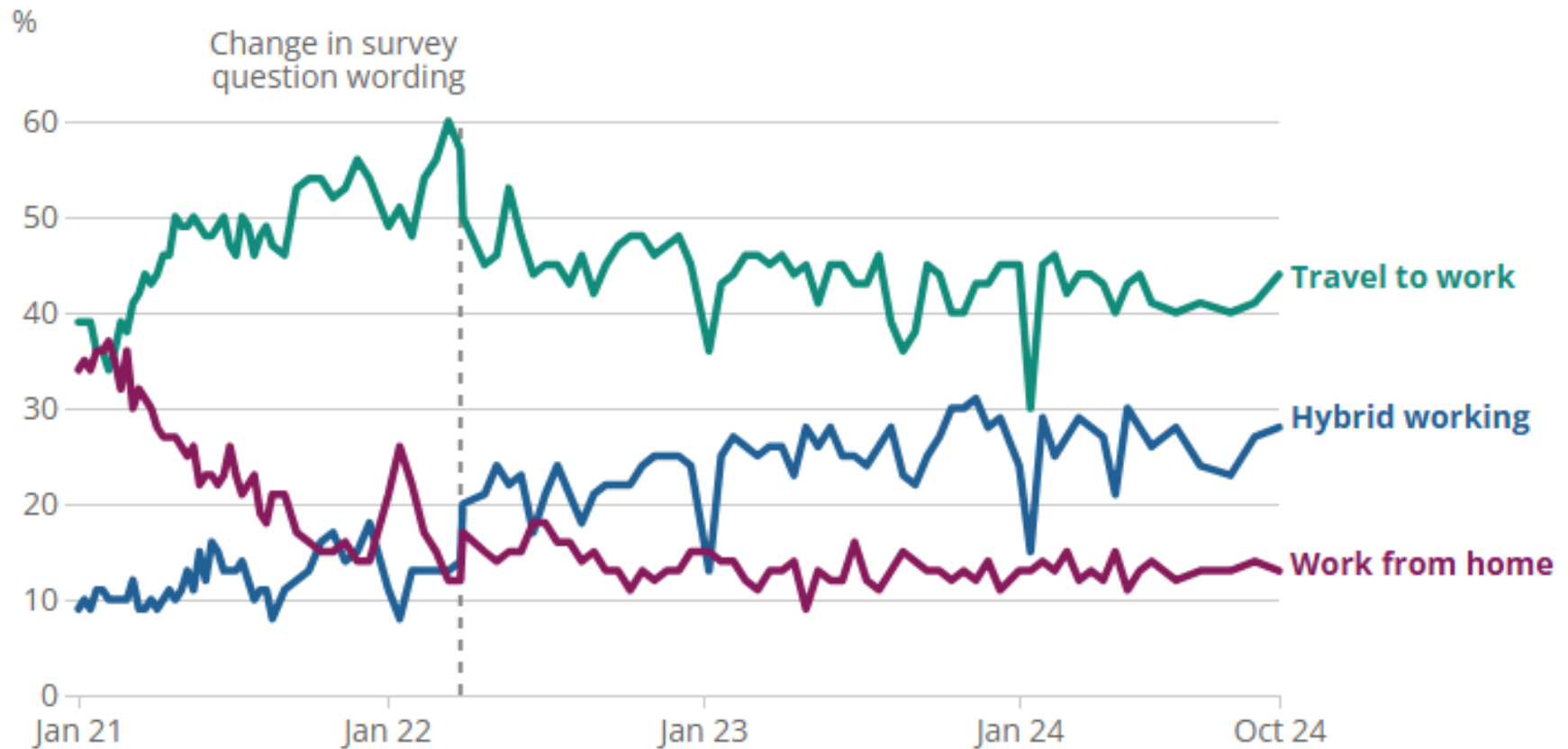
Trends

Percentage of working adults that have worked from home only

22 December 2020 to 3 January 2021	26%
13 December 2023 to 1 January 2024	13%
4 December 2024 to 5 January 2025	15%

Trends

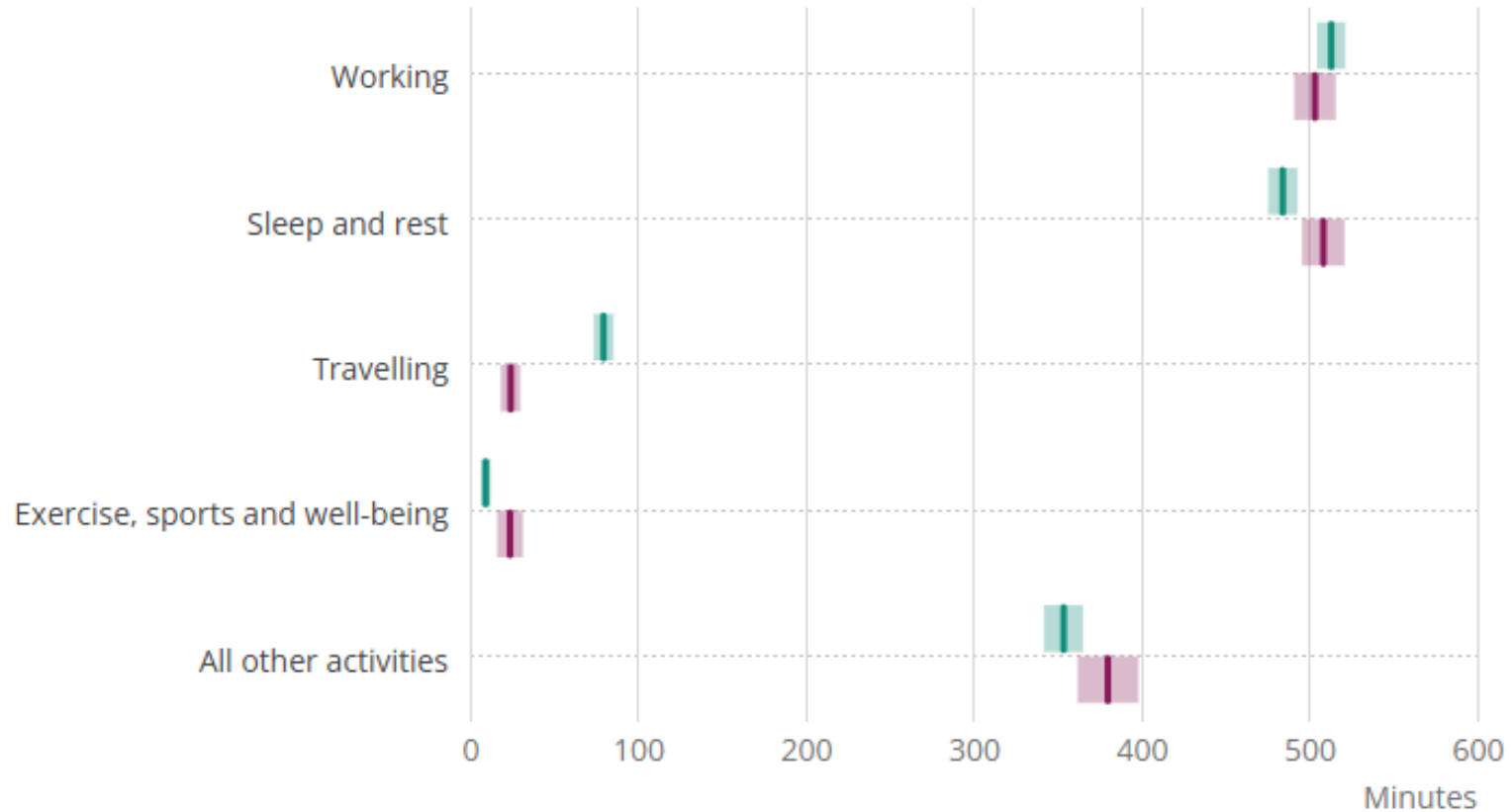
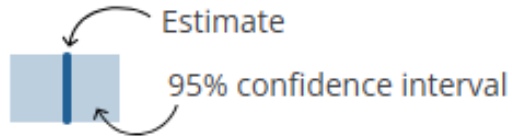
Percentage of working adults by working arrangement, Great Britain, 7 January 2021 to 27 October



Source: Opinions and Lifestyle Survey from the Office for National Statistics

Average daily minutes spent on different activities by work location, UK, March 2024

● Working away from home ● Working from home

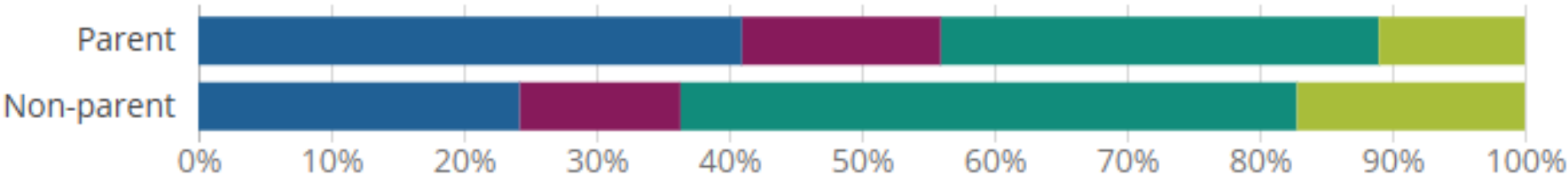


Source: Time Use Survey from the Office for National Statistics

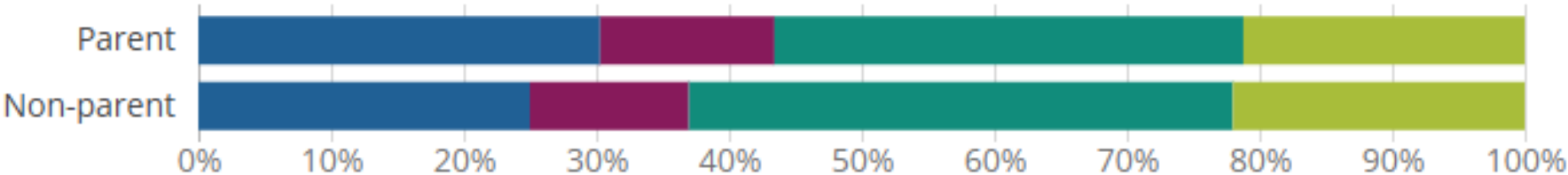
Percentage among working adults, by parental status and sex, Great Britain, 10 April 2024 to 30 June 2024

- Hybrid
- Home only
- Travelled to work only
- Didn't work from home and didn't travel to work [note 1]

Male



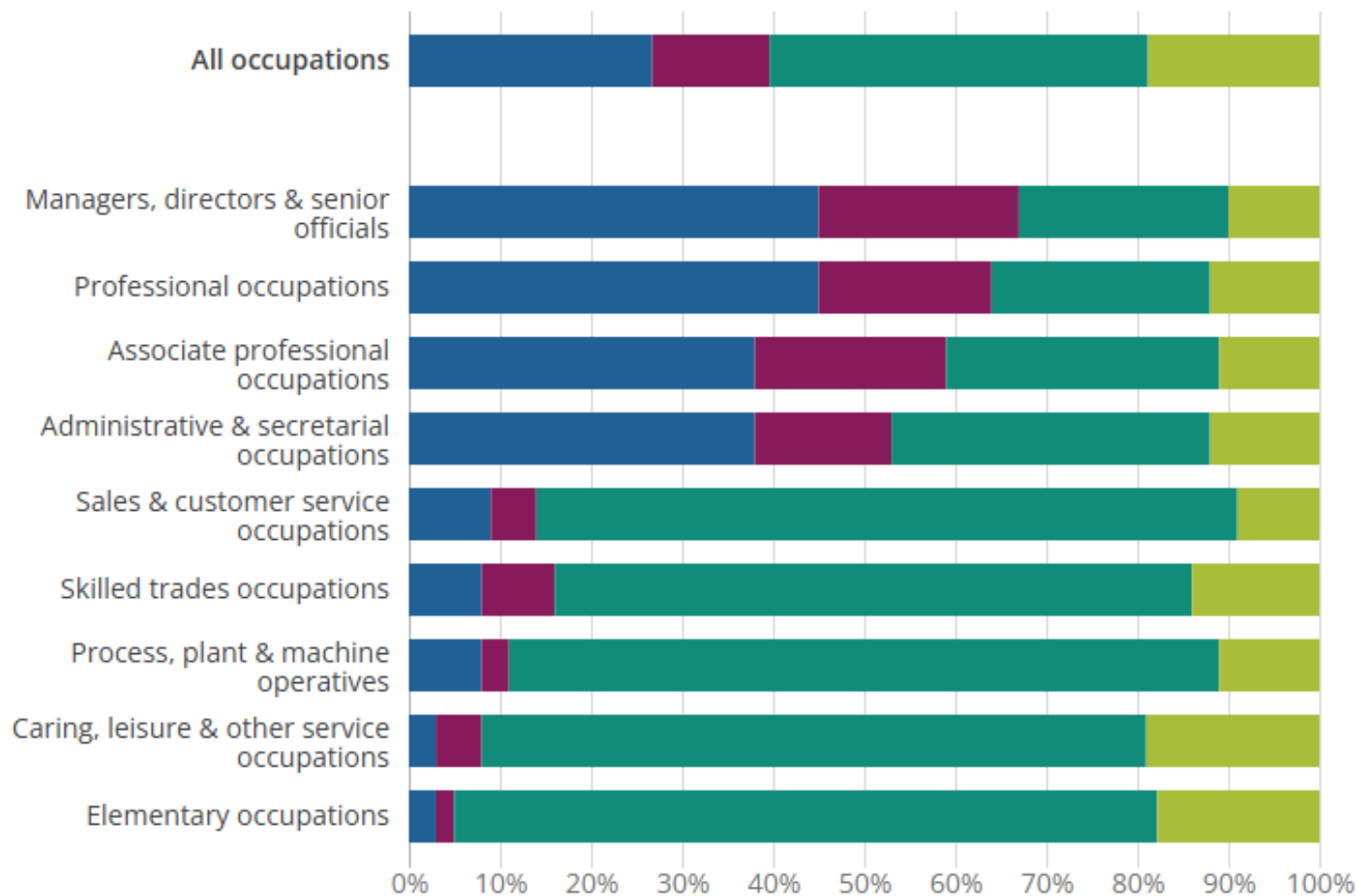
Female



Source: Opinions and Lifestyle Survey from the Office for National Statistics

Percentage among working adults by occupation group, Great Britain, 10 April 2024 to 30 June 2024

- Hybrid
- Home only
- Travelled to work only
- Didn't work from home and didn't travel to work



Source: Opinions and Lifestyle Survey from the Office for National Statistics



The Debate

Advantages

Advantages of Working From Home

Positive aspects of home working according to employees

Aspect	▼ Employees Affected
Improved work life balance	78%
Fewer distractions	53%
Quicker to complete work	52%
Improved wellbeing	47%
Easier to think of new ideas	16%
Easier to work with others	12%
Other, please specify	11%
No advantages	8%
More job opportunities	7%

Source: ONS • Embed

Forbes ADVISOR

Brachers
With you all the way

Disadvantages

Disadvantages Of Working From Home

Negative aspects of home working according to employees

Aspect	Employees Affected
Harder to work with others	48%
No disadvantages	31%
More distractions	26%
Reduced wellbeing	19%
Harder to think of new ideas	15%
Other, please specify	10%
Reduced work life balance	9%
Slower to complete work	9%
Fewer job opportunities	5%

Source: ONS • Embed

Forbes ADVISOR

Brachers
With you all the way

Benefits of flexible working

- For employees it could be:
 - Helping balance working lives alongside personal responsibilities, needs and preferences;
 - Promoting positive health and wellbeing; and
 - Opening up more job opportunities.
- For employers it can help:
 - Attract and keep staff;
 - Make employees more productive, keeping them happy and motivated;
 - Recruit employees for jobs that are harder to fill; and
 - Improve diversity and inclusivity.

Challenges

- Common concerns with hybrid working:
 - Communication barriers;
 - Collaboration and learning/development;
 - Learning and development for staff;
 - Maintaining company culture; and
 - Managing performance and productivity.

The push back (to the office)

- Lord Rose, the former boss of Marks & Spencer and Asda - working from home is creating a generation who are “not doing proper work”.
- Lord Alan Sugar - a lot of young people “just want to sit at home” and “they’ve got to get their bums back into the office”.

Returning to the office – The push back

- **Barclays:** Announced a return-to-office policy affecting thousands of workers
- **Starling Bank:** Requires hybrid workers to be in the office at least 10 days a month
- **Asda:** From January 2025, office staff must work in-office at least three days per week
- **Santander:** Implemented a return-to-office policy in 2024
- **JD Sports:** Mandated a return to the office in 2024



The Legal Aspects

Key Legal Issues

- Requiring Employees to return to the office (fully or more):
 - Contract Law
 - Discrimination Law
 - Flexible Working Law



Contract Law

Contract Law

- Can you order/instruct your employees to return to the office?
- Can you instruct them to work from home?
- Can you do this full time/part time/on what terms?
- Related issues such as expenses/commuting/business travel etc.
- Related issues such as can you dictate where home is?

Contract Law

- Back to basics:
 - What does their contract of employment say about their place of work?
 - Is there any evidence it has varied by agreement:
 - Written agreement
 - Oral agreement
 - Conduct of the parties as evidence of agreement?
- Case by case assessment and judgment for a court on the particular facts of each case.

Contract Law

- Example:
 - David's contract says he works in the Company's offices in Kent for all of his working time.
 - Prior to COVID he did so, he never worked from home.
 - During COVID lockdown he worked permanently from home.
 - Since the end of lockdown, he has continued to work permanently from home.
 - What is the contractual agreement now in 2025?

Legal risks of imposing a return to the office

- If you instruct and do not have the right:
 - Breach of contract
 - Likely a fundamental breach
 - Risk of constructive dismissal
 - Potential risk of constructive unfair dismissal
 - Maybe collective redundancy issues/collective dismissals/code of practice on fire and rehire
 - In any event, loss of staff/staff engagement/morale



Discrimination Law

Risks

- Is insisting on in office/premises working directly or indirectly discriminatory?
 - Sex Discrimination
 - Disability Discrimination
- Main risk is indirect – provision, criterion or practice
- Legitimate Aim?
- Proportionate means of achieving that aim?



Flexible Working Law

The Law

- Summary:
 - Part VIII A of the Employment Rights Act 1996 (ERA 1996) (sections 80F to 80I) (as amended)
 - Together with the Flexible Working Regulations 2014 (SI 2014/1398) (Flexible Working Regulations) (as amended).
 - Together with a statutory Code of Practice, “Code of Practice on requests for flexible working”, issued by Acas.

Types of Change

- An eligible employee may request a change to their employment terms if the change relates to:
 - A change to the hours they work.
 - A change to the times when they are required to work.
 - A change to their place of work (as between their home and any of the employer's workplaces).

(Section 80F(1), ERA 1996.)

Summary of the Right

- Summary:
 - Day one right (no longer have to be employed for 26 weeks).
 - Employees only - entitled to make two requests (instead of one) in any 12-month period.
 - Employers must decide in two months (reduced from three months), subject to agreeing a longer decision period.
 - Employers cannot refuse a request unless the employee has been consulted.
 - Employees no longer have to explain what effect their requested change may have on the employer and how any such effect might be dealt with.

Making a request

- A statutory request must:
 - Be in writing.
 - Be dated.
 - State that it is a request made under the statutory procedure.
 - Specify the change that the employee is seeking and when they wish the change to take effect.
 - State whether the employee has previously made an application to the employer and, if so, when.

(Section 80F(2), ERA 1996 and regulation 4, Flexible Working Regulations.)

Dealing with a request

- The employer must:
 - Deal with the request in a reasonable manner
 - Consult the employee before refusing the request
 - Notify the employee of its decision (including the decision on any appeal) within the two-month decision period, which may be extended by agreement.
 - Only refuse the request on one, or more, of the following grounds

Dealing with a request

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

(Section 80G(1), ERA 1996.)

Reasonable Manner

- There is no statutory definition of what it is to deal with a request in a reasonable manner.
- The Acas Code suggests that it

*“should include carefully assessing the effect of the requested change for both the employer and the employee, such as the potential benefits or other impacts of accepting or rejecting it”
(paragraph 8).*

Reasonable Manner

- Acas Code recommendations:
 - Where the employer cannot accept the employee's written request in full and must consult with the employee, the employer should organise a timely consultation meeting, preferably attended in person or remotely by video conference call.
 - The employer should allow the employee to be accompanied at a consultation meeting.

Reasonable Manner

- Acas Code recommendations:
 - The content of a consultation meeting, and the manner in which it is conducted, should enable a reasonable discussion and consideration of the employee's request. This includes considering use of trial periods in appropriate circumstances.
 - The decision reached after a consultation meeting should be confirmed in writing without unreasonable delay.

Reasonable Manner

- Acas Code recommendations:
 - The refusal of a request should clearly explain the business reason(s) together with any additional information which is reasonable to help explain the decision.
 - The employer should allow the employee to appeal against the refusal of a request and to be accompanied at an appeal meeting.
 - The decision reached after an appeal meeting should be confirmed in writing without unreasonable delay.

Consult the Employee

- Unless the employer decides to agree to the employee's written request in full, the employer must consult the employee before deciding whether to refuse their request.
- The Acas Code suggests that the employer should undertake consultation by inviting the employee to a meeting to discuss the request (paragraph 12) and that the employee should be allowed to be accompanied.
- A consultation meeting can help ensure all the relevant information is understood before a decision is made (and, where appropriate, can clarify whether a request concerns a reasonable adjustment for a disability) (paragraph 13),

Consult the Employee

- The employer should give the employee advance notice of the time and place of the meeting which should:
 - Be held without unreasonable delay, providing both parties with reasonable time to prepare for the discussion while taking account of the statutory period for deciding a request and any appeal (see The decision period).
 - Be held privately either in person or remotely via online video conferencing or, where neither of those are possible, via telephone call.
 - Be conducted by a person with sufficient authority to make a decision.

(Paragraphs 14, 15 and 18, Acas Code.)

Consult the Employee

- The content of a consultation meeting, and the way in which it is conducted, should enable a reasonable discussion and consideration of the employee's request (for example, discussing the potential benefits or other impacts of accepting or rejecting the request, and any practical considerations involved in implementing the request, will usually be helpful) (paragraph 16, Acas Code).
- If the original request cannot be accepted in full, the employer and employee should discuss whether it is possible to secure some of the benefits sought by the original request.

Consult the Employee

- For example, whether:
 - Any potential modifications to the original request, or any alternative flexible working options, are available and suitable for both parties.
 - A trial period may be appropriate to assess the feasibility of an arrangement (see Trial periods).

(Paragraph 17, Acas Code.)

- A written record of the meeting, which provides an accurate reflection of the discussion, should be kept (paragraph 19, Acas Code).

Consult the Employee

- The Acas Code suggests that, once it has made a decision about the request, the employer should confirm the decision in writing without unreasonable delay, taking into account the statutory two-month period for deciding requests including any appeal (paragraph 20).

Outcomes

- If the employer accepts the employee's flexible working request, the new work pattern will be a contractual variation to the employee's employment and will be permanent, unless otherwise agreed.
- The employer is obliged to issue a "section 4 statement": a written statement of changes to the employee's terms and conditions that have been provided in accordance with section 1, within one month of the changes taking effect (section 4, ERA 1996).

Outcomes

- The Acas Code suggests that:
 - The employer should confirm the details of the agreed arrangement in writing (paragraph 21).
 - The written decision should offer the employee an opportunity for a discussion to clarify any further information that may be helpful in implementing the agreed arrangement. This might include, for example, agreeing dates to review how the arrangement is working (paragraph 22).
 - The employer and employee may mutually agree that such a discussion is not necessary but, if one takes place, an accurate written record of the discussion should be retained (paragraph 23).

Ground for refusal

- In selecting the ground for refusal, the wording of section 80G(1)(b) of ERA 1996 suggests that the test is a subjective one on the part of the employer.
- If the employer considers that one or more of the grounds applies, then the test is satisfied.
- The test does not on the face of it import any question of reasonableness into this judgment.
- It would appear that, assuming one of the eight reasons is given, an employee could only challenge the employer's decision if the employer's view is based on incorrect facts.

Ground for refusal

- There is no statutory requirement to include a “sufficient explanation” as to why a particular ground applies.
- The Acas Code suggests that when an employer refuses an employee’s request, the employer’s written decision should clearly explain the business reason(s) and “set out any additional information which is reasonable to help explain the decision” (paragraph 24).

Future legal position and expectations

- Employment Rights Bill:
 - Introduce a test of “reasonableness” where an employer considers a statutory **flexible working** application.
 - Require that notification of the employer's decision will have to state the ground or grounds for refusing the application and explain why the employer considers that it is reasonable to refuse the application on that ground or those grounds.
 - Set out steps in regulations made by the Secretary of State that the employer must follow to comply with the requirement to consult with the employee before refusing a request for **flexible working**.
 - Same current list of grounds for refusal.

Future legal position and expectations

- This will, in theory, make it more difficult for an employer to refuse a request for flexible working.
- The test will move from subjective to objective.
- This will put more scrutiny on the rationale for refusal by an employer.
- It is not quite, however, the politically promoted, “flexible working as the default position”.
- It is likely to result in more tribunal claims where a flexible working request is refused.

Claims for Failure

- An employee who has made a request under the statutory procedure may bring a claim on the basis that the employer:
 - failed to deal with their request in a reasonable manner.
 - refused the request without consulting the employee.
 - failed to notify them of the decision on their request within the decision period.
 - rejected the request for a reason other than one of the statutory grounds.
 - **decision to reject the request was based on incorrect facts.**
 - treated the request as withdrawn but neither of the grounds entitling the employer to do so applied.

(Section 80H(1), ERA 1996.)

Claims for Failure

- **But** the compensation limit is eight weeks' pay set out in section 80I of the ERA 1996 for a successful claim brought under section 80H.
- **But** can order reconsideration.
- No proposals to increase this.

Wider Risks

- Employees who make, or plan to make, a statutory flexible working request are protected from unfair dismissal and detriment.
- If someone is dismissed for making a flexible working request, it will be treated as an automatic unfair dismissal (a day one right).
- Detriment means someone experiences being treated worse than before and/or having their situation made worse. Examples include:
 - Bullying;
 - Harassment; or
 - Overlooking promotions or development opportunities.

Risks if employers get it wrong

- When handling a request, employers must not discriminate unlawfully against the employee in relation to any of the protected characteristics set out in the Equality Act 2010:
 - age
 - disability
 - gender reassignment
 - marriage and civil partnership
 - pregnancy and maternity
 - race
 - religion or belief
 - sex
 - sexual orientation

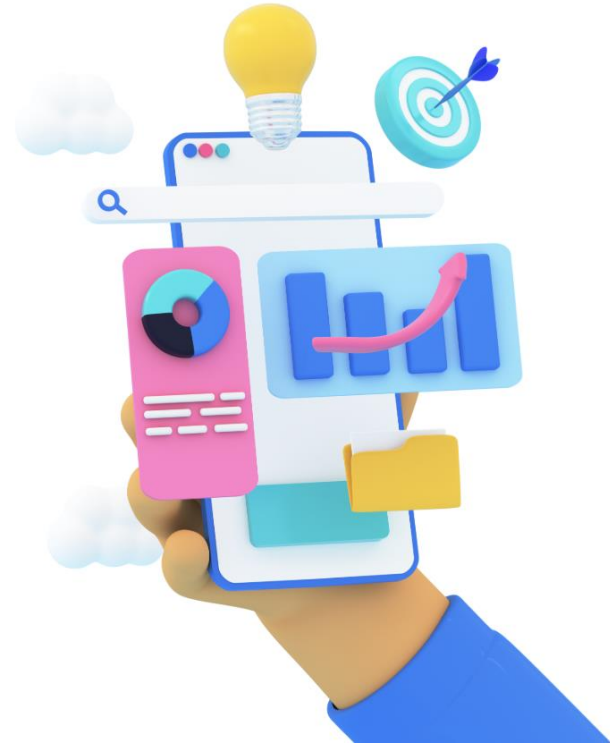


Questions

Keep up to date

Follow us on Social Media

Stay up to date with the latest business news and insights.



@brachersllp



@brachersllp