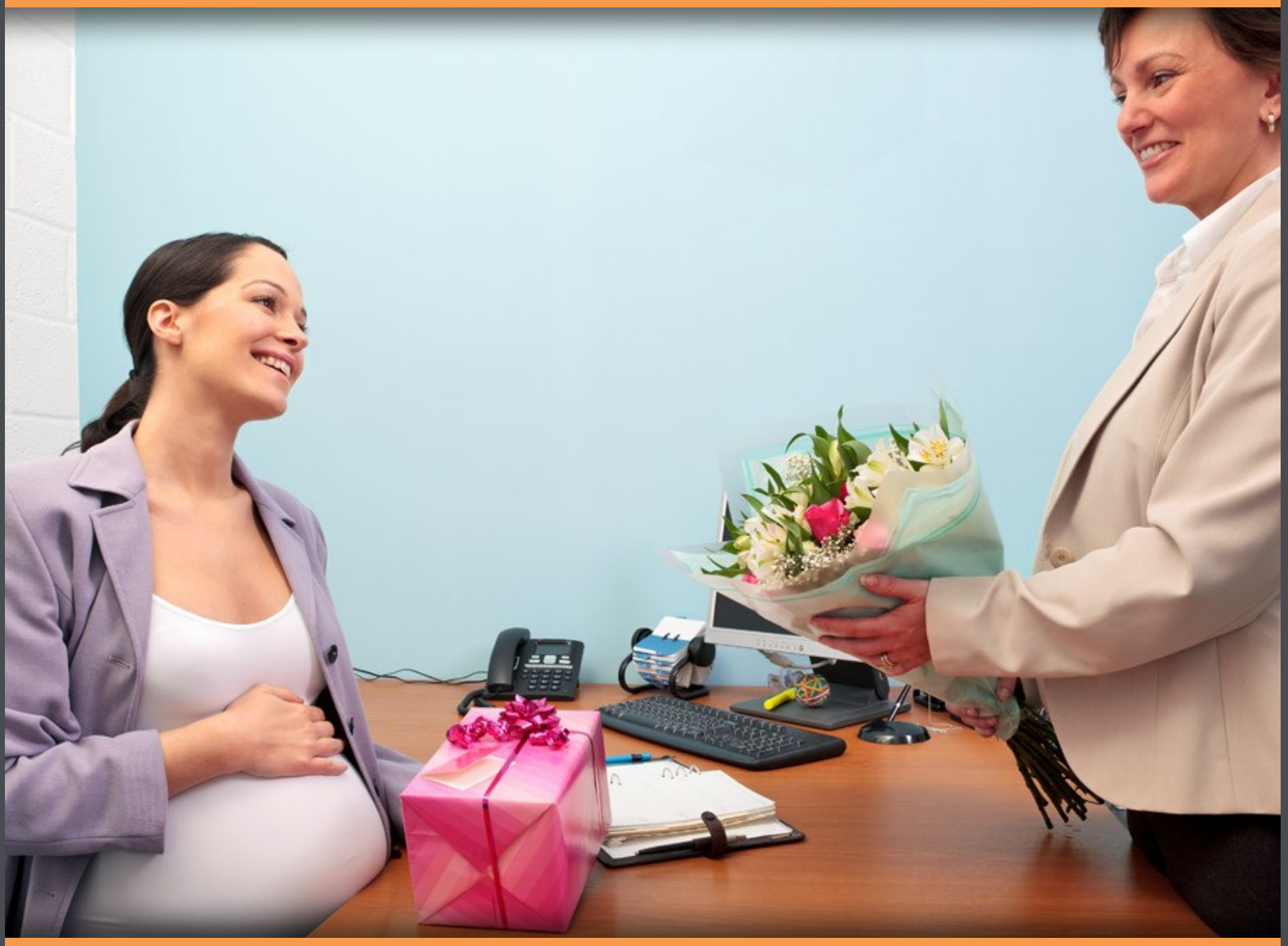
Employers Guide to Family Friendly Flexibility

Kate Russell



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Preface

Over the last few years successive governments have increased existing and introduced new family friendly rights.

When Margaret Attwood wrote The Edible Woman in 1969 woman had very few rights in the workplace. Many were dismissed when they became pregnant and had no legal protection. Since then there have been a number of statutes passed with the result that women who are pregnant or on maternity leave are among the best protected employees in the UK. From the introduction of six weeks' maternity pay in 1975 to the right to return to work after having a baby in 1981, things have slowly changed and improved for female employees.

From 2002 we have seen a significant increase in rights for families. Most of the rights support employees with young children, but they have been extended to include older children as well as employees caring for adult dependents. The legislation has been strongly supported by case law, in particular the cases decided by the European Court of Justice.

There will be more in the pipeline. Ever since the Coalition Government came to power in 2010 it has indicated that it wants to introduce flexible working for all employers.

About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her brand of down-to-earth, tactical HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine and her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries and occupations across the UK. Our team of skilled and experienced HR professionals has developed a reputation for being knowledgeable, robust and commercially aware. We are especially well versed in the tackling and resolving of tough discipline and grievance matters.

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Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email pm@russellhrconsulting.co.uk for an up-to-date copy of statutory limits. Please cite BookBoon-Family Friendly when you do so.

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Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

1 Overview of the Ebook

1.1 Introduction

From 2002 onwards we have seen a significant increase in rights for families. Most of the rights support employees with young children, but they have been extended to include older children as well as employees caring for adult dependents. The legislation has been strongly supported by case law, in particular the cases decided by the European Court of Justice.

This book takes the reader through the current framework of family friendly legislation.

1.2 Maternity rights

There are a number of special provisions protecting pregnant employee and employees who are on maternity leave. Such employees are protected from unlawful discrimination and also from being subjected to a detriment for a reason related to their pregnancy or maternity.

1.3 Paternity rights

Paternity rights were first introduced in 2002. These enabled the father to take paid time off at the time of the birth to help and support the mother. Additional paternity leave has been added more recently, to enable the father to spend time with the baby in the first year of its life.

1.4 Adoption rights

While adoption in the UK remains a difficult and protracted process, employees who are successfully able to adopt, either from the UK or abroad, will need support and time to adjust in the child's first year of placement. Adoption rights, which are very similar to maternity rights, provide the necessary help.

1.5 Flexible working

Love it or hate it, the right to request flexible working is firmly on the Government's agenda and the courts are very supportive of family friendly rights. There are clear processes to be gone through and many organisations fail to follow them correctly, or make decisions without properly establishing the facts. An unreasonable refusal can lead to complaints to the tribunal.

1.6 Time off for dependents

Even in the best organised homes and businesses, things can go wrong from time to time and we need to take some time to get sorted out. If problems of an unforeseen nature arise and they involve an employee's dependents, the Government recognises that it is reasonable to take a brief unpaid leave of absence to resolve the problems.

1.7 Parental leave

The right to take parental leave has been with us since 1999, but in reality relatively few employees take the time, largely because it is unpaid.

The right to planned parental leave is to allow an employee to make arrangements for the good of his/her children. In the absence of other arrangements, the statutory model applies, which means that the employee has to take a whole week off, all of which is unpaid.

2 Maternity rights

2.1 Introduction

This chapter focuses on the provisions that apply to pregnant employees and those on maternity leave. Such employees are protected from unlawful discrimination and also from being subjected to a detriment for a reason related to their pregnancy or maternity.

2.2 Notification

Maternity leave can start no earlier than 11 weeks before the Expected Week of Childbirth (EWC), unless the woman gives birth early or when medical reasons require her to begin maternity leave early. If she is absent from work wholly or partly because of her pregnancy in the four weeks preceding the EWC, maternity leave automatically starts from the first day of absence. If the woman gives birth before maternity leave was due to start, maternity leave commences on the date of the birth.

A pregnant employee is not obliged to notify her employer of the pregnancy until she reaches the end of the 15th week before the baby is due. At that stage she must notify the following information to her employer:

- that she is pregnant and notification is being made at least 28 days before she wants her leave to start;
- the EWC, by means of a medical certificate, if requested;
- the date when she intends to start maternity leave.

Within 28 days of receipt of this notification, you must reply to her in writing, giving her the expected return to work date. The legislation assumes that a woman will take the full maternity leave to which she is entitled.

Once the notification has been made, the employer will respond in writing within 28 days telling her when she is due to return. The employer will work this out on the basis of the full leave entitlement of 52 weeks.

The employee must provide medical evidence of the EWC in the form of a maternity certificate. This certificate is the MAT B1 form and is available from a doctor or midwife after the 20th week of pregnancy. It must be handed to the employer as soon as possible, but no later than three weeks after the start of the Maternity Pay Period (MPP). No Statutory Maternity Pay (SMP) will be payable without this certificate.

2.3 Ante natal care

All pregnant employees are entitled to reasonable time off with pay to keep appointments for antenatal care made on the advice of a registered medical practitioner, midwife or health visitor. Antenatal care can include relaxation classes and parent craft classes.

After the first appointment, you can ask to see a certificate confirming the pregnancy from a registered medical practitioner, midwife or health visitor, plus the employee's appointment card or some other document showing that an appointment has been made.

2.4 Safety

There are special rules relating to risk assessments for new and expectant mothers in the workplace. If you employ women of child-bearing age to do work of a kind that could involve risk to the health and safety of a new or expectant mother or her baby, you must include an assessment of those risks. You should not wait until an employee becomes pregnant before you carry out this assessment.

The type of risks will largely depend on the type of business it is. In an office environment, they may be as simple as people tripping over cupboard drawers which have been left open. If the business involves employees engaged in heavy lifting, or working with dangerous substances, they will be different and potentially more serious hazards. Common risks for new and expectant mothers include work-related stress, long working hours, lifting and carrying, excessive noise, handling chemicals, and movements and postures.

You must identify any risks and put in place precautions to prevent harm as far as is reasonably practicable. Nothing is ever 100% safe, but you can do a great deal to reduce risk to an acceptable level. Where there may be a risk, you must take all reasonable steps to reduce to an acceptable level or remove the risk altogether. This could include moving the employee to another job temporarily, on no less favourable terms of employment. Where you are unable to do this then the employee would be suspended on full pay until either the risk can be eliminated or her maternity leave starts.

2.5 Leave entitlement

A pregnant employee is entitled to a period of 52 weeks' maternity leave, regardless of her hours of work or length of service.

The woman can normally choose to start maternity leave at any time from the eleventh week before the expected week of childbirth up to the birth. She is entitled to work up to the week in which the baby is due if her health permits it. If she is absent with a pregnancy related illness at four weeks before the expected birth date, then this triggers compulsory maternity leave.

If a woman wants to return to work early from maternity leave, she must serve at least eight weeks' notice of her date of return to work. If she attempts to return to work earlier than the end of her maternity leave without giving eight weeks' notice, you may postpone her return until the full eight weeks' notice has been given. However, you may not postpone her return to a date later than the end of her maternity leave period.

An employee whose return has been postponed under these circumstances is not entitled to receive wages or salary if she returns to work during the period of postponement. However, if you didn't provide appropriate notification of when her leave should end the employee is not obliged to give the eight weeks' notice.

2.6 Maternity pay

A woman is entitled to Statutory Maternity Pay (SMP) if she has worked for her employer for a continuous period of at least 26 weeks, ending with the 15th week before the expected week of childbirth and has average weekly earnings at least equal to the lower earnings limit for National Insurance contributions.

To qualify for SMP the employee must meet the notification requirements at 11 weeks before the expected week of childbirth.

SMP can be paid for up to 39 weeks; it is payable by the employer but partly (or, for small firms wholly) reimbursed by the state. The first six weeks are paid at 90 per cent of her average weekly wage and the balance paid at the current weekly statutory rate.

A woman who does not qualify for SMP may be entitled to Maternity Allowance (MA), paid by the Department for Work and Pensions. To qualify, she must have been employed or self-employed for 26 weeks in the test period (the 66-week period before the expected week of childbirth), and have specified minimum average weekly earnings.

As a general rule, SMP is calculated on the basis of the average earnings of the woman taking maternity leave during the eight-week period ending on the last normal pay day before the end of the 15th week before the expected week of childbirth ('the Relevant Period').

SMP must be recalculated if the employee received a backdated pay rise which took effect during the Relevant Period.

Example

Ms Alabaster challenged the way in which legislation dictated that SMP should be calculated. The European Court of Justice found that not giving effect to a pay rise awarded throughout the entire duration of a woman's maternity leave amounted to a breach of the equal treatment provisions of Article 119 of the EC Treaty.

Alabaster v Woolwich plc [2004]

As a result of this case, a woman's SMP must be recalculated if she receives a pay rise which takes effect at any time between the start of the Relevant Period and the end of her maternity leave. Note that these rules apply not only when a pay increase is awarded, but also where such an increase would have been awarded had the woman not been absent on maternity leave. This is because a woman should not be subjected to a detriment due to the fact that she chose to take maternity leave

If the increase in SMP means that a woman qualifies for SMP for the first time, employers are only required to pay the woman the difference between Maternity Allowance at the standard rate and the level of SMP.

Women are entitled to receive SMP regardless of whether they intend to return to work. However, if the employee is taken into legal custody, or starts work for another employer payment of SMP will stop.

2.7 Other rights

During the whole maternity leave period, a woman is entitled to benefit from all her normal terms and conditions of employment, except for remuneration (monetary wages or salary).

In some cases employees are entitled to a contractual bonus, separate from their basic salary. It will depend on the phrasing of the arrangement. If it's a company-wide bonus based on company performance over the year, then everyone should receive a payment, including those on maternity leave.

Sometimes an employee will be entitled to receive a bonus based on the team's performance. In that case the bonus is likely to be pro rated and the actual time during which the employee is on maternity leave will not generally be included, except for the two or four weeks of compulsory maternity leave.

For example, a woman goes on maternity leave three months before the end of her company's financial year. At the end of the year, while she is on maternity leave, bonuses for the whole year are awarded to staff. The woman's bonus is calculated based on the nine months of the year when she was not on maternity leave plus the two week compulsory maternity leave period that applies to her because she is not a factory worker (it would be four weeks if she worked in a factory).

An occupational pension scheme is treated as including a maternity equality clause if it does not have such a clause already. The effect of this is to make sure that if a woman is on maternity leave, she will continue to build up the same benefits in relation to her pension.

You are not required to treat pregnant women more favourably than she would have been treated if she had not been pregnant. The European Court of Justice have found that it is not discriminatory to reduce the sick pay of a female worker who is absent due to pregnancy-related illness in the same way as for a male worker who is absent for some other illness, nor to offset such absences against the full entitlement under a sick leave scheme. However, pay cannot be reduced to an amount so low that it undermines the objective of protecting pregnant workers.

Example

Ms McKenna was absent on sick leave for almost the whole time she was pregnant. The illness was linked to her pregnancy. Her employer, the North Western Health Board had a sick-leave scheme under which employees were entitled to six months on full pay and six months on half pay within any four-year period. The scheme applied to pregnancy-related illnesses in the same way as any other forms of illness.

Ms McKenna was treated as having exhausted entitlement to full pay after six months' absence and her pay was reduced to half until the start of her maternity leave. At the end of her maternity leave, during which she received full pay in accordance with regulations that apply to health Boards, she was still unfit for work on medical grounds and again her salary was reduced to half.

Ms McKenna claimed that she had been discriminated against contrary to the Equal Treatment Directive in that her pregnancy-related illness had been treated in the same way as any other illness and her period of absence had been offset against her overall sick-leave entitlement. She also claimed that by placing her on half pay she was treated unfavourably.

The Equality Officer in Ireland upheld Ms McKenna's claim and ordered that arrears of pay be paid together with compensation for discrimination. On appeal by the Board, the Labour Court decided to refer the issues to the ECJ for a preliminary ruling. The Court found that it was not discriminatory where a rule of a sick-leave scheme provides that female workers absent prior to maternity leave due to an illness related to pregnancy are to be treated in the same way as male workers absent for any other reason, in regard to a reduction in pay where absence exceeds a certain duration, so long as the amount payable is not so low as to undermine the objective of protecting pregnant workers

Nor is it discrimination where a sick-leave scheme provides for absences on grounds of illness to be offset against a maximum total number of days of paid sick leave to which a worker is entitled over a specified period, whether or not the illness is pregnancy-related.

However, this is subject to the proviso that the offsetting of the absences on grounds of pregnancy-related illness does not have the effect that, during the absence affected by that offsetting after the maternity leave, the female worker receives pay that is lower than the minimum amount to which she was entitled during the illness that arose while she was pregnant.

North Western Health Board v McKenna [2005]

2.8 Reasonable contact

During the maternity leave period you may make reasonable contact with an employee, and vice versa. The frequency and nature of the contact will depend on a number of factors, such as the nature of the work and the employee's post, any agreement that you might have reached before maternity leave began and whether either party needs to communicate important information to the other, such as for example news of changes at the workplace that might affect the employee on her return.

The contact between you can be made in any way that best suits you both. For example, it could be by telephone, by email, by letter, involving the employee making a visit to the workplace, or in other ways.

You must, in any event, keep the employee informed of promotion opportunities and other information relating to her job that she would normally be made aware of if she was working.

It's useful to meet before the maternity leave starts, to discuss arrangements for staying in touch with each other. This might include agreements on the way in which contact will happen, how often, and who will initiate the contact. It might also cover the reasons for making contact and the types of things that could be discussed.

What constitutes 'reasonable' contact will vary according to the circumstances. Some women will be happy to stay in close touch with the workplace and will not mind frequent contact with the employer. Others, however, will prefer to keep such contact to a minimum.

2.9 Keeping in touch days

In order to facilitate occasional training, or keeping in touch without losing SMP, an employee can work for the Company for up to ten days during her maternity leave without ending her right to maternity leave and pay (if during the paid leave period).

She can work for one hour or a whole day. This will still be a Keeping in Touch (KIT) day. KIT day must be made by agreement between the employee and the Company. KIT days must be mutually agreed. The Company has no right to demand that any KIT work is undertaken and nor has the employee.

KIT days must be mutually agreed. The Company has no right to demand that any KIT work is undertaken and nor has the employee.

During these days she will be paid at her normal rate.

If the employee is still receiving statutory maternity pay the Company will continue to pay SMP for the week in which any KIT work is undertaken but will count the amount of SMP for the week in which the work is done towards the agreed contractual pay.

2.10 Return to work

If the employee returns to work after maternity leave she has the right to return to the same job on the same terms of employment as she had prior to commencement of leave.

If it is not reasonably practicable for her to return to her old job, she must be offered a job:

- that is both suitable and appropriate for her to do;
- on terms and conditions that are no less favourable than those for her original job.

Example

Mrs Blundell was a primary school teacher. The practice in the school where she worked was for teachers to teach a particular class every two years and then rotate. This gave a breadth of experience. At the time she started her maternity leave in January 2004, she was in her second year of teaching the reception class. On her return to work, at the start of the following academic year, she was offered the choice of a floating role or teaching year two. She chose the latter. However, she claimed that this was a more stressful role. She complained to the employment tribunal that it was not the same job that she had left prior to her maternity leave.

The EAT disagreed. As the role was regularly rotated, the EAT found that the nature of Mrs Blundell's job was to teach at a primary school. Her capacity was as a class teacher rather than a reception teacher, and her place of work was at the school and found her role to be that of a primary school teacher, and not specifically defined as a teacher of the reception class.
Blundell v St Andrews Catholic Primary School [2007]

An employer has to think about several things when deciding upon the 'same job'. The first is the 'nature' of the job, as provided by the contract of employment, the 'capacity' in which the employee is employed, which is a factual label to describe the employee's function more than merely their status and the 'place' at which the employee works.

Capacity and place are not dictated solely by the contract, but are to be decided by a tribunal on the particular facts. For example, where a mobility clause allowing for an alternative location exists in the contract of employment, this would not necessarily entitle an employer to move an employee on her return from maternity leave.

An employer is not obliged to freeze time at the precise moment that maternity leave is taken, but may have regard to the normal range within which variation has previously occurred. In Mrs Blundell's case, it concluded that teaching year two was not outside the normal range of variability that she could reasonably have expected, and was therefore the same job.

If the employer offers the employee a job that fulfils the criteria above and she unreasonably refuses it, she will be treated as having resigned.

If the employee is too ill to return on the due date, she must notify the employer and the usual sickness absence policy and procedure will apply.

If she does not wish to return after to work after maternity leave she must give notice of termination as outlined in the employer's terms and conditions.

She is entitled to return to her original job or a job that is a suitable alternative. If a redundancy situation has arisen, she is entitled to be offered a suitable alternative vacancy if one is available. It is for the employer to determine what constitutes a suitable alternative job, taking into account her circumstances.

If the employer cannot offer suitable alternative work, she may be entitled to redundancy pay, but if she unreasonably refuses a suitable offer, she may forfeit her right to redundancy pay.

2.11 Miscarriage or still birth

In the sad event of a miscarriage or stillbirth before or during the 24th week of pregnancy the employee will not be entitled to maternity leave or pay. In these circumstances she will be entitled to sick pay. Consideration will be given to granting special leave depending on individual circumstances.

A miscarriage or stillbirth from the 25th week onwards will mean that the employee is entitled to maternity leave and pay as outlined in this policy.

If a baby is born alive, but does not survive, the employee will be entitled to maternity pay or leave, regardless of weeks of pregnancy.

3 Paternity rights

3.1 Introduction

Paternity rights were introduced in 2002. These enabled the father to take paid time off at the time of the birth to help and support the mother. Additional paternity leave has been added more recently, to enable the father to spend time with the baby in the first year of its life.

3.2 Ordinary paternity leave

An employee whose children were born on or after 6 April 2003, enjoys a statutory right to paid ordinary paternity leave (OPL) provided he meets the following qualifications.

- He must have or expect to have responsibility for the child's upbringing.
- He must either be the biological father of the child or the mother's husband or partner (a female partner of the mother would qualify).
- He must have worked continuously for his employer for 26 weeks leading into the 15th week before the baby is due.

You can ask employees to provide a self-certificate as evidence that they meet these conditions.

Eligible employees may take either one or two consecutive weeks' leave (but not odd days).

Leave can start from:

- the actual date of the child's birth; or
- a chosen number of days or weeks after the date of the child's birth (whether this is earlier or later than expected); or
- a chosen date.

Statutory paternity leave may not be taken before the birth or adoption of a child. Leave can start on any day of the week on or following the child's birth but must be completed within 56 days of the actual date of birth or adoption of the child.

Employers will pay Statutory Paternity Pay (SPP) for either one or two consecutive weeks, as the employee has chosen. The rate of SPP will be at the current statutory maternity rate per week or 90 per cent of average weekly earnings if this is less.

An employee must give notice of his intention to take paternity leave by the 15th week before the baby is expected, unless this is not reasonably practicable. He will need to advise:

- the week the baby is due;
- whether he wishes to take one or two weeks' leave;
- when he wants his leave to start.

The date on which he wants his leave to start may be amended, providing he tells you at least 28 days in advance (unless this is not reasonably practicable). Employees are entitled to the benefit of their normal terms and conditions of employment, except for terms relating to wages or salary (unless their contract of employment provides otherwise), throughout their paternity leave.

Paternity leave and pay will be also available to employees following the placement of a child for adoption.

There is no right for an employee to take paid time off to accompany his pregnant partner to ante-natal appointments. If he wishes to have time off at this time, he has to book time off from his holiday entitlement in the normal way.

3.3 Paid OPL

Most employees will be entitled to Statutory Paternity Pay (SPP) during their period of ordinary paternity leave.

To be eligible for SPP the employee must have been continuously employed by the employer for at least 26 weeks leading into the 15th week before the baby is due. He will not qualify for SPP if his average weekly earnings are below the Lower Earnings Limit for National Insurance Contributions.

Pay during paternity leave will be paid in the normal manner and will be subject to deductions of income tax, pension contributions, if due, and National Insurance as usual.

Employees who do not qualify for SPP may be able to get Income Support whilst on paternity leave.

3.4 Right to return after OPL

Employees are entitled to return to the same job as before, on the same terms and conditions of employment, unless a redundancy situation arises. The law presumes that the employee will return to work after a period of paternity leave.

If the employee cannot return to work at the end of his paternity leave because of illness, he should follow the normal procedures for sickness absence.

If he does not wish to return to work he is required to give notice in accordance with his contractual notice period.

3.5 Additional paternity leave

Eligible employees may take up to 26 weeks' additional paternity leave (APL) within the first year of their child's life provided that the mother has returned to work. APL is also available to adoptive parents within the first year after the child's placement for adoption, provided that the child's primary adopter who elected to take adoption leave has returned to work.

The earliest that APL can start is 20 weeks after the date on which the child is born, or 20 weeks after the date of placement of the child for adoption; it must end no later than 12 months after that date. APL must be taken as a single block in multiples of complete weeks. The minimum period is two consecutive weeks and the maximum period is 26 weeks.

During the period of APL, the employee's contract of employment continues and with the exception of remuneration, he is entitled to receive all his contractual benefits. Pension contributions will continue to be made during any period when the employee is receiving statutory paternity pay but not during any period of unpaid APL.

An employee who wishes to request APL must give eight weeks' written notice of the date on which he wishes to take the leave, specifying the date on which the child was expected to be born; the actual date of birth or, in the case of an adopted child, the date on which the employee was notified of having been matched with the child and the date of placement for adoption.

He must also submit a self-certificate to his employer not less than eight weeks before the proposed start date of APL. This must state that the purpose of the leave is to care for the child and that he satisfies the relationship eligibility conditions.

The mother or primary adopter must submit a written and signed declaration form stating:

- his/her name, address and national insurance number;
- the date the mother/ primary adopter intends to return to work;
- that he has given notice to his employer of returning to work;
- that he is entitled to statutory maternity pay, maternity allowance or statutory adoption pay;
- the start date of the maternity or adoption pay period;
- confirmation that the employee satisfies the relationship eligibility conditions;
- consent to the Company processing the information contained in the declaration form; and
- that the employee is to her knowledge the sole applicant for additional statutory paternity pay and, in the case of a birth child, also that the employee is to her knowledge the only person exercising the entitlement to additional paternity leave in respect of the child.

The employer can ask the employee for evidence of the name and business address of the mother's or adopter's employer and a copy of the child's birth certificate or, in the case of an adopted child, evidence of the name and address of the adoption agency, the date on which he was notified of having been matched with the child and the date on which the agency expects to place the child for adoption. The employee must supply this information within 28 days of it being requested.

The employee can change the leave start date, provided that he advises the employer in writing at least six weeks before the new start date or as soon as reasonably practicable. The employer must reply in writing within 28 days, confirming the relevant start and end dates of APL.

3.6 Additional paternity pay

Additional statutory paternity pay may be payable during some or all of APL, depending on the length and timing of the leave. An employee is entitled to additional statutory paternity pay if in addition to the qualifying criteria to take APL:

- his average weekly earnings for the period of eight weeks ending with the relevant week are not less than the lower earnings limit for national insurance contributions;
- the mother is entitled to statutory maternity pay or maternity allowance or, in the case of adoption, the primary adopter is entitled to statutory adoption pay, and the mother or primary adopter has returned to work;

- the mother or primary adopter has at least two weeks of his/her maternity or adoption pay period that remains unexpired.

Statutory paternity pay is paid on the same basis and at the same rate as maternity pay.

The same rules relating to reasonable contact and keeping in touch days apply to APL, as do to maternity leave.

If the employee wishes to return to work earlier than the expected return date, he must give the employer at least six weeks' notice of his date of early return, preferably in writing.

An employee who takes OPL or APL is entitled to return to the same job that he did before starting paternity leave. It will be on the same terms and conditions of employment as if he had not been absent.

4 Adoption rights

4.1 Introduction

While adoption in the UK remains a difficult and protracted process, employees who are successfully able to adopt, either from the UK or abroad, will need support and time to adjust in the child's first year of placement. Adoption rights, which are very similar to maternity rights, provide the necessary help.

The primary rationale for adoption leave is to ensure that the new parents can take time off work to bond with the child once he or she starts living with them.

4.2 Who qualifies?

Since 6 April 2003, adopters have been given rights to time off and pay. This allows one member of an adoptive couple to take paid time off work when their new child starts to live with them. The other may take paternity leave and pay. This leave is available whether a child is adopted from within the UK or from overseas.

To qualify for adoption leave, an employee must be newly matched with a child for adoption and have worked continuously for his employer for 26 weeks, ending with the week in which he is notified of being matched with a child for adoption. This right is not available in circumstances where a child is not newly matched for adoption – for example, when a step-parent is adopting a partner's children.

The child may be anything from a new-born baby up to a child of 18. The adoption may be from the UK or abroad.

4.3 Notification

Adopters are required to inform their employers of their intention to take adoption leave within seven days of being notified by their adoption agency that they have been matched with a child for adoption, unless this is not reasonably practicable. They should tell you when they expect the child to be placed with them and when they want their adoption leave to start. They should also provide documentary evidence from their adoption agency as evidence of their entitlement to Statutory Adoption Pay (SAP). You can also ask for this evidence.

Once you have been notified of the adopter's intention to take adoption leave, you must reply within 28 days, setting out the date on which you expect the employee to return to work if the full entitlement to adoption leave is taken.

4.4 Adoption leave

Adoption leave and pay is available to individuals who adopt or to one member of a couple where a couple adopt jointly. The couple may choose which partner takes adoption leave and the other person can take paternity leave.

Qualifying employees are entitled to up to 52 weeks' adoption leave. Adopters who want to return to work before the end of their adoption leave period must give their employers eight weeks' notice of the date they intend to return.

Foster parents can take SAL in certain circumstances.

- The child that the employee fostered is then matched with them for adoption **by a UK adoption agency**. Adoption via a court order does not count.
- The child is then actually placed with them for adoption.

The adoption leave only relates to the actual placement for adoption - any period of foster caring does not count.

An employee can choose to start his leave:

- on the date of the child's placement (whether this is earlier or later than expected);
- on a fixed date which can be up to 14 days before the expected date of placement;
- on any day of the week.

If the child's placement ends during the adoption leave period, the adopter can continue adoption leave for up to eight weeks after the end of the placement.

If the employee wishes to change the date on which he wants his leave to start he must give his employer at least 28 days' notice.

Employees are only entitled to one period of leave even if more than one child is placed for adoption.

If the placement ends during the adoption leave period, adoption leave continues for up to eight weeks after the end of the placement.

4.5 Adoption pay

Statutory adoption pay (SAP) is paid for up to 39 weeks at the current statutory maternity rate per week or 90 per cent of average weekly earnings, whichever is the lower.

Those who are eligible are entitled to a total of 52 weeks' leave. An employee's contractual rights and benefits remain in place while he is on adoption leave except for the terms relating to his salary.

To be eligible for SAP the employee must have been continuously employed by the Company for at least 26 weeks leading into the week in which he is notified of being matched with a child for adoption. The rate of pay mirrors SMP. As with maternity pay 39 weeks are paid and any remaining leave is unpaid.

Pay during adoption leave will be paid in the normal manner and will be subject to deductions of income tax, pension contributions, if due, and National Insurance as usual.

Employees are entitled to receive SAP regardless of whether they intend to return to work.

4.6 Keeping in touch days

In order to facilitate occasional training, or keeping in touch (KIT) without losing SAP, an employee can work for the Company for up to ten days during his adoption leave without ending his right to adoption leave and pay (if during paid leave period). The decision to undertake a KIT day must be made by agreement between the employee and the Company

The Company has no right to demand that any such KIT work is undertaken and the employee has no right to demand to undertake such work.

During these days the employee will be paid at his normal rate as he is carrying out work for the Company under his contract.

If the employee is receiving statutory adoption pay the Company will continue to pay his SAP for the week in which any KIT work is undertaken but will count the amount of SAP for the week in which the work is done towards the agreed contractual pay.

4.7 Returning to work

The law presumes that an employee taking adoption leave will return to work at the end of the full adoption leave entitlement. If he intends to return to work before the end of the adoption leave period, the employee must give at least eight weeks' notice of his intended date of return. If he fails to do so, the Company may delay his return until the eight week period has expired, or the end of the adoption leave period, whichever is earlier.

When the employee returns to work after adoption leave he has the right to return to the same job he had prior to commencement of leave. If it is not reasonably practicable for the employee to return to his old job, he will be offered a job that is both suitable and appropriate for him on terms and conditions that are no less favourable than those for his original job

If the Company offers the employee a job that fulfils these criteria above and he unreasonably refuses it, he will be considered to have resigned.

If the employee is too ill to return on the due date, he must notify the Company and the sickness absence policy and procedure will apply.

Where the employee does not wish to return after his adoption leave he must give notice of termination as outlined in the Company's terms and conditions.

5 Flexible working

5.1 Introduction

The right to request flexible working is firmly on the Government's agenda and the courts are very supportive of family friendly rights. There are very clear processes to be gone through and many organisations fail to follow them correctly, or make decisions without properly establishing the facts. An unreasonable refusal can lead to complaints to the tribunal.

Employees must not be treated less favourably, suffer detriment or be dismissed because they request flexible working arrangements or take them up.

5.2 What is flexible working?

An application for flexible working is an application for a permanent variation to the employee's hours, time or place of work.

An employee can request a change to:

- the hours that he is required to work;
- the times that he or she is required to work; and/or
- where, as between his or her home and the employer's place of business, he or she is required to work.

Many requests for flexible working relate to requests to work part-time. That's only one option. There are a number of others.

Compressed Working Hours – the usual hours worked are completed over fewer working days. If the hours worked are more important to *when* the work is performed, this option gives employees the opportunity to work longer days in a shorter working week, and can work in most cases, although phone or other cover may need to be managed for all working days.

Flexi-time – this involves giving staff flexibility on the starting and finishing times of a working day, and can also include compressed working hours. With many options on how this policy is applied, this can give huge flexibility for both the employer and their workers with few complications if implemented and managed properly.

Home-working – this involves the work being performed away from the employer's premises. Health and safety of the staff would need to be considered, as well as protection of the employer's data, but modern technology will often allow employees to work (including taking calls) at any location where they can get internet access, or can use a computer to fulfil their duties.

Job-Sharing – a job is split between more than one employee, who work the necessary hours between them. This option can be difficult for some small employers where training may be necessary, but there may be savings on National Insurance contributions.

Sabbaticals or Career Breaks – staff are given a long break in their employment. This may not be suitable for all small employers, and in dealing with any request, they would need to consider whether the business can afford any extra cost associated with temps, or a fixed-term appointment to cover the absent employee.

Shift Swapping – workers given freedom to swap shifts between themselves, ensuring the shifts are covered. With good management procedures in place, to ensure the employer knows who is due in on any given shift, this gives employees more freedom, and can work for most employers where the staff perform the same tasks.

Staggered hours – different workers having different start and finishing times. These policies can serve the interests of both employers & employees, giving attendance in the workplace over a longer period of the day, and providing staff the option of getting off work earlier or arriving later, either of which can help manage work & child care or other responsibilities.

Term-Time Working – staff only attend the workplace during a school term, but are on leave at school holidays. This flexible working can be useful to employees without child care arrangements, and can often be coupled with part-time working.

Zero-Hours Contracts – employers only provide employment when there is work to be done. The staff remain employees, but are contracted for no set out hours. This is popular among small employers, particularly those looking at their first recruits.

5.3 Eligibility

Flexible working is about considering the way work is organised to see whether it is possible to have different arrangements: the result must always be, however, that the business achieves its core business purpose as efficiently as is possible.

To be eligible to request flexible working, an employee must:

- have a child under the age of 16 or under the age of 18 if the child is in receipt of disability living allowance; OR who is, or expects to be, caring for an adult who they are married to or are the partner or civil partner of; is a near relative; or lives at the same address; and
- be an employee with 26 weeks service; and
- have not made another application to work flexibly under the right during the past 12 months

The right to apply is limited to parents, i.e. this does not include aunts, uncles or grandparents, unless they have legal responsibility for the child. It applies equally to anyone who has responsibility as a parent of a child and should not present any additional barriers to same sex couples

There are a number of circumstances where an employee may have responsibility as a parent for a child. The employee must satisfy these relationship requirements if he expects to have responsibility for the upbringing of the child. The employee must meet one of the following conditions and be:

- The biological parent, guardian, adopter or foster carer of the child
- Married to a person as outlined in the above bullet point and lives with the child
- The partner of a person as outlined in the first bullet point and lives with the child

5.4 Making a flexible working request

All requests must be made in writing. When making a request, the employee needs to provide certain information. The request must:

- state that it is an application for flexible working;
- say whether a previous application has been made to the employer and, if so, when;
- specify the flexible working pattern applied for and the date on which it is proposed the change should come into effect;
- explain what effect, if any, the employee thinks the proposed change would have on the employer and how, in their opinion, any such effect might be dealt with;
- explain how the employee satisfies the requirements relating to the relationship with the child;
- be signed and dated.

5.5 Employers' responsibilities

The manager (or nominated person) will meet with the employee within 28 days of receiving an application to consider it. The employee has the right to be accompanied at this meeting by a work colleague. The employee must be informed in writing of the decision within 14 days of the meeting.

If the organisation accepts the request, it should write setting out the new arrangements and the date they take effect, together with any additional changes arising from the agreement. For example, if an employee wants to reduce his hours, his hourly rate will remain the same, but the amount he earns and his holiday entitlement will be pro rated.

If the employer rejects the application, it has to provide written business ground for doing so and an explanation. It must also set out details of the appeal process and to whom the appeal should be forwarded.

If the manager and/or the employee are not sure that the proposed flexible working pattern will work in practice, a different working arrangement will be discussed or, alternatively, the desired pattern will be allowed for a trial period before a formal agreement is reached.

An employer is under a duty to properly consider all correctly made requests. A failure to do so can lead to a complaint to the employment tribunal.

Example

Deborah Clarke had been employed in 1997 as an operations representative for Telewest in Dudley. She was contracted to work 37.5 hours per week which could include Saturdays and Sundays. She started maternity leave in May 2003 and made an application to change her hours on 31st July. She was due to return to work in January 2004.

She did not receive a response from the company within the specified 28 day period. A meeting was set up for 29th September in which her request for flexible working was rejected. An appeal meeting was arranged for December although it is clear that a decision had already been made by the company as Ms Clarke was handed a letter before the hearing took place, rejecting her request.

As a result Ms Clarke was forced to resign and she submitted her letter of resignation on 11th December 2003. Ms Clarke made claims at the Employment Tribunal of indirect sex discrimination, constructive unfair dismissal and for breach of the flexible working regulations.

Ms Clarke was successful in her claims at the Employment Tribunal, which found that Telewest had made a number of procedural errors in handling her application. It had failed to apply promptly to her initial request, it did not provide written reasons for the decision to refuse the change, and by rejecting her appeal by letter two days before the appeal hearing was to take place. This evidence pointed to Telewest having made the decision before properly considering the merits of her request. Clarke v Telewest Communications Plc [2004]

This case reminds employers of the importance of being flexible in their approach and to be familiar with the proper procedure for flexible working requests. Investigations of such requests must be undertaken thoroughly and transparently.

5.6 Further changes

The legislation gives the right for eligible employees to make one formal request in a 12 month period. If agreed that change is binding until such time as the parties agree to change it again (if they ever do).

If the manager and the employee think that a flexible working arrangement resulting in a permanent change to their contract of employment may not be the best solution, you can agree on an informal temporary arrangement. This may be appropriate where, for example, the employee suddenly becomes the carer of an adult with a terminal illness or they have to care for someone with a fluctuating condition like Parkinson's disease.

Put any such agreement in writing, including the notice needed from either party to end the informal arrangement.

5.7 Reasons for refusing a request

An employer may only refuse an application on one or more of the following business grounds:

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

Tribunals are increasingly willing to find cases of indirect discrimination proven and the case below illustrates how difficult it is for employers to justify refusals of requests for part-time work. In this case, the employer's requirement that a female employee work at least 75 per cent of her full-time hours was indirect sex discrimination, as it was a provision, criterion or practice that had a disparate impact on women and was not justified.

Example

Jessica Starmer was a female commercial pilot who had been employed by BA since 2001. In 2004, following return to work after maternity leave, she applied to work 50 per cent of her full-time hours. BA refused to allow this, arguing that she needed to maintain a minimum number of flying hours, but stated that she could reduce her hours to work 75 per cent of her full-time hours. Ms Starmer lodged an appeal under the company's procedure against her employer's decision but was still unsuccessful.

The business reasons given for the refusal included the burden of additional costs, an inability to reorganise work among existing employees, a detrimental effect on quality and performance and an inability to recruit extra employees.

Ms Starmer complained that BA had indirectly discriminated against her on the grounds of her sex. The company appealed unsuccessfully against the decision.

The EAT considered that the original tribunal had correctly weighed up the justifications put forward by BA for requiring that Ms Starmer work 75 per cent of her full-time hours, and was not persuaded that BA had satisfied the onus of justifying this requirement.

An issue of safety was considered separately as this was not taken into account by BA at the time of its decision, but raised as part of BA's defence to the proceedings. Safety was considered to be a relevant consideration to the justification argument, even though it did not feature consciously in the decision making process. However, even when considered with all the other justifications put forward for refusing Ms Starmer's request, the tribunal concluded that BA had not provided any cogent evidence as to why it would be unsafe or in any way unsuitable for her to fly at only 50 per cent of full-time hours.
British Airways plc v Starmer [2005]

5.8 Right of appeal

If an employee wishes to appeal against the decision to refuse the application, he must lodge his appeal in writing and within 14 days after notification of the decision. The letter must be dated and set out the grounds for appeal.

Wherever possible a more senior manager will hear the appeal, and this will be heard within 14 days of receipt of the appeal. The employee has the right to be accompanied to the appeal meeting as at the discussion meeting.

The employee will be informed in writing of the outcome of the appeal within 14 days of the date of the appeal meeting. Where the appeal is refused the employee will be given an explanation at to why.

After this a further statutory request cannot be made for 12 months, though there's nothing to stop the matter being discussed informally.

5.9 Withdrawal of request

An employer may treat an application for flexible working as having been withdrawn if the employee in question has:

- notified it orally or in writing that he is withdrawing the application;
- without reasonable cause, on more than one occasion failed to attend a meeting to discuss the application or a meeting to discuss an appeal where the application has been refused; or
- without reasonable cause, refused to provide information necessary in order for the employer to assess whether or not it should agree to the contract variation.

Except where the employee has provided written notice of his withdrawal of the application, the employer should confirm the withdrawal in writing.

5.10 Protection from detriment

Eligible employees have the right not to be victimised or subjected to any other detriment by any act, or any deliberate failure to act, by their employer for presuming to exercise or assert their statutory right to apply for flexible working, or for challenging or questioning any alleged infringement of that right (whether before an employment tribunal or otherwise), or for alleging the existence of circumstances that would constitute grounds for bringing proceedings before an employment tribunal.

Example

Thomas Horn was employed Quinn Walker Security as a security officer at an offenders institution in Darlington, where for two years he did the afternoon and evening shifts so he could look after two of his three children while his wife was at work. The arrangement had been informal and Mr Horn had been able to manage his work and childcare responsibilities by swapping his shifts with other employees.

When the company discovered the shift swaps, it told Mr Horn that he couldn't have this informal arrangement any longer, so he wrote to the company, making a formal request to work flexibly so he could look after his children. Shortly afterwards, he was dismissed for refusing to work to the company's system. He complained successfully to the Employment Tribunal, which agreed that he had been dismissed for asserting his statutory right. The dismissal was found to be automatically unfair. Horn v Quinn Walker Security Ltd [2003]

The amount of compensation that may be awarded to an employee in such circumstances is such amount as the tribunal considers just and equitable in all the circumstances, having regard to the infringement to which the employee's complaint relates, and any loss attributable to that infringement (including expenses incurred by the employee and any loss of benefit that he or she might reasonably be expected to have had but for that infringement).

6 Time off for dependents

6.1 Introduction

The Employment Rights Act 1996 gives employees the right to take reasonable time off work to deal with certain family emergencies involving a dependant. This time off will usually be unpaid, though consideration may be given to paying for some or all of an employee's time off work, depending on the circumstances.

6.2 Who is a dependent?

A dependant is someone who relies on the employee for assistance, such as a spouse or partner, parent or child. It may also include someone who is dependent on the employee from time to time, for example, an elderly neighbour. Tenants or boarders are not included in the right. Similarly, somebody living as an employee in the family home, for example, a live-in housekeeper is also excluded.

6.3 Right to time off

An employee has a right to take time off work if there are unforeseen circumstances and they are needed to give assistance, either when;

- a dependant falls ill or is injured;
- arrangements for the care of a dependant break down unexpectedly;
- a dependant gives birth;
- a dependant dies;
- there is an unexpected emergency involving a dependent child at school or on a school trip.

Example

Miss Moore, an employee with less than 12 months service, telephoned her employer on a Saturday to say that her father had been taken seriously ill in Ireland, and she needed time off work to make arrangements for her father's admission to hospital.

On the following Friday, she telephoned her employer to say that her father had taken a turn for the worse and was dying, and so she would not be able to return to work for another week. Her employer did not believe that her father was ill, and contacted the hospital who confirmed that her father was suffering from an acute medical problem which was not at the time, life threatening.

The employer telephoned Miss Moore to say that, unless she returned to work on the following Monday, she would be dismissed. Her father had a heart attack on Sunday, and failing to return to work on the Monday, her employer wrote to Miss Moore confirming that she had been dismissed. Her father died in hospital the day after she received her employer's letter.

The EAT held that an employee's right to time off to care for a dependant is a right to be permitted a reasonable amount of time off work in order to provide assistance or to make arrangements for the provision of care when a dependant is suddenly taken ill or injured. The EAT said that in the majority of cases one or two days will be the most that are needed to deal with the immediate issues and sort out longer term arrangements if necessary.

The EAT allowed the employer's appeal, but remitted the matter for a rehearing.
MacCulloch & Wallis Ltd v Moore [2002]

If an employee looks after a person who relies on them for help in emergencies, but the person involved is not a "dependant" as defined above (for example, a neighbour, family friend or more distant relative), then he may still be entitled to reasonable time off to help the person if he becomes ill or injured, or if the arrangements for his care break down unexpectedly.

Additionally, if an emergency occurs which is not covered by the right, such as, for example, a boiler bursting in the employee's home, this is considered to be a 'contractual matter' between the employer and the employee, and it is up to the employer to decide whether to grant time off under such circumstances.

6.4 Procedure

In order to qualify for time off under the right, as soon as an employee is aware of the emergency, he should notify his manager explaining the circumstances of the emergency and, if possible, the amount of time he expects to be away from work. If he is not able to notify you before leaving, he should notify you by telephone as soon as they can. He should keep in touch while he is away and keep you updated as to the emergency he is dealing with.

In order to keep company records up to date, he will also need to complete an absence request form on his return if it has not been possible to do this prior to the absence.

The employer is not entitled to demand detailed explanations of the reason why an employee cannot attend work.

Example

Mr Truelove had to work on some Saturdays. He became aware that his wife would also have to work on a specific Saturday and that their usual childminder would not be able to look after their young daughter on this day. As a result, Mr Truelove asked for the day off as annual leave a fortnight before it was required. This request was refused because of problems with staff cover. Mr Truelove made alternative arrangements, but these fell through the day before the child needed to be looked after. Mr Truelove mentioned to his manager on the Friday that it was possible he would need to take the following day off to look after his young child. Once Mr Truelove knew that he would be required to stay at home to look after his daughter, he asked another manager for the time off but didn't mention that it was because child care arrangements had fallen through at the last minute. His request was refused.

Mr Truelove was disciplined for taking unauthorised leave and lost his entitlement to a bonus of approximately £250. He complained that he had been unreasonably refused time off for dependent care leave.

The EAT said that the Act was aimed at helping people who were faced with sudden and difficult situations in respect of a dependant, in this case a child. In this situation, all that had to be communicated by the employee was enough information for the employer to understand that something had happened to cause what had been a stable arrangement in relation to a dependant to be disrupted, and that as a result of this the employee would have to leave work urgently. The EAT also held that in this case Safeway Stores had received sufficient information between the various managers to determine that the statutory right to dependent care leave had been engaged.
Truelove v Safeway Stores plc [2005]

6.5 How much time can an employee take off?

An employee is entitled to take a 'reasonable' amount of time off. The legislation does not give guidance on the amount of time off that would be deemed "reasonable". It is therefore likely that what is considered "reasonable" will be determined by individual circumstances.

When deciding what is considered reasonable, it is just the individual's circumstances that are taken into account, not the disruption and inconvenience caused to the company. Organisations should take a sympathetic approach where appropriate. Time off is given so that the employee can deal with an emergency. Usually, once the emergency has been dealt with, the employee should return to work.

In some cases, it may be that the incident may not be considered to be an emergency or the amount of time off requested by the employee is unreasonable. In such a case, the employer should speak to the employee with a view to agreeing a course of action. It might be appropriate for the employee to take time off work as part of his holiday entitlement instead.

Example

Ms Qua was employed as a legal secretary by JFM from January 2000. On 27 October 2000 she was dismissed because of her high levels of absence. Ms Qua complained that she should not have been dismissed on the grounds of her absences as these were caused by her having to take time off to care for her son who had medical problems. She claimed that she was entitled to that time off under the dependency leave provisions and that her dismissal was automatically unfair.

An employment tribunal dismissed her complaint on the grounds that her absences did not count as dependency leave because she had failed to inform her employer of the reasons for her absence as soon as reasonably practicable and/or for how long she expected to be absent. Ms Qua appealed.

The EAT set out guidance for the application of the dependency leave provisions.

- The right is for an employee to take time off to 'provide assistance'. This does not allow an employee to take time off to care for a dependant personally, except to the extent that this is necessary to deal with an immediate crisis.
- An employee must comply with the notice provisions in order to claim protection. A decision as to whether there has been compliance must be taken with regard to each instance of leave.
- In determining whether time off was necessary, a number of factors will be taken into account. These include the nature of the incident that has occurred, the closeness of the relationship between the employee and dependant and whether anyone else was available to care for that dependant.
- The amount of time that it is reasonable for the employee to take will depend on the circumstances in each individual case. It will always be a question of fact for the tribunal and it is not possible to lay down a maximum reasonable period.
- An employer is entitled to take previous dependency leave into account when determining whether an employee's absence is necessary and reasonable.
- Time off is permitted when a dependant 'falls ill'. This does not permit an employee to have an unlimited amount of time off. This is so even if the employee complies with the notice requirements each time and only a reasonable amount of time is taken on each separate occasion. The provision does not apply once it is known that the dependant is suffering a particular medical condition and is likely to suffer recurring illness.

Qua v John Ford Morrison [2003]

The courts are clearly prepared to construe the right very broadly. Even where the requested time off work is some way off, the disruption or termination of the childcare arrangements may still be "unexpected" and the time off may still be "necessary".

Example

Mrs Harrison, a part-time employee, and mother of two, was given two weeks' notice by her child minder that she couldn't work a specific day in the week before Christmas. Although Mrs Harrison tried to make alternative arrangements, none were available, and so a few days later she told her employer, the Royal Bank of Scotland (RBS), that she would need to take the specified day off work.

RBS could not find someone to cover for her, and so a week later her request was refused, and she was told that if she took the day off her absence would be unauthorised. However, without a replacement childminder, Mrs Harrison had to take the day off work and she received a formal disciplinary warning as a result.

Mrs Harrison brought a tribunal claim, which was found in her favour. Even though she had had two weeks to organise alternative arrangements for her child, the unavailability of her normal childminder was 'unexpected' and so the time off was ultimately necessary as a result of the unexpected availability. Royal Bank of Scotland (RBS) v Harrison [2008]

There may be some exceptional circumstances for example, where an employee returns to work before it has been possible to contact the employer, but he should still tell the employer the reason for the absence on returning.

The right to time off is a "reasonable" amount. It's not unlimited.

Example

Mr O'Toole worked for Cortest Ltd. He and his partner Ms Hyde have three children, the youngest of whom is difficult to manage. Following a period of sustained pressure at home, which was exacerbated by financial difficulties, Mr O'Toole took two days' sick leave to ease the pressure on Ms Hyde. However, she reached the point where she was unable to cope and had to leave the house for several weeks. As he could not afford to employ a temporary carer, Mr O'Toole felt that he had no option but to ask for time off. He telephoned his employer, Mr Wyeth, on 4 January 2007 to ask for one, or possibly two, months of unpaid leave. Mr Wyeth told Mr O'Toole that he could take the time off provided that he resigned. As long as there was work available, he would be reinstated when his domestic situation had improved. There were conflicting versions of this conversation. Mr Wyeth said that Mr O'Toole had asked to resign, while Mr O'Toole said he had done no such thing and complained he had been unfairly dismissed.

The employment tribunal found that there had been a dismissal, not a resignation. It preferred Mr O'Toole's version of the conversation on 4 January, supported by Ms Hyde's testimony that she had not heard Mr O'Toole utter the word "resignation" during the telephone call. Having established that there had been a dismissal, the tribunal went on to hold that Mr O'Toole's request for time off fell within the right to time off for dependants. The request was "because of the unexpected disruption or termination of arrangements for the care of a dependant" and had been made as soon as reasonably practicable. The amount of time off requested was at the top end of what might be permitted, but was reasonable in the circumstances. The tribunal took into account the fact that Mr O'Toole's request was for unpaid leave (and, as matters turned out, only four weeks off were required), as well as his length of service. As the request for time off fell within s.57A, the dismissal was automatically unfair.

The employment tribunal rejected the alternative submission that, if there was a dismissal, it was for some other substantial reason. The EAT found that whether or not there had been a dismissal was essentially one of fact.

The guidance indicates that time off for dependants is for the purpose of enabling an employee to deal with certain unexpected emergencies and to make any necessary long-term arrangements. It gives the example of the unexpected absence of a child's usual carer. This could occur where a childminder or nurse fails to turn up, or where a nursery closes unexpectedly. The guidelines do not specify the amount of time off that is reasonable, because this varies in accordance with the emergency. However, they do state that, in most cases, one or two days should be sufficient and that an employee "is not entitled to take two weeks' leave to look after a sick child".

The EAT held that one month or longer would rarely, if ever, fall within the right to time off for dependants. To allow a parent to become a childminder for such a long period would create another form of time off not envisaged by the legislation which was enacted to allow employees to deal with emergencies and to give them a short period of breathing space. The EAT remitted the case to a fresh tribunal to consider whether or not Mr O'Toole had been dismissed, and, if he had, whether the dismissal was fair or unfair, having regard to its conclusion that his request for time off did not fall within the meaning of the Act.
Cortest Ltd v O'Toole [2007]

In dealing with cases requiring time off for dependants, make sure that you act promptly when responding to requests for time off work and gather all the facts before making a decision.

6.6 Refusal

There may be certain circumstances in which a refusal to allow time off would be reasonable. Obviously if the employer was notified of the event after it happened, then this would not be possible, but if the employee is at work when the event arises then the employer may be in a position to refuse time off.

There are two main reasons where dependent care leave can be reasonably refused.

- If it is not necessary for the employee to take time off work. For example, it is unnecessary for both parents to take time off if their childminder does not turn up. It is however considered reasonable for both parents to take time off if their child has had a serious accident.

- If the amount of time off requested by the employee is unreasonable. Leave should be enough to help the employee cope with the crisis, and in most cases, one or two days is sufficient.

6.7 Abuse of the right

If an employer believes that an employee is abusing their right to time off, then the situation should be dealt with according to normal disciplinary procedures.

It is unfair to be selected for redundancy for taking, or seeking to take, time off under this right, and there is no statutory requirement for employees to produce evidence, either of the actual incident or of their relationship to a dependant.

7 Parental leave

7.1 Introduction

The right to parental leave entitles parents of both sexes (who fulfil the qualifying conditions) to take up to 13 weeks' unpaid leave to care for a child, or up to 18 weeks' for a disabled child. Employees will qualify if:

- they have at least one year's service with the company; and
- they have a child under the age of five (or 18 if disabled) or have a child who was adopted within the past five years and is under the age of 18; and
- they have - or expect to have - parental responsibility for the child, but they do not have to live with the child.

7.2 The right to time off

If an employee is entitled to parental leave, he is entitled to a total of 13 weeks' leave for each child in respect of whom the right applies. If the child qualifies for disability living allowance, then the parent is entitled to 18 weeks'. It is worth noting however, that employees can take no more than four weeks off in any one year, for each child. For this purpose, a year is calculated as the 12 months from the date upon which the employee first became entitled to parental leave in respect of the child in question.

If an employee has parental responsibilities for twins, triplets etc, he is entitled to 13 weeks' leave for each of those children.

Parental leave must be taken in blocks of at least one whole week and any shorter period of leave taken will be counted as a whole week's leave, and deducted from entitlement accordingly. A week is based on the week that the employee works. So if an employee works three days a week, he would be entitled to take 13 weeks based on a week of three days. The whole week is unpaid.

If the child receives disability living allowance, then the employee is entitled to take up to 18 weeks up to the child's 18th birthday. He may take leave in days, rather than whole weeks. In that case only the actual amount taken will be deducted from their entitlement. The leave is still unpaid and the notification requirements are the same.

Example

Mr Rodway was a train guard conductor who had been employed by South Central Trains Ltd since 1984. He had a two year old son who lived with his ex-partner. In June 2003, the child's mother asked Mr Rodway to look after their son on the 26th July, so that she could visit her disabled sister. Mr Rodway applied for a day's annual leave, but as it could not be guaranteed on that day, he requested a day's parental leave in writing. He was told verbally on the 24th July that this would not be possible, but having warned the employer that he would be absent, Mr Rodway spent the 26th July caring for his son.

He received a formal warning following a disciplinary hearing for unauthorised absence. He complained to a tribunal that he had suffered a detriment.

The court held that the minimum period of leave for which an employee could apply was one week. One week is based upon an employee's normal working week. The regulations specifically refer to a week's leave so the employer was right to refuse the employee's request and the disciplinary action had been justified.
Rodway v South Central Trains Ltd [2005]

The 13 or 18-week entitlement applies to an individual child, not to individual employment. Therefore if, for example, an employee has taken eight weeks' parental leave with their previous employer, he is only entitled to take another five (or ten) weeks while in your employment.

7.3 Terms and conditions during parental leave

As the employee will remain employed whilst on parental leave, some terms of their contract, such as contractual notice and redundancy terms, still apply. At the end of parental leave they have the right to return to the same job as before or, if that is not practicable, a similar job with the same or better status and terms and conditions. If they take leave for a period of four weeks or less, they are entitled to go back to the same job.

Some terms may be discretionary. For example, employees who have the use of a company mobile phone may be required to return that property during their period of leave.

Example

Susan Lewen was employed by Mr Denda's firm when she became pregnant. Her maternity leave ended on 6th September 1996, at which point she took parental leave until the 12th July, as permitted by German law. She did not receive a Christmas bonus because she was not in active employment on 1st December 1996. She claimed that this contravened EU law.

The ECJ said it was up to the national court to determine whether the bonus was to be regarded as retroactive pay for work performed during the year, or as a way of encouraging employees to work hard during the coming months. If the latter, failure to pay a bonus to a woman on parental leave would not be discriminatory, since the contract of employment has been suspended.

If, on the other hand, the bonus was classified as retro-active pay for work performed in the course of the year, then it would be discriminatory not to pay someone on parental leave.
Lewen v Denda [2000]

7.4 How much notice must an employee give?

If an employee wishes to take parental leave, he must give at least three weeks' notice of the date he wants the leave to begin, and the date upon which he intends to return to work.

If an employee wants to take parental leave immediately after the end of the maternity, paternity or adoption leave, he must notify his line manager 21 days before the maternity or adoption leave ends and in the case of paternity leave, inform the manager at the time paternity leave is applied for.

7.5 Postponing parental leave

In some circumstances, the employer can postpone the leave for up to six months where the business would be particularly disrupted if the leave were taken at the time requested. Examples of when it is reasonable for an employer to refuse leave include:

- when work is at a seasonal peak;
- if a significant proportion of the work force applies for parental leave at the same time;
- where an employee's role would mean that his absence at a particular time would harm the business; and
- if a replacement cannot be found during the notice period.

An employee may still take leave even if part or all of that leave will be taken after the child's fifth birthday (or fifth anniversary of the placement for adoption) if this is a result of the employer's postponement. However, an employer cannot postpone the leave so that it would end on or after the child's 18th birthday.

If postponement is necessary, it is important that the employer;

- gives the employee notice in writing within seven days of their request for leave, explaining why the dates given cannot be accommodated;
- tries to agree alternative dates for leave, of which will never be more than six months later than the original dates originally asked to take as leave.

When an employee applies to take parental leave immediately after the birth or adoption of a child, then leave cannot be postponed.

7.6 Providing evidence

An employer may require the employee to produce evidence of their entitlement to parental leave. In this respect, the employee may be required to provide proof of:

- their responsibility for a child in respect of which they are taking leave;
- the age of the child, or the date upon which the child was placed with the employee for adoption;
- where relevant, the fact that disability living allowance is being received in respect of the child.

The employee has an obligation to produce the evidence for the employer's inspection, and failure to do so could result in a request to take parental leave, being refused. An employee who tries to claim leave dishonestly should be dealt with under an employer's normal disciplinary procedure, as this is regarded as an act of gross misconduct.