



The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

Episode 5 – Flexible working with Kelly Thomson and Victoria Othen

Ellie Hi and welcome to The Work Couch podcast, your fortnightly deep dive into all things employment. Brought to you by the award winning employment team at law firm RPC we discuss the whole spectrum of Employment Law with the emphasis firmly on people. My name is Ellie Gelder, I'm a senior editor in the Employment, Equality and Engagement Team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of Employment Law and all the curveballs that it brings to businesses today. We hope by the end of the podcast you will feel better prepared to respond to these people challenges in a practical, commercial and inclusive way. Today we are going to talk about flexible working, a topic which has garnered its fair share of headlines especially in the wake of the pandemic which prompted a major shift in how many people do their work. Since those restrictions eased and workplaces reopened many people teams continue to grapple with how best to move forward with flexible working. What is effective? What is reasonable? How can we implement an arrangement that keeps everyone happy and which works for the business? So putting the pandemic aside, the need to work flexibly is actually nothing new. In fact it is a concept that was first introduced legislatively in the UK 20 years ago way back in 2003 but it is increasingly seen as a key driver for recruitment and retention amid the ongoing "war for talent". While on the flipside research has found that where flexible working isn't offered this is a major factor in women, often in senior roles, deciding to leave that business. So today we'll discuss why flexible working is more important than ever for employers and upcoming legal developments to look out for, we'll look at how the current law imposes certain obligations on employers when they receive requests from employees to work flexibly and we'll look at the practical considerations for businesses. We'll also look beyond the law and hear how the ability to work flexibly has had a major impact on the working and personal lives of two of our RPC colleagues. I am very happy to be joined on The Work Couch today by Victoria Othen, Consultant Employment Lawyer here at RPC and part time Employment Judge and Partner and ESG Lead, Kelly Thomson. Hi both, thanks so much for joining me today on The Work Couch.

- Victoria** Hi Ellie.
- Kelly** Hi Ellie.
- Ellie** So Victoria, in recent years I think the term hybrid working in some ways seems to have almost replaced the term flexible working, but actually hybrid working is just one form of flexible working and there is a whole host of other types of flexible working aren't there?
- Victoria** There are indeed. So, flexible working can relate to hours or the times that people work or their place of work. So aside from hybrid working where employees work some hours from home and other hours on site, other examples can include home working for example, which may not always be possible for employees in certain sectors, part time working, compressed hours and also flexitime working.
- Ellie** And we'll talk in a moment about the future of flexible working and what developments we are likely to see, but can you just summarise for us what are the current eligibility requirements? What do you need to have to request flexible working?
- Victoria** Yeah, no problem. So, it is important to emphasise that employees don't have a statutory right to flexible working but they do have a right to request it, that is an important difference. So to be eligible to request it, as the law stands at the moment it says that they must have at least 26 weeks' continuous employment and have submitted a written flexible working request in accordance with the key legislation, so that's the Employment Rights Act 1996 and the Flexible Working Regulations 2014.
- Ellie** And just briefly explain what an employer has to do legally when it receives an eligible request?

Victoria	So, employers must deal with requests reasonably and they must provide a decision within three months unless that period is extended by agreement. And requests can be rejected but they must be for legally prescribed reasons. There are quite a few of these. They include for example the burden of additional costs, detrimental effect on the employer's ability to meet customer demands or a detrimental impact on the quality or performance of the employee's work. They are fairly low hurdles when it comes to the reasons, there are quite a few of them and it's fairly easy to tie them into general work or commercial demands of the business.
Ellie	And there are legal consequences aren't there of failing to comply with that statutory process?
Victoria	Yeah, as far as the process is concerned, if an employer breaches the statutory procedure that I just outlined the employee can make a claim and if successful they can claim up to eight weeks' pay subject to a statutory cap.
Ellie	So looking at the DEI angle then in terms of flexible working, how you respond to any request is actually often a measure of how inclusive you are as an employer and could potentially raise the risk of a discrimination claim.
Victoria	Yes, I think this is where we get into the area of potentially costly or high risk claims. So, for example you may face a claim for indirect sex discrimination if your organisation's policy on flexible working places women, who are more likely to have, childcare responsibilities at a substantial disadvantage compared to men for example. Alternatively, you could face a direct sex discrimination claim if only your requests by women are accepted. And then as far as disability discrimination is concerned there is also a potential risk such as where a request amounting to a reasonable adjustment is refused. And with the discrimination claims there is no limit on the amount of compensation you can claim and no minimum length of service required to claim discrimination. Where a request is denied and employment ends other potential claims can include, for example, automatically unfair dismissal and constructive dismissal where an employee resigns. So managing these risks really requires careful consideration of each request on its own merits and its own facts.
Ellie	And I mentioned earlier Victoria, the fact that the pandemic caused that shift in how a lot of people work, but now that businesses are looking to get back to the quotation marks "new normal", I just wondered what kinds of concerns or issues do you come across from clients who are trying to find a way forwards with flexible work, and what are their concerns about flexible working?
Victoria	Yeah, so various clients have raised issues with us about for example, their ability and their concerns about raising or measuring and assessing productivity or work performance remotely. So, in the past obviously when an employee is on site there may be particular procedures that you use in measuring productivity which are more difficult to do from a remote location and the pandemic really led to everyone having to think more outside the box and to assess and measure quality of performance or productivity, in more imaginative ways. And more flexible ways. Now, when those employees have returned to work, employers often feel that they want to reinstate the original ways of working, pre-pandemic ways of working, but employees often push back because they have worked in a particular way and got used to working , for example, from home for a number of months or even years. And it may be difficult for an employer to reject a request for flexible working where they can say, for example, they need to measure productivity or assess performance, if for the previous 12 months they have managed to do so remotely due to the pandemic. So, really it is a case of rethinking processes and flexible procedures to maintain productivity and performance in a different way. So, for example doing so in a hybrid working relationship.
Ellie	Kelly there's been a real push for employers actually to allow employees to work flexibly. Tell us what changes the Government are expected to make to the law to strengthen those provisions that Victoria mentioned on flexible working?
Kelly	Yeah that's right. I think it's one of the reasons why you said right at the start Ellie there's been a lot of press coverage about flexible working recently and this series of proposals from the Government is one of the reasons for that. So a bit of a Christmas present I guess in December just gone. The Government confirmed its intention to make the right to request flexible working. Victoria was talking about a day one right so essentially from your first day in employment you would be permitted to request it. Again it's still a right to request, there's no suggestion of making that a kind of right to work flexibly. The estimate is that moving the right to be a day one right to request will kind of open up the option of asking for flexible working to about 2.2 million extra people. There are also some sort of associated changes that the Government have committed to including requiring employers to consult with their employees before they refuse a request so sort of having a dialogue. Allowing employees to make two requests in a 12 month period whereas at the moment they're sort of limited to one so if it's not successful you've sort of got to wait around. And also requiring employers to respond within two months of a request rather than three which I think is in part to enable that additional

	<p>request within a 12 month period if an employee wants to make it. And also currently there is a requirement on an employee who is submitting a request to their employer to set out how any effects of their flexible working request on the organisation could be met by the employer, so for example, there will be an increased workload for the rest of the team and here are my suggestions as to how that could be met, that's, that will be removed as a requirement going forward.</p>
Ellie	<p>And when can we expect the new law to come into force?</p>
Kelly	<p>That is a very good question. We don't have a date as yet and it's a bit of a mixed bag actually as to what, some of it is just the government has said they will issue some more detailed guidance, some of it requires secondary legislation so that is the move to a day one right, but some of the changes, so those ones I mentioned around the requirement to consult, the additional request option, the kind of shorter period of response, they require actually primary legislation. So we're going to have to wait until there is time in the parliamentary timetable.</p>
Ellie	<p>Let's look beyond the law now. As regular listeners will know here on The Work Couch we like to look at employment law issues in the round and that includes hearing about people's lived experiences of the topic in question and this episode is no exception. So I'm going to ask you Kelly and Victoria if I may, to take off your lawyer hats for a moment and put on your employee hats because you have actually both got your own stories of how flexible working has had a huge impact on your career. So, Kelly, can we start with you and the circumstances which led you to request flexible working and how that has shaped your career as an employment lawyer?</p>
Kelly	<p>Yeah, absolutely. So, I, I worked full time in a very standard sort of five days in the office up until my first maternity leave and my son was born and I kind of probably, in a pretty, sounds slightly arrogant, in my minds' eye I was like I want to work part time after having my child and that's what I'll do and it kind of hadn't occurred to me that that might be a challenge or an issue to get that agreed and it actually, it wasn't, because I've a really supportive team really, supportive organisation, but I've talked to so many friends who had different experiences and I realise just how privileged a) to be able to afford to make that work; b) to have the support at home to make that work; and c) to have the support within the workplace. So, yeah, after my maternity leave with my son I came back three days a week which was really unusual then, we're talking, well he's nearly 12, so we're talking a while ago, and did that all the way through to having my, I then had a second maternity leave and had my daughter and I came back again three days a week. So, it was the best part of probably five years or so, and I decided when they were both at school full time, that was when I was able to kind of increase my hours and what I, and it was very much coming from me and us as a family there was never any pressure to do that but I wanted to go back up to more than three days but even then I did it on a flexible basis. I continued sort of three normal days, that I was doing before and they were in the office, and then I added back in the two other days but they were short days from home. So essentially I worked during school hours so it didn't, it didn't, for the kids and for my time with the kids it didn't make any difference to them going from three up to nearly five because I was still dropping them off and then picking them up and around. But it made a difference, I felt like it made a difference to my, to the work that I could take on and to, you know, my ability to sort of feel like I was, the balance at work was different to what it was when I was doing three days a week. Because I think, I think it is, there are difficulties and challenges that we don't always talk about, because there is no point pretending that it's not challenging, because then people think oh my god, like I have to be able to, I have to be like a superwoman or a superman or a superperson and it's just not the case, it's just a different juggle to everybody else's juggle, but we all have a juggle. And it, to your second bit of your question, you said sort of how it has kind of affected my career or me as a, it's definitely, it did change some of my decisions, I mean it's very hard to look back and go what would you have done, you know if you were working differently, but I definitely decided whether this was the right thing to do or not is a different question but I thought I am not going to go for partnership until the work balance is different, until I'm not just doing three days a week. I think, I think the conversation might be very different now, I think I might feel very differently now, but certainly then I felt like that would be a stretch. But what was great is it didn't take me off the track. I made partnership afterwards and I definitely think, I'd be interested in what Vic thinks about this from her perspective, but I definitely feel like it has been a really positive learning experience that helps with advising clients because I see, I've experienced it from the angle of being the person working part time and now, you know, as a partner I experience it as from the employer side as well of thinking, of understanding both the challenges and the amazing opportunities it creates for brilliant people to continue to do great stuff. So, all in all a positive experience and I feel like I've learned tonnes of things that I still use every day now in my work. For sure.</p>
Ellie	<p>Victoria, tell us about your experience of requesting to work flexibly. What were the circumstances that led you to change your working arrangements?</p>

Victoria	<p>So, I was a little bit different to Kelly. For many years I worked in a commercial firm as a solicitor up in Liverpool, because I'm based in Liverpool, I'm not, I'm not down in London. So, I was working the billable hours and subject to targets along with a lot of lawyers and a lot of other professions, I had three young children and like Kelly I loved my work but I really kind of struggled with the conflict of fulfilling, meeting those targets and those billable hours in work and client demand. But also then the demands at home which were pretty full on with three young children. Constantly felt in conflict and guilty about the whole situation. So eventually I actually left employment and I took some time out, I decided to set up myself as a sole practitioner at that time, so we're talking about, about 12 or so years ago and my aim at that time was to carry on doing the job that I loved doing but to do it in a different way where I wasn't subject to targets and billable hours and I could do the work that I wanted in the way that I wanted to do it whilst fulfilling the client demand because clients ultimately want a good value service for, you know, a reasonable price, and ultimately that's what all clients in all sectors want. And that's when I was approached at that point by RPC through a mutual contact and there was, it was immediately apparent there was a synergy between us. So, RPC although they were based down in London, and are based down in London and Bristol, their requirements and their priorities were to provide a high quality service to clients and they didn't necessarily need office working or on-site working, they looked to provide that service in different and flexible ways. So, at that point I began working with them and for them for specific clients providing specific services. And it really struck up a relationship where I was able to work from home at that time, so we're talking about ten years ago where, you know, working from home wasn't as commonplace as it is now, anywhere near as acceptable as it is now. But both of us were able to kind of think imaginatively and because of the evolving impact and use of IT at that time, we were able to provide that service to clients and everyone was happy basically. So, the client was really, really happy with the service they received, RPC was happy with the way I was able to fulfil that brief and to provide that service and I was happy because I was able to work the hours that I needed to work in the way that I needed to work from home and although at that time the use of Skype and Teams and all the rest of it wasn't around anywhere near in the way that it was in, you know, or started in 2020 with the pandemic. You know, there was email, there were phones, there were other ways of talking and relating to people and providing a really good quality service to clients that didn't require you actually visibly to be in an office all working hours five days a week. So, that's how I approached it and I've worked as a consultant ever since really.</p>
Ellie	<p>That's really interesting and like you say, ten years ago, working from home, especially in the legal industry just wasn't very common at all. So, what has this arrangement meant for your professional life as a lawyer and now part time employment judge?</p>
Victoria	<p>So, similar to Kelly it's been overwhelmingly positive. It raises its own challenges but then I don't think really there is any straightforward or simple way of working when you have a home life too, so whether that be children or perhaps caring responsibilities maybe for parents or partners or maybe actually you have other things you want to balance with, in your life, other than work because although this is a work podcast obviously there is more to life than work isn't there. So, they all pose challenges because you want to work in a way which means that everyone is happy within the workplace, clients are happy, customers are happy, your colleagues are happy, but at the same time you can be there and present at home so that neither suffer. So that is a constant tension, it's a constant challenge. And, I don't think that will ever go away. But if you can manage to do it in a flexible manner rather than being tied to almost an artificial regime of being physically present it means that you can fulfil that brief more successfully. I think what it has meant for me personally is that I have had to be really organised and really planned, so you have to constantly plan ahead, you have to have a lot of self-discipline, because of, you know, what you are going to do when. You have to keep a focus on quality and not quantity which I think once you have got that as your prime driver it's a really important ethos to keep holding in mind. And now my kids are grown up so I can dedicate much more time to my career and I feel I haven't lost, you know, a valuable place or experience in the workplace. I haven't had to miss out on parenting as much as I would have done if I had remained employed and tied to normal working hours and, you know, normal procedures and ways of working. So, I think, provided you can set those parameters and you can be organised and you can plan effectively, really, I know it's a bit of a cliché, but I would say the sky is the limit when it comes to work and the way that you perform it.</p>
Ellie	<p>Fantastic. Thank you both for sharing such inspiring stories about how RPC was actually thinking outside the box way before talk of hybrid working became commonplace and its just, it is wonderful the firm had that vision to be inclusive regardless of people's caring commitments which, which I think has undoubtedly contributed to the lovely culture here that RPC is renowned for. So, as we look ahead to the future of flexible working, let's take a look at the ground-breaking pilot scheme for businesses to introduce a four-day working week without reducing employee's pay. So Kelly, this is a global pilot that launched last year.</p>

Kelly	Yeah. This is the other reason why we're seeing a lot of press I think about flexible working in recent months. So it's the biggest pilot of its kind I believe. It ran from June to December last year. And I think around 70 companies started this trial of a four day week. And it's a four day week with no loss of salary, so 100% pay, 80% days on the basis of employees committing to 100% productivity which for those of us who work part time, we recognise that, right? We've seen it before, people working three day week, three days a week somehow manage to do, to be as productive. But I think there's something in that. And it was a range of employers. The one that is quoted in every article you read about it, and it's wonderful, is the chip shop in Norfolk, so it's everything from chip shop in Norfolk up to kind of big software companies, banks etc. And I think the idea underpinning it is that, you know, we built the world of work for sort of a 20th century industrial kind of environment and that's not necessarily the most effective or efficient or good for wellbeing in every 21st century working environment. So lets try it out and see if there's anything in that.
Ellie	And the findings of the pilot which actually came out quite recently, they've been fascinating haven't they? Tell us what the findings were.
Kelly	Yeah, really fascinating. So, just about every organisation that took part, 92% in fact, has decided to continue with the shorter working week. They reported a reduction in employee burnout, anxiety, fatigue, sickness absence, 18 of the participants said it's going to be a permanent change, at least 56 are continuing with it in some shape or form. They reported a 57% reduction in the likelihood that an employee would quit their role, 65% reduction in sick days and interesting individuals were reporting, you know, sort of perhaps wider kind of benefits in terms of satisfaction with things like their household finances, their relationships, how their time was being managed, quite interesting. The other bit that was interesting because I think we all would have anticipated the employee wellbeing and sort of life-work satisfaction benefits that I've just mentioned but the vast majority of the participant companies were satisfied that business performance and productivity was maintained, and in fact some of those kind of key business metrics actually showed a positive impact, so revenue stayed broadly the same and in fact rose by 1.4% on average. And that's quite interesting as you pause for a second and think, , people were not working for 20% of the time they were before.
Ellie	It's amazing.
Kelly	And revenue rose. And it's amazing yeah. And there's some lovely sort of lived experience bits as well that I think are equally compelling. So there was a guy, I read an article, I think it was in Personnel Today, and there was a chap from Citizens Advice was saying, he said I feel like its really making a difference in so many crucial ways, staff are getting more work done in less time and overall working more efficiently and effectively. Most of our services are seeing more clients than they were before the trial.
Ellie	Yeah.
Kelly	I just thought that was, you know, so interesting.
Ellie	It's fascinating to see that and, so I guess watch this space for other businesses to follow suit and adopt something that will further change how people work today. So, certainly some positive strides in enabling people to work how they want to work, but we can't ignore the challenges of flexible working and obviously you have both alluded to various challenges for your arrangements. But just to touch on inclusion, it can also conversely raise the risk of exclusion. So, tell us how exclusion can occur, albeit unintentionally, in the context of flexible working.
Kelly	Yeah, I think it's a really important one, and we're starting to see some post eye of the storm pandemic research around the kind of more challenging impact and I think the one that is talked about quite a bit is remote workers in particular feeling isolated or disconnected from the team that they are involved in and also perhaps not feeling visible enough and therefore missing out on the perception of missing out on quality work or promotion, that whole out of sight out of mind piece of the jigsaw. Other things that I've seen come up are, the idea that flexible working is just for some people, for example, parents or even mothers, that of course your policy will never say that, anyone speaking to it with any level of kind of thought or understanding will never say that but that doesn't mean in an individual workplace people might not feel that that is the expectation and that creates almost these sort of unspoken tiers of different strata in the workforce which is, which is, you know, not good. And then I mentioned the policy there, you can't get away from that risk of a disconnect between a policy versus lived experience, you can have a wonderful bells and whistles we're a flexible environment, people can work in the way that they can, the way that they can best manage their lives, but if in your team that's not the done thing, that's your lived experience, that's your experience with that organisation and in fact having a policy that says something else doesn't help and can actually make it worse because you've got that disconnect. So, all of those sort of factor into how successful a flexible working approach will be. And then there's also just the way its managed day to day, so there's a lot written about,

	<p>you know, how even just things like a Zoom meeting, can be really exclusionary. Particularly in a hybrid world actually because it can be very easy with the best will in the world to forget if you are in a room with some people, that there are some people joining remotely and those people can end up feeling completely isolated from the call. And there's also like behaviours around, you know, people using the chat function or sending side messages and the exclusion that those sorts of things can inadvertently create as well. So, there's new etiquette issues that we all have to grapple with in our workplaces to ensure we're not inadvertently excluding people.</p>
Ellie	<p>And just to touch on those challenges as well I think it's really important in flexible working to, to make sure that they are genuinely flexible and not sort of a token effort and actually you've still got to do five days work into three, you know, that sort of classic situation that you hear about. So, if you're going to offer these flexible arrangements they need to be just that going back to your point about having a lovely policy, it's got to be genuinely flexible in real terms.</p>
Kelly	<p>Absolutely. And I think there's some research recently around fake flexibility and a number of women in particular reporting, yeah, sure on the face of it, it looks like I've got a wonderful flexible arrangement but these are the ways in which it has impacted on my progression, my sense of achievement at work, my sense of wellbeing and all of that stuff, and then actually you end up it becoming kind of a double edged sword don't you, where people think, right, great, we've sorted flexible working, job done, and actually there is people over there really struggling with the reality of it in your organisation.</p>
Ellie	<p>So what can businesses do to just minimise those unintended exclusionary consequences we've just talked about?</p>
Kelly	<p>I think you have to have that open conversation really if you want to make the most out of all of those arrangements, where I think organisations can go wrong is in having very silo'd sort of discussion on an individual to organisation level, like that's your arrangement, cool, what's the next one. And then people in the team or the clients or whoever else needs to know from a practical perspective, don't really ever know or it's almost this sort of like secret sort of unspoken thing and then it's just, you're just making it harder in that situation to manage. Rather than embracing it and going this is a positive thing, this is really great, let's work out what that means in practice and having those kind of boundaries, so I think its shifting the kind of, the way in which we think about flexible working as not being some sort of accommodation if pushed that an organisation might make, but actually being a really positive way of increasing the talent pool, increasing engagement, getting more out of our people and giving more to our people in return. If we look at it that way it maybe changes the conversation a little bit on a team level.</p>
Ellie	<p>Absolutely. It's going beyond that statutory procedure that we talked about earlier, it's so much more than that isn't it. And as you say, celebrating it and seeing it as a positive thing helps to keep everybody informed of what different people are doing, what arrangements they have got and why shouldn't that be transparent.</p>

Ellie

Well thank you both so much for joining me today, I think your experiences really go to show that if an employer can think outside the box and enable employees to work in different ways, that can mean all the difference to not just the individual but also the business itself and ultimately contribute to a motivated and loyal workforce. And as Kelly and Victoria say, if businesses can be alive to those potential risk areas of exclusion, and offer genuinely flexible work, that can really boost your ability to attract and retain the best talent which feeds into your wider diversity, equity, inclusion and belonging strategy. If you would like to revisit anything we discussed today you can access transcripts of every episode of The Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch. Or if you have questions for me, or perhaps Kelly or Victoria, or even suggestions of topics you'd like us to cover on a future episode, please get in touch by emailing us at theworkcouch@rpc.co.uk. We'd really love to hear from you. And finally if you enjoyed this episode we'd be so grateful if you could spare a moment to rate, review and subscribe and please spread the word by telling a colleague about us. Thank you all for listening and we hope you'll join us again in two weeks.



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