

The Right to Request Flexible Working in Britain: the Law and Organisational Realities

Abstract: In April 2003 the UK Government introduced the right for working parents to request flexible working arrangements under the provisions of the Employment Act 2002. This legislation has been widely criticised as providing only weak rights for employees, as neo-institutionalist business system theories would lead one to expect in Britain's 'Liberal Market Economy'. However, criticism of the law has to be tempered by understanding how it relates to practice in large companies and this paper investigates these practices. It finds that large companies have gone beyond the terms of the legislation, in order to establish themselves as 'employers of choice'. It is therefore argued that British practice, in reality, only partly conforms to the expectations generated by neo-institutionalist business systems theory.

1. INTRODUCTION

On 6 April 2003 working parents in the UK with young or disabled children gained the legal right to request flexible working arrangements; their employers acquired a statutory duty to give these requests serious consideration. Giving parents this right was part of a broader legislative package, introduced by New Labour, driven by the view that employment rights facilitate productive and committed workers rather than creating burdens for businesses¹. It was also a reflection of the Government's stated commitment to supporting working families.² At the time of introduction, there was much criticism of this legislation, on the grounds that its provisions were weak and therefore offered little real benefit to working parents. Viewed from the lens of neo-institutionalist business systems theory, this would not be unexpected in a liberal market economy such as Britain. However, early, albeit limited, evidence suggests that an increasing number of employers have responded positively to requests from employees to work more flexibly. For example, Patricia Hewitt, Secretary of State for Trade and Industry reported in April 2004 that since the legislation had come into force almost a million parents had requested flexible working arrangements and that eight out of ten of them had been granted³. Research carried out by the Maternity Alliance, whilst somewhat less positive, nevertheless showed that 68% of respondents

¹ Fredman, S. 'Women at Work: the broken promise of flexicurity', *Industrial Law Journal*, 33(4) 299-319, 2004.

² McColgan, A. 'Family Friendly Frolics? The Maternity and Parental Leave etc. Regulations 1999', *Industrial Law Journal*, 29 (2) 125-143, 2000.

³ The Rt. Hon. Patricia Hewitt, Keynote Speech, Father's Direct, 'Working with Fathers' Conference, London, 5th April 2004.

had either had their request agreed or had reached a compromise with their employer⁴. We argue that in order to assess the impact of legislation, it is important to assess not only the legislative provisions per se, but also how they are interpreted and enacted upon in organisations. There may be factors other than the specific provisions of the legislation, which influence the way in which employers respond to it. Thus the purpose of this article is to examine the impact of this legislation on employer practice and evidence is presented from four case study organisations.

The initial idea for this legislation was contained in the Green Paper ‘Work and Parents: Competitiveness and Choice’⁵, where ‘the possibility of introducing a limited right to work reduced hours’ for parents was put out for consultation. There was also a proposal to allow employers to refuse such a request, if it would cause ‘harm’ to the business. The idea, in principle, was well received by the TUC, trade unions, voluntary sector organisations and to a limited degree by the (then) Industrial Society (now the Work Foundation)⁶. However, the Confederation of British Industry (CBI) and the Institute of Directors (IoD) opposed the idea. In essence their opposition was to employment tribunals being in a position to judge the reasonableness of an employer’s decision to refuse a request.

In June 2001 the ‘Work and Parents Taskforce’ was established by UK government to seek a compromise between parents’ desire for more flexible work patterns and business efficiency. The taskforce comprised ten members including representatives of employers, trade unions, parents’ groups, the Equal Opportunities Commission and an independent chairman, Professor Sir George Bain. The taskforce’s brief was to develop a proposal for legislation, giving parents of young children the right to request flexible working⁷ and for the legislation to require employers to give the request serious consideration⁸. Both during the consultation exercise and in the Work and Parents Taskforce there was considerable discussion about the degree to which the rights of managers to organise work should be protected against interventions from tribunals⁹. Bain’s account of the taskforce’s deliberations stressed the difficulty of achieving agreement and his insistence on the necessity for unanimity if government was to be influenced¹⁰. The taskforce reported in November 2001¹¹. The final report which was unanimous, made nine recommendations, all of which were accepted by the Government and found their way into the Employment Bill, introduced as an amendment at committee stage. The main provisions of this legislation now exist in Part 8A of the Employment Rights Act 1996 (as inserted by section 47 of the Employment Act 2002). Unanimity had the effect wished for by

⁴ ‘Happy Anniversary? The right to request flexible work one year on’ A report from Maternity Alliance, London, 2004.

⁵ Department of Trade and Industry, ‘Work and Parents: Competitiveness and Choice’ Green Paper Cm. 5005, HMSO, London 2000.

⁶ L. Anderson, ‘Sound Bite Legislation: The Employment Act 2002 and New Flexible Working ‘Rights’ for Parents’, *ILJ*, vol. 32, 2002, p.37-42.

⁷ Interestingly the Green Paper had referred only to reduced hours.

⁸ Work and Parents Taskforce, *About Time: Flexible Working*, London, HMSO, 2001.

⁹ For a similar discussion over the introduction of the right to work part-time in Germany see M. Schmidt, ‘The Right to Work Part-Time under German Law: progress in or a boomerang for equal opportunities?’, *Industrial Law Journal*, 30 (4), 335-351, 2001.

¹⁰ G. S. Bain, ‘The Bullock Committee and the Low Pay Commission: some Reflections by Sir George Bain’, Advisory Board Lecture, 29 November 2001 (Modern records Centre, University of Warwick, 2002).

¹¹ *Op cit.*, 2.

Bain, but at the cost of the legislation's terms being the product of a 'lowest common denominator' agreement between the widely differing interests represented on the taskforce.

This article will first examine the provisions of this legislation and its legal context. Second, it will investigate how the law relates to existing practice. Interview and case study data are presented from four large employing organisations. A theoretical distinction proposed by Malmberg¹² is used and on the basis of our evidence, it is argued that the impact of this legislation is influenced by factors specific to large companies. Neo-institutionalist 'varieties of capitalism' theories are also discussed in the light of actual experience. This literature argues that British employment relations are those of a 'Liberal Market Economy' (LME), in which employers can be expected to resist co-ordination by legal or other methods¹³. This literature has been criticised for under-stating the areas of discretion available to companies, and our argument is consistent with these criticisms.¹⁴ Our argument is that at the macro level the legislation's details are of much less importance than the market pressures experienced by companies, which have caused them to go beyond its terms in practice. Our data show that these large employers have included all employees, not just parents eligible under the legislation. This demonstrates how this particular law's effects cannot simply be inferred from its own limited terms. The article's contribution is therefore to show how the operation of British labour law cannot be understood simply by reference to the law itself, but has to be seen in the context of both the external labour market and intra-management relations. We argue that this is significant in the context of discussions of British employment relations in comparison with those in more highly legally regulated economies such as those in 'Co-ordinated Market Economies' (CMEs). The paper is therefore concerned with the relationship between the real responses of British employers and the stylised account of these given in 'Varieties of Capitalism' theories and used to characterise the British case in international comparative terms.

2. ASSESSING THE LEGISLATION

The provisions of the legislation are set out in section 80F-80I of the amendment. An employee may apply to his or her employer to change their terms and conditions of employment in order to work more flexibly, if they have care responsibilities for a child under 6 years old, or a disabled child under 18 years of age. In order to make an application the employee must have at least 26 weeks continuous service with their employer at the date of application. They must have responsibility for the child's upbringing and so this could include for example the mother, father, adopter, guardian or foster parent. Under section 80F(1) (a) the legislation specifies that changes may be to the hours worked, the times of work, or where work is undertaken. The employee is required to put their application in writing indicating the change requested, when it is proposed the change should come into force and what they think

¹² Malmberg, T. 'Effective Enforcement of EC Labour Law: A Comparative Analysis of Community Law Requirements', *European Journal of Industrial Relations*, 10 (2) 219-229, 2004.

¹³ The initial influential work in this literature is Hall, P.A., Soskice, D., (eds.) *Varieties of Capitalism: the Institutional Foundations of Competitive Advantage*. Oxford University Press 2001.

¹⁴ Allen, M.M.C., 'The varieties of capitalism paradigm: not enough variety?', *Socio-Economic Review* 2 (1), 87-108, 2004.

the effect of this change is likely to be for the employer and how this might be dealt with¹⁵.

Once an application has been made the employer must meet with the employee within 28 days to discuss the implications of the proposed changes. They are then required in the following 14 days to notify the employee of their decision. If they are refusing the employee's request, they are required to indicate the grounds for their decision. In such circumstances the employer needs to show that their refusal fits one or more of the grounds specified in section 80G. These grounds include 1) burden of additional costs 2) detrimental effect on ability to meet customer demand 3) inability to re-organise work amongst existing staff 4) inability to recruit additional staff 5) detrimental impact on quality 6) detrimental impact on performance 7) insufficiency of work during the period the employee proposes to work and 8) planned structural changes.

The requirement on employers to give serious consideration to requests to work more flexibly and if refusing the request, to demonstrate that their reason fits one of the specified grounds, is at least likely to mean that they think through the consequences of flexible working. However, given the broad scope provided by these eight reasons for refusal, it would seem that the legislation offers considerable legal scope to an employer wishing to refuse a request. In practice this suggests that the effect of the legislation will be relatively weak. Furthermore, this impression is heightened by the level of penalty on non-compliant employers, set at a maximum of eight weeks pay. Although, arguably the administrative and attendance costs associated with internal appeals, external arbitration or employment tribunals would also have to be added to the formal penalties.

The legislation disappointed many, including those who had pressed for stronger penalties. The Equal Opportunities Commission's submission during the consultation period argued for higher sanctions. The penalties on employers were seen as 'insignificant'¹⁶. The legislation has been described as having a 'restricted nature and weak sanction'¹⁷. It has also been criticised as excessively weak, 'sound bite' legislation¹⁸. Anderson suggests that the Government's aim was primarily to promote cultural change rather than fairness at work.

We argue these criticisms could be amplified, since the law also contains an important and potentially self-defeating contradiction. When an employee makes a request to vary their contractual arrangements in order to allow them to accommodate their child care arrangements, any such change takes the form of a *permanent* variation to their terms and conditions of employment. In other words, this arrangement will continue up to and beyond the time when the employee would no longer be eligible to make a request to work more flexibly (i.e. when the child for which they have care obligations reaches the age of 6 years, or 18 years in the case of a disabled child). Depending upon the nature of the business, employers may believe

¹⁵ Section 80F (2).

¹⁶ O. Aikin, 'Manage Management,' *People Management*, vol. 9 5), p. 20-21.

¹⁷ J. McMullen, 'Focus on the New Right to Request Flexible Working,' <http://www.branchwebs.cipd.co.uk>, downloaded 12 March 2004.

¹⁸ L. Anderson, 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents', *ILJ*, vol. 32, 2002, p.37-42.

that a ceiling exists on the proportion of staff it is viable to have working on a flexible basis. For example, in customer-facing jobs, it may be important to ensure that operating times are adequately covered. From the list of acceptable reasons for refusing a request, it seems likely that if a significant number of staff already had flexible working arrangements, a refusal could be argued under ‘detrimental effect on ability to meet customer demand’ or ‘inability to re-organise work amongst existing staff’. If employees, who would no longer be eligible to apply to work flexibly under this legislation, continue to work flexibly, the situation may arise where an employer decides, for business reasons, to refuse a request from a parent who is eligible and whose application would otherwise be granted. In other words, not treating the right to work flexibly as a temporary arrangement until the child has passed the qualifying age, may mean that the flexible working possibilities become ‘clogged up’ by people who would no longer qualify for the right to request flexible working. Since the original intention of this legislation was to assist working parents, the lack of a provision to review the arrangement when the child reaches the relevant age, potentially means that the legislation may in this sense be self-defeating. It could be argued that this omission is likely to limit the effectiveness of this legislation in helping working parents.

Furthermore, it has also been pointed out that there is an important synergy between this law and sex discrimination law¹⁹. Penalties for the employer could become unlimited if the case also infringed the Sex Discrimination Act 1975. Earlier case law (Robinson v Ooddbins Ltd., EAT/18896, 19 June 1996), had been publicised as showing that a woman could argue that, if working arrangements did not take sufficient account of her need to make childcare arrangements, then it would constitute indirect discrimination. Before the flexibility legislation came into force, it was publicly suggested that a dynamic unfavourable to employers could be established in certain circumstances²⁰. Women could bring cases for indirect discrimination; more women could therefore have their requests granted, and men might then be eligible to bring direct discrimination cases. Thus, this law is potentially both weaker and stronger than its own penalties for non-compliance imply. This is part of the background to employers’ attitudes to it, in that it stimulated more uncertainty and more attempts to diminish that uncertainty than has been recognised by critics.

3. THEORETICAL FRAMEWORK

Although socio-legal studies are well-established, and there have been previous attempts to understand managerial reactions to some types of legislation such as the National Minimum Wage, there has been no direct attempt to assess the factors impacting management reactions to this type of legislation²¹. Two theoretical frameworks inform our research. The first is the discussion of British employers within the ‘varieties of capitalism’ literature, which suggests certain types of

¹⁹ M. Fraser, ‘New Rights for Old: Flexi-working and Sex Discrimination,’ *Employee Relations*, vol. 26 (2), P. 167-181.

²⁰ S. Gregory, ‘The Fairer Flex,’ *People Management*, vol. .9(2).

²¹ R. Lucas, M. Langlois, ‘Anticipating and Adjusting to the Introduction of the National Minimum Wage in the Hospitality and Clothing Industries,’ *Policy Studies*, vol. 24 (1), P. 33-50.

employer behaviour. The second is that of socio-legal theory, which suggests a differentiated view of legislation's effects. We outline these in turn.

The behaviour of British employers in employee relations and labour legislation terms has been extensively discussed. It has been variously described as characteristic of 'Liberal Market Economies' (LMEs)²² ²³ ²⁴ or of 'compartmentalised business systems'²⁵ According to these theories, British employers would be expected to resist state legislative interference and to behave in uncoordinated ways, in comparison to those in 'Co-Ordinated Market Economies', such as Germany. They would be expected to resist attempts to co-ordinate their activities except on an *ad hoc* basis and to work to maintain maximum freedom to determine their own labour market policies. Similarly, in the related but different framework used by Whitley, in compartmentalised business systems union influence at national level is relatively weak and therefore, the expectation would be that labour law would also be relatively weak²⁶. Thus, the overall nature of the British law is to be expected, although the important synergy with other legal areas such as sex discrimination law is not predicted by these theories.

How is the impact of the law to be measured in terms of theory? Jonas Malmberg contends that legislation can be evaluated at both the micro and the macro levels. The micro level concerns the extent to which the law enables cases to be successfully pursued. For example, can a person who has been refused the right to work flexibly enforce that right effectively? The macro level is concerned with the extent to which changes are made, or principles upheld at a general level. For example, what is the broader effect of the legislation on working patterns for employees?²⁷ As far as the legislation giving employees the right to request flexible working is concerned, it could be argued that whilst it is likely to have limited impact at the micro level, the impact at macro level may be different. The key issue is how in practice employees' working practices are affected and this is mediated by managerial structures, ideologies and behaviours.

How would employers be likely to react to weak legislation in an 'unco-ordinated' LME? The first possibility is that they do nothing and simply ignore the law. The second is that they adhere to the letter, but not necessarily the spirit of the law. Conversely, employers may embrace the spirit of the legislation by putting policies and procedures in place to achieve the broad policy aim of increasing flexibility. Finally, because of labour market pressures, they may chose to go beyond the intention of the legislation.

²² K. Thelen, 'Varieties of Labour Politics in the Developed Democracies,' in P.A. Hall and D. Soskice (eds.), *Varieties of Capitalism- The Institutional Foundations of Comparative Advantage*, Oxford, Oxford University Press, 2001.

²³ S. Wood, 'Business, Government and Labour Market Policy in Britain and Germany,' in P.A. Hall and D. Soskice (eds.), *Varieties of Capitalism- The Institutional Foundations of Comparative Advantage*, Oxford, Oxford University Press, 2001.

²⁴ P.A. Hall, D. Soskice, *Varieties of Capitalism- The Institutional Foundations of Comparative Advantage*, Oxford, Oxford University Press, 2001.

²⁵ R. Whitley, *Divergent Capitalisms: the Social Structuring and Change of Business Systems*, Oxford, Oxford University Press, 2000.

²⁶ *Op cit.*, 61-3.

²⁷ J. Malmberg, *Op cit.*

The issues for investigation are therefore:

(1) What effects have this apparently weak law had on British employment relations? Here we take into account the macro-micro distinction.

(2) If the effects are stronger than might be anticipated from the terms of the law, the criticisms made of it and from theory, why is that the case? Here we use and examine the varieties of capitalism theory.

4. METHOD

The purpose of the fieldwork was to investigate these issues through four case studies of large, UK employers. We chose to focus on large employers because of the level of influence they exercise over the labour market in the UK, since they are relatively important to employment in Britain in comparison with other European economies²⁸²⁹. Practices of large and small companies may well differ, and this is an important limitation of the research, meaning that our results may not be generalisable to all companies. The research was conducted in a 6-month period following the introduction of the legislation, in order to allow the initial impact of the legislation on employer policy and to a lesser extent practice to be examined.

For our purposes it was important to use an approach to data collection which allowed us to explore not only what types of flexible working were offered, but also the rationale behind their use and an insight into the implementation. There have been a number of surveys that have examined the extent to which employers use various forms of flexible working³⁰. However a problem with such survey data is that it is difficult to discern the reasons behind the introduction of flexible working practices. In recent years we have seen a shift in the focus of the flexibility debate to include not only flexibility *of* employees, concerned with managing labour more efficiently, but also flexibility *for* employees, to help achieve a better work-life balance. Since, with a few obvious exceptions (e.g.: job sharing), many of the practices used for these different purposes may look similar, it may not be clear from survey data why a flexible work practices has been introduced. For this reason we chose to conduct case studies so that the reasons for the forms of working could be explored.

The case studies were conducted in the following way. Detailed descriptions of the implementation of flexible working practices were obtained from HR specialists in the four companies. This was supplemented by secondary sources such as media reports on the companies' practices. Follow-up interviews were conducted in three of the organisations in order to explore the rationale for and implementation of these policies in more depth. These interviews were semi-structured and involved head office personnel responsible for developing policies on flexible working. In these organisations we also had access to in-company documentation such as policy

²⁸ H. Gospel, *Markets, Firms and the Management of Labour in Modern Britain*, Cambridge, Cambridge University Press, 1991.

²⁹ H. Gospel. A. Fiedler, 'Database of Top 100 Firms by Employment, 1906, 1935, 1955, 1972, 1992/5/8,' Unpublished Database, Centre for Economic Performance, London School of Economics.

³⁰ See for example Executive Report of the Cranet Survey on HR Policies and Practices, Cranfield, Cranfield School of Management, 2004.

documents, in-company reports and confidential surveys not in the public domain. A limitation of the approach adopted is of course that we do not have data from employees who have experienced the implementation of the policy. However, given that we were essentially interested in how the legislation had impacted on employers and the relatively short period that the legislation had been in force, it was felt appropriate at this stage to focus on policy and as such we have focused our attention on managerial respondents and the examination of management sponsored initiatives.

5. FINDINGS

The case study organisations included a major UK based, international bank (BankCo), a large food and clothing retailer (ShopCo), one division of a US based multinational information technology company (InfoCo) and a major Telecommunications firm (TeleCo). BankCo offers a range of financial services to personal, corporate and institutional clients. Headquartered in London, it employs approximately 56 000 people in the UK. ShopCo has 330 stores throughout the UK and employs approximately 67 000 staff. Info Co is a subsidiary of a US-based international software company employing 55,000 staff worldwide and approximately 1,500 in the UK. TeleCo offer a range of telecommunications services and employ approximately 100, 000 people across the business. BankCo and TeleCo both recognise trade unions for bargaining purposes.

Below we present data from the case study organisations according to their motivations for introducing flexible working, the process via which it was implemented and the outcomes. The data presented is ‘first order’; i.e. respondents’ views and interpretations are reflected as faithfully as possible. In the following section, these data are interpreted in ‘second order’ mode ³¹, in which the authors interpret the data.

5.1 Motives: Interestingly, none of the organisations had introduced flexible working specifically in response to the legislation. All had used flexible working in some form for some years, and in TeleCo’s case for over ten years. In every case though, flexible working had been reviewed and promoted more actively since the legislation was proposed in 2000. For example, although BankCo had been offering some forms of flexible working for many years, in the last two years they had increased the range of options available to employees.

None of the organisations confined the opportunity for flexible working to parents, still less parents with young or disabled children. The achievement of work-life balance was seen as an important goal for all employees, although in some of our cases (BankCo in particular) the greatest uptake of flexible working had been amongst parents. These organisations saw flexibility as going beyond accommodating the working parents and did not, as articulated by one respondent, see the parental focus of the legislation as positive,

“In some senses I think we are back to ‘those women with a problem’ again.”

³¹ N. Blaikie, *Designing Social Research*, Oxford, Blackwell Publishers, 2000.

In most cases flexible working was part of a wider strategic initiative provoked by the legislative proposals and an important part of their employee proposition. At BankCo flexible working was seen as part of their ‘managing diversity’ initiative and an important part of their desire to become a ‘world-class’ employer. At ShopCo flexible working was seen as an important part of their employment offer and given prominence in their ‘A Great Place to Work’ initiative. At InfoCo, promoting flexible working was in response to negative feedback from a staff survey about the long hours culture and how staff felt about working for InfoCo.

Respondents also mentioned practical business reasons for introducing flexible working that pre-dated or coincided with the legislation. In some cases these related to recruitment and retention problems. For example, offering remote working, or compressed working time could increase the geographical recruitment pool. Flexible working also facilitated adaptation to the demand patterns experienced by the organisation. For InfoCo, flexibility over when hours were worked meant that they could cover more markets globally. For TeleCo flexible hours allowed them to offer services for longer hours without paying staff unsocial hours premia. By increasing remote working they had also significantly reduced the amount of increasingly expensive office space required.

5.2 What was on offer: A range of flexible working practices was available in the different organisations. Most commonly, practices included flexibility over working hours (part-time working, term-time only working), working time (compressed working time, staggered hours) and locational flexibility (working from home, remote working). Other forms included career break schemes, emergency personal leave and gradual return to work following maternity leave. In BankCo, the number of initiatives in place had increased rapidly in the last two years, as had the degree of take-up by staff. Flexible working at ShopCo had traditionally involved flexibility over working hours and working times and line managers had dealt with this in localised and informal ways. In some stores this led to an unusually complex set of arrangements with a high degree of variation in working arrangements, especially regarding start and break times. More recently head office had launched a wider range of initiatives promoted as options ‘for everyone’, ‘for families’, ‘for carers’ and ‘for supporting the community’. At InfoCo they had run a pilot scheme for six months where employees experimented with different forms, including remote working, flexible working times and compressed working time, before selecting what to offer. Interestingly here, flexible working did not include the option to reduce the number of hours worked, but rather where and when hours were worked.

When the proposals for flexible working had been introduced, all of the case organisations had operated some form of employee consultation exercise with either trade unions, or other employee representative groups. Generally, the reaction had been positive. At BankCo, the trade union welcomed increased choice for their members, but was keen to ensure that staff were not required to change the way they worked, if they did not wish to do. The manager responsible for the implementation of flexible working commented on the negotiations,

‘If it increases choice for their members they are very supportive. It has been a fairly easy discussion so far, but I know people are concerned about us forcing changes in working patterns ... that is why they (the trade union) want it all negotiated and they want to keep an eye on it.’

In ShopCo, non-union employee representatives had also made representations on behalf of employee flexibility and wished to monitor take-up.

5.3 Mechanisms: At BankCo there was a page on their intranet which listed the various forms of flexible working on offer and illustrated them with case histories, giving employee and line manager views on how well the arrangements worked. Employees who wished to work flexibly had to make a formal request to their manager. For example, staff could request working hours to suit their own circumstances and where possible, taking into account factors such as branch footfall patterns, this would be accommodated. Head office personnel indicated that line managers are 'encouraged not to say no'. Interestingly, BankCo do not actively recruit part time staff in the branches - in the region of 80-90% of people who worked part-time in the branches, did so at their own request.

As indicated above, at ShopCo staff had historically made requests for flexible working to their line managers on an *ad hoc* basis. More recently the application process at ShopCo had been formalised and individuals had to make a formal application to their line manager, stating the reason for their request and indicating what kind of impact they saw it would have on their job. At the same time as formalising these arrangements, ShopCo ran a poster and leaflet campaign to publicise the range of options available to staff. This formalisation was in part driven by a desire on the part of the company to tighten up the approach used, but also, as a result of profit pressures, there had been some moves to make flexibility more company, as opposed to employee, driven. Head office employment specialists indicated that this formalisation made it easier for managers to refuse a request, since it gave them clearer grounds and possibly also the confidence to do so. Previously there had been a prevailing view that requests should be granted if at all possible. Thus, in this company, mechanisms formalised and regulated employee demand for flexible working. However, it is important to recall that the company was perceived externally and internally as having relatively high levels of flexible working in relation to other companies and certainly well in excess of the legal requirements.

At InfoCo staff had to put a written business case to their manager indicating what they wanted do and how they felt it would impact on them and their work team; this was then discussed in the context of their personal development plan. If accepted, the new arrangements would be reviewed after six weeks to see how well they were working. At TeleCo staff also had to make a formal request to work flexibly, however TeleCo indicated that they did not ask staff to specify the reasons why they wanted to work flexibly, since they did not feel they should be making value judgements about this. TeleCo's HR department recognised that operational managers had to be convinced of the scheme's usefulness, something that they achieved by using managers who had successfully managed the process to convince others.

This last point underlines that there were certain impediments to the implementation of flexible working in all organisations studied. At InfoCo it was felt that at certain times in the business cycle, flexible working was not possible and had to be seen as a two way process,

‘Some of the teams have had their flexibility put on hold, because there has been a peak in the business – so they have had to stop for four weeks and then they go back to it – so it is very much a two way process.’

Equally, although all staff were issued with laptop computers, homeworking on a regular basis was restricted to those people who lived in areas where a Broadband connection was possible, since this was necessary to link into the company system.

At BankCo flexible working was more difficult to implement in small branches, where minimum staffing levels were stipulated during opening hours for security purposes. Equally, employees required a portable computer and if they did not already have one, a business case needed to be made for them to have one before they could work remotely. Across the cases it was reported that there had also been a need to change the mindsets of some managers and to develop a greater awareness of the business benefits to be derived from flexible working. A senior manager at BankCo remarked:

‘I guess there are leaders around who have found the management of flexible working difficult. They want to control the work and that includes seeing it.’

They believed however that their intranet site, giving case examples, had been useful in helping line managers see how flexible working could work in practice and had helped overcome resistance. Head office personnel at ShopCo indicated that in some areas of the business, there was still a need for the benefits of flexible working to be marketed internally in order to shift the culture towards flexible working.

5.4 Outcomes: The legislation led to re-examination of policies and practices in all cases and all respondents felt they had achieved human and financial benefits from flexible working arrangements. These had brought them closer to becoming a ‘preferred’ or ‘employer of choice’, and improved employee motivation and commitment. For BankCo business benefits centred on improved retention rates, particularly for employees with changing life circumstances. BankCo argued that their size, at least outside of branches, enabled them to balance staffs’ desire for flexibility with changing business demands. Equally, at InfoCo where 80% of staff were involved in some form of flexible working, it impacted positively on morale and on retention,

‘People stay longer and our image, our internal image and our external image have been improved quite dramatically ... morale and commitment among staff has also gone up.’

This was evidenced by improved results in their follow-up staff survey. TeleCo, where flexible working had operated longest, estimated that having more than 7000 home based workers had saved about £42M on accommodation costs. They also suggested that productivity had increased by 42% and that sickness rates were lower because of flexible working.

However, recognition existed that where flexible working was implemented there was a need for other supporting changes. The case study organisations indicated the need for a change in the way people are managed. Command and control models needed abandoning in favour of one based on supporting and encouraging staff, and to move to output or achievement oriented forms of appraisal and performance management. If employees are not physically present in the office, or are working at

different times from their managers, then changes in performance measurement were required. Equally, opening times of facilities such as catering needed to serve those working outside normal hours. All of the organisations had put their managers through training to help them manage employees working flexibly. A senior manager at InfoCo commented:

‘We can’t assume managers have the skills to manage flexible teams. It’s a new competency and we were very keen to support our managers ... it brings up big issues around trust and visibility.’

6. DISCUSSION AND CONCLUSIONS

Our discussion reflects our two-stage research process. In the first stage, we gathered data that was essentially companies’ more public explanations of their motives and processes. In the second stage, we gathered more detailed data that enabled an interpretation of the external, ‘public’ statements. Our point of departure is that external, public statements should be interpreted in the internal organisational context and this informs our ‘second order’ discussion.

The findings reported here show these organisations had taken a number of steps to increase the opportunities for flexible working open to their employees. The evidence from our case studies of large employers responding positively to employees’ desires for more flexible arrangements appears to be reflected more generally in the available survey evidence. It would therefore seem that in general, in spite of the seemingly weak legislative provisions, working parents to a large extent have been able to gain the work flexibility that they seek. At the micro level it is hard to assess the impact of the legislation, given the limited amount of time it has been in force, but an analysis of the provisions of the legislation would suggest that it is unlikely to have a significant impact at this level. However, at the macro level, the evidence is more encouraging. Employers had differential reactions to the legislation, but in at least two, but arguably in all of the four cases examined, the legislation’s actual effect was greater than its critics had envisaged.

What then were employers’ motives for going beyond the provisions of the legislation? Cost-cutting through removal of premia for working outside normal times was undoubtedly one motive, but the effect of this was variable both within and across companies. Equally, employee representation was not generally a major factor in magnifying the effects of the legislation, although it was present in two companies. In one of these cases, that of the non-union representation in ShopCo, there appears to have been as much genuine negotiation as in the unionised case. This may partly have been because management rhetoric sanctioned the issue as ‘legitimate’ for negotiation by employee representatives. Other motives appear to have had greater weight.

Interestingly, in this group of companies, all employers extended the right to request flexible working beyond parents and in fact none made any specific reference to parents. They were concerned about the possibly de-motivating and divisive effects on staff of limiting the right to request flexible working in the way envisaged by the law. All of the companies experienced pressure from external labour markets in terms

of staff recruitment and retention and therefore it was felt important to offer flexible working universally. All of these employers sought to establish themselves as 'employers of preference', in relation to their labour market competitors who were often local, frequently smaller firms. Our research did not cover smaller firms, but there is evidence that they have taken a more evasive approach to the legislation³² and arguably their scope for compensating for the effects of employee absence may be less than larger firms. A National Opinion Poll survey of 500 small firms found that 30% were denying staff the right to work flexibly³³. Thus, a consequence may be for larger firms to establish themselves as 'employers of preference' over smaller firms.

The 'employer of preference' argument, in common with the legislation *per se*, also had an important internal function, that of enabling senior managers to legitimise policy to lower level managers, more concerned with output than strategic HR issues. Senior managers are interested in increasing the value added by labour by means of attracting and retaining high quality labour at as low a cost as possible by becoming 'employers of choice'. Tight external labour markets and fear of internal tensions between those employees granted the right and those not, have meant that the terms of the law have been extended in large companies. Senior management in effect has been able to use the law to help overcome resistance from operational managers. It has been suggested elsewhere that a sizeable gap in perceptions between senior managers and operational managers exists in large companies in LMEs³⁴ and this would appear to be the case here.

The procedures and expectations in terms of actual use of the right must of course be distinguished from the simple existence of a policy. HR specialists were frequently involved in coaching operational managers and employees in implementing flexible working practices. In InfoCo, flexibility within the working day was increased, but part-time working was not permitted and employees had brought no requests under the legislation. This may be explained by the fact that the company is a US-owned MNC. This type of company has been shown by other researchers also to tend to institutionalise procedures and systems to guide choices more than European-owned companies and to exercise greater central control over HR issues more widely. Since American practice is to provide less flexibility to employees than European companies, the effects of central control in the area are obvious.³⁵ In these latter cases, the legislation was used to increase central management control and to render more transparent lower management activity in relation to it. 'Decentralisation' of the HR function was in practice a controlled one. Thus, particularly in InfoCo, procedures and cultures could mitigate the effect of the 'flexibility' rhetoric. Nevertheless, it is important to recall that even in this case employee satisfaction with the flexibility offered increased, as reflected in employee opinion surveys. Employees' frames of reference (notably in a non-union environment without the

³² 'The Flexible Fallacy,' *The Guardian*, 2004.

³³ *Ibid.*

³⁴ M. Porter, 'Capital Choices: Changing the Way America Invests in Industry,' in D. Chew (ed.), *Studies in International Corporate Finance and Governance Systems*, Open University Press, New York, 1997.

³⁵ A. Ferner, P. Almond, I. Clark, T. Colling, T. Edwards, L. Holden, M. Muller-Camen, 'The Dynamics of Central Control and Subsidiary Autonomy in the Management of Human Resources: Case-Study Evidence from US MNCs in the UK,' *Organization Studies*, vol. 25(3) p.363-391.

institutionalisation of inter-company comparison) appear to have been with previous practice in their own workplace.

What is the relevance of this for theories about the operation of the law and about varieties of capitalism? We now deal with these in turn. Criticism of the law's terms is valid, particularly when widespread rejection of employee requests appears to be occurring in smaller companies. The relative weakness of UK law both in legislative and judicial terms is widely recognised.³⁶ However, in this case we argue that the law has given a positive impetus to an existing trend towards employee-friendly flexibility already apparent in some companies. It has also provided senior management with justification for the implementation of flexibility in particular ways consistent with the 'employer of choice' philosophy.

Prima facie, this may appear to confirm the argument advanced by the neo-institutionalist 'varieties of capitalism' school, that 'LME' employers have not followed a co-ordinated approach, even though policy outcomes among large employers have been broadly similar. No evidence of inter-employer co-operation or co-ordination was revealed by our research. However, the experience also shows that, with the partial exception of the US-based company, differentiation between larger employers is less than might be expected from this model. These employers are thus collectively differentiated from smaller ones. This is essentially because of similar company responses to shared labour market pressures. Competition to become an 'employer of preference', and fear of intra-employee divisions have been major factors, in tight labour markets, causing senior management to assert strategic company interests over lower-level management's reservations. Thus, tight labour markets in a LME could exert an influence over company policy that ensured that outcomes in large companies were not as dissimilar to those in CMEs as might be supposed, either simply from the terms of the law itself, or from neo-institutionalist theory.

This research was carried out in the when the legalisation had only been in force for a relatively short period of time. Over time it will be interesting to track the behaviour of employers, both large and small, to see whether the pattern of response found in this research continues when the legislation has become more embedded.

³⁶ S.D. Burri, H.C. Opitz, A.G. Veldman, 'Work-Family Policies on Working Time in Practice. A Comparison of Dutch and German Case Law in Working Time Adjustment,' *IJCLLR*, Vol. 19, 2003, p.321-346.