EMPLOYMENT TRIBUNALS

Claimant: Mrs E Brown

Respondent:
1. The Governing Body of Wennington Hall School
2. Lancashire County Council

HELD AT: Manchester **ON:** 20-21 June 2018

BEFORE: Employment Judge Slater
Mrs M A Gill
Mrs C A Titherington

REPRESENTATION:

Claimant: In person
Respondent: Mr D Campion, counsel

JUDGMENT having been sent to the parties on 2 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant brought a complaint of disability discrimination and a complaint under section 80H of the Employment Rights Act 1996 of failure to deal with a flexible working request in a reasonable manner. At the preliminary hearing, the claimant confirmed that her complaint of disability discrimination was one of a failure to make reasonable adjustments only. The claimant had made a reference in her claim form to less favourable treatment, which could suggest a complaint of direct discrimination, but she confirmed at the preliminary hearing and confirmed again at this final hearing that her only complaint of disability discrimination was of a failure to make reasonable adjustments.

2. In relation to the complaint of a failure to make reasonable adjustments, the issues were confirmed at the final hearing to be as follows. Disability was conceded in relation to the condition of myeloid leukaemia. Knowledge of disability was also conceded. There were two provisions, criteria or practices relied upon. These were:

(1) a requirement to work full-time until the change in November 2017; and

(2) a continuing requirement to work afternoons.

3. The respondent accepted that the requirement to work full-time put the claimant at a substantial disadvantage in comparison with persons who are not disabled, at least at relevant times. However, the respondent disputed that the requirement to work afternoons put the claimant at such a disadvantage. The respondent also disputed that the respondent could reasonably be expected to know that the claimant was placed at a disadvantage by the second provision, criterion or practice. It disputed knowledge of disadvantage, in the early stages, for the requirement to work full-time but conceded that, by November 2017, the respondent had knowledge of disadvantage relating to full-time work. If the duty to make reasonable adjustments arose, the Tribunal had to consider whether the respondent failed to take such steps as it would have been reasonable to take to avoid that disadvantage. The claimant sought the adjustment of not being required to work in the afternoons. There was also a time limit issue in relation to the full-time working requirement.

4. In relation to the complaint of failure to deal with a flexible working request in a reasonable manner, the issues had been identified at the preliminary hearing as being as follows:

(1) Has this claim been brought within the statutory three month time limit, and, if not, was it reasonably practicable for it to have been brought in time? If not, was it brought within a reasonable period?

(2) Was the claimant's application "disposed of by agreement" so that she is not entitled to bring the claim (section 80H(2) Employment Rights Act 1996)?

(3) Did the school ever notify the claimant of its decision on her application?

(4) Did the school deal with that application in a reasonable manner, taking into account the ACAS Code of Practice on handling in a reasonable manner requests to work flexibly, and, if the Tribunal considers it relevant, the council's procedure on such requests?

5. At the start of the final hearing, Mr Campion also added an additional issue as to whether the letter dated 17 February 2017 was a flexible working request in the form required by the legislation. Although this issue had not been identified at the preliminary hearing, it raised a jurisdictional matter, and, therefore, although it had not previously been identified it was one that the Tribunal was required to consider once it was brought to its attention.

The Facts

6. The claimant was diagnosed with chronic myeloid leukaemia in 2004.

7. Prior to joining the respondent, the claimant worked in administration in other schools. She worked in a nursery school and a primary school with combined hours

of 33 hours per week. She worked some full days at each school and some split days, travelling a 15 mile journey between them. During this time, the claimant did not have any issues with tiredness. She had a period of absence around the time of her diagnosis but, after that, she had very little time off sick. She had only had one day's sickness absence and then some time off for hospital appointments.

8. The respondent is a school which has some weekly residential pupils.

9. The school advertised the post of School Administrative Officer (2) after a full-time member of staff, whose duties had included covering reception, resigned. The claimant successfully applied for the post and started work on 20 April 2015. Her duties included reception duties. The advertised hours were 37 hours per week. Her original contracted hours were 9.00am to 5.00pm Monday to Friday, but, in common with other staff, the claimant was requested to be in work 15 minutes before her start time each day. The claimant was based in the Reception Office.

10. The claimant shared reception duties with Mrs Ashworth who had been employed on a part-time contract from 5 January 2015 working initially 9.00am to 2.30pm each day.

11. The claimant had a 40 minute unpaid lunch break. She took morning and afternoon coffee breaks at her desk so continued with reception duties during those times. She was not able to have the same breaks away from her desk that she had taken in her previous employment.

12. The respondent school is close to the claimant's home. The claimant did not anticipate any problems with tiredness in working the contractual hours. She did not consider herself disabled so did not put details of her condition on the application form.

13. In May 2015, the claimant made her line manager, Mrs Thwaite, aware of her condition since she required time off for a medical appointment. Mrs Thwaite asked the claimant why she had not disclosed the condition at interview or on the application form. The claimant said she did not consider herself to have a disability and that everything was under control due to her medication. She did not, at that stage, mention being tired. Mrs Thwaite reported the claimant's condition to the then Head Teacher, Mr Prendergast.

14. In October 2015, the claimant made a verbal request to reduce her hours, saying that she found the long days tiring. She made her request to either Mrs Thwaite or Mr Prendergast or to both. We found that the claimant did not inform Mrs Thwaite or Mr Prendergast that she believed her tiredness was linked to her condition. We are doubtful that the claimant had made the connection between her condition and her tiredness herself at the time, but, whether or not she had made the connection for herself, we find she did not communicate it at this time to Mrs Thwaite or Mr Prendergast.

15. In January 2016, the claimant says she made a further verbal request to Mrs Thwaite which was refused. If she did make such a request, we accept that Mrs Thwaite does not recall this. If a request was made, there is no evidence that the

claimant linked her request to tiredness related to her condition in talking to Mrs Thwaite.

16. Mr Prendergast left the school in July 2016 and, on 1 September 2016, Mr Weallans became Acting Head.

17. The claimant says she made a further verbal request to Mrs Thwaite in September 2016 which was refused. Again, if the claimant did make such a request, we accept Mrs Thwaite does not recall this, and, if such a request was made, there is no evidence that the claimant informed Mrs Thwaite at this time that tiredness related to her condition and that this was the reason for her request.

18. In December 2016, Ofsted reduced the school's "outstanding" rating to "inadequate" after an inspection.

19. On 17 February 2017, the claimant wrote a letter to Mr Weallans requesting a change in hours. The letter is headed "request for flexible work arrangements". The letter does not refer to any legislation about flexible working requests. It does not state whether any previous application under legislation has been made. The primary reason the claimant gives in this letter for wanting a change in her working hours is to enable her to help her daughter with childcare, particularly on a Friday. However, the claimant also wrote in her letter:

> "I am now 60 years old and although classed as in remission I still have Leukaemia and find working over 37 hours a week very tiring. I am open to flexibility of where I work within the school, to my start and my finish times and to the administrative tasks I am given."

20. The claimant, in this letter, requested a new working pattern with finish times of 2.30pm or 2.45pm Monday to Wednesday, 4.00pm or slightly later on Thursdays and not working on Fridays. She wrote that Mrs Reynolds had said she would be happy to work in reception and that it would not adversely affect her work. Mrs Reynolds is a School Administrative Support Officer based in the Administration Office.

21. The claimant told us that she obtained information to assist her in writing her letter from googling on the internet.

22. The claimant received no response to this letter from Mr Weallans before he left his Acting Head post.

23. On 6 March 2017, Mr Blundell, an agency interim Head Teacher, replaced Mr Weallans.

24. On 10 March 2017, the claimant went to see Mr Blundell, taking a copy of her letter of 17 February 2017. Mr Blundell showed Mrs Thwaite a copy of the claimant's letter. Mrs Thwaite and Mr Blundell discussed the claimant's request. Mrs Thwaite understood the claimant, from this letter, to be making a link between her condition and tiredness.

25. Mrs Thwaite did not talk to Mrs Reynolds, or Mrs Reynolds' line manager, about whether the claimant's request could be accommodated. We accept Mrs

Thwaite had concerns that the review work which Mrs Reynolds did, being part, but not all, of her work, was not suitable to be done in the more open reception area. Mrs Reynolds worked in the more private administrative office.

26. Mrs Thwaite spoke to the claimant, rejecting the proposed working hours the claimant had put forward but proposing that the claimant be offered afternoon working. There is a dispute as to whether Mrs Thwaite specified the hours of 12 noon until 5.00pm in this conversation but we do not consider it necessary to make a finding on this. The claimant refused the counter proposal. Mrs Thwaite had suggested that the claimant be offered afternoon working so that she would be able to cover reception after Mrs Ashworth left. Mrs Ashworth, at that time, finished work at 2.30pm.

27. The respondent did not respond in writing to the claimant's request. If the application was an application under the Lancashire County Council policy, this was a breach of that policy. If it was a statutory request, failure to reply in writing was, as we note later, a breach of the ACAS Code of Practice.

28. In April 2017, the claimant had a number of conversations and email correspondence with Mr Selby, the manager of a council owned children’s Home who had been sent by Lancashire County Council to help turn the respondent school around. Mr Selby told the claimant about Lancashire County Council policies which might help her. Mr Selby forwarded an email from the claimant to his line manager at Lancashire County Council. We did not hear evidence of any involvement after that email by Mr Selby’s manager.

29. The claimant found the council policy on flexible working on the Lancashire schools’ portal after she had spoken to Mr Selby. This alerted her to the possibility of going to an employment tribunal if the policy was not followed. The claimant said she picked up on that and googled this and found out about the Equality Act.

30. On 3 May 2017, the claimant’s consultant provided a letter confirming that the claimant was extremely tired and lethargic with the treatment for leukaemia. The consultant wrote that the claimant was:

> “…responding quite well from her chronic leukaemia but she is extremely tired and lethargic with the treatment which can be one of the side effects from Imatinib chemotherapy.
>
> “She is now 60 and she is working a full-time job in a school, which is not helping her tiredness and she would like to drop down to a part-time job, which I would fully support, as it seems appropriate with her clinical condition. If there is any further query about her haematology condition, I am very happy to give further information.”

31. We find that the claimant included a copy of this letter with a letter she left for Mr Blundell later in May.

32. On 17 and 18 May 2017, the claimant had email correspondence with “Ask HR” at Lancashire County Council. The claimant wrote that she had been verbally requesting to reduce her hours from full-time to part-time for over 18 months. She said she was still awaiting a written reply. The claimant did not write that she had

been offered part-time hours working afternoons and that working afternoons would cause her particular problems. HR advised the claimant to take up the matter with the Head. They advised that cancer is one of the defined conditions under the Equality Act 2010.

33. Around May 2017, the claimant joined a trade union. The union would not assist with this claim because matters arose before she became a trade union member but they gave the claimant some advice.

34. The claimant wrote to Mr Blundell on 22 May 2017. The respondent could not say whether the letter had been received by Mr Blundell, Mr Blundell not being available to give evidence. However, we find, on a balance of probabilities, that it would have been received, since the claimant left it in his pigeon hole. The letter said that this was written on the advice of Unison. She wrote that she had found out that, under the Equality Act 2010, having cancer was classed as being disabled from the moment of diagnosis, and she said, as such, she had more rights at work than non-disabled members of staff. The claimant raised a particular concern about what she regarded as less favourable treatment she had received then other employees who had made requests to change hours and had had their requests granted. She also made specific reference to the duty to make reasonable adjustments. She included with this letter a copy of the letter dated 3 May 2017 from her consultant.

35. In the period 13-27 June 2017, the claimant was off work with stress related illness.

36. On 1 September 2017, Mr Steele replaced Mr Blundell as Interim Head Teacher.

37. The claimant wrote a letter of grievance to Mr Steele on 18 September 2017 and gave this to Mr Steele, together with a copy of her letter of 17 February 2017. In the letter of 18 September 2017, she wrote that she had been requesting, verbally and in writing, to reduce her hours for over 18 months. She wrote that Mr Prendergast had rejected her request, saying that, as she worked in the reception office, this was not possible as he wanted reception covering from 9.00am until 5.00pm. She wrote about her request in writing in February 2017 and that Mrs Thwaite, in March, had said they could only offer her 12 noon to 5.00pm to ensure that there was cover in reception. The claimant said she had since discovered that as she had leukaemia she was covered by the Equality Act 2010, which classed her as being disabled. She wrote that her grievance was that Lancashire's policy on flexible working had not been adhered to in her case; there had been no consideration of the Equality Act 2010 and how it covered her. She wrote that she had received less favourable treatment than other members of staff which she asserted was unlawful for someone classed as disabled, and she gave some examples of other employees who had been allowed to change their working hours.

38. On 22 September 2017, the claimant met with Mr Steele. As a result of their discussion, the claimant amended her request to requesting not to work on Fridays and to work Monday to Thursday 8.30am to 4.30pm. The claimant tells us that she did this because she thought her best chance of reducing her hours would be to take it in small steps, requesting something which was likely to be granted. She intended, she tells us, to make another request in February 2018. Also, by this time, her

daughter no longer required assistance with childcare. This request was subsequently approved by the Governing Body.

39. It appears that Mr Steele gave a form of apology to the claimant at the time. The claimant says that he said to her that, unfortunately, the school still appeared to be working to the legacy of Mr Prendergast's headship and he found it strange that people were so adamant that staff only work in the office they had been assigned to when first employed by the school. Mr Steele tried to reassure the claimant that he would deal with any repercussions her reduction in hours may cause.

40. The claimant was notified verbally of the decision to approve her amended request on 10 October and, after half-term, on 6 November 2017, the claimant began to work the amended hours. The claimant did not start to work her amended hours earlier because she needed to do a handover with Ms Downham who was to cover reception on Friday afternoons until she went on maternity leave. The claimant was given a document confirming her change of hours and a document concerning her duties.

41. On 7 December 2017, the claimant learned that Mrs Ashworth had been given a change in hours which, she was told, had been granted because it would not have a great impact on the running of the school day. The claimant says that Mrs Ashworth made the request so that she could look after a new puppy and other livestock. Mrs Ashworth's finish time was changed from 2.30pm to 1.30pm. The claimant was very upset by Mrs Ashworth having her request granted so quickly, compared to how the claimant felt her requests had been treated. The claimant accepted that her upset at Mrs Ashworth's treatment was the trigger for her contacting ACAS on 7 December under the early conciliation procedure.

42. The early conciliation certificate was issued on 8 December and the claimant presented her claim to the Employment Tribunal on 15 December 2017.

43. The current Head Teacher, Mr Berman, took up his post at the school on 8 January 2018.

44. The claim form submitted by the claimant was received by the respondent on 11 January 2018.

45. The claimant was off work with stress in the period 26 February through to 8 April 2018. During her absence, an Occupational Health report was obtained. This was dated 12 March 2018 and recommended that management considered reducing Mrs Brown's working hours. They wrote:

> "She has a condition that is likely to be covered under the Equality Act and it would be a reasonable adjustment and would help to maintain her attendance at work."

46. Mr Berman had a further meeting with the claimant on 19 March and conducted a stress risk assessment. A change to the claimant's working hours was agreed and she began working her amended hours with effect from 9 April 2018. The new hours were that she would work 20 hours a week over four days, Monday to Thursday, working 8.30am to 1.30pm. She did not work on Fridays. Since the claimant's change of hours school's reception has been covered by agency staff and

other members of staff. We heard evidence that this has not been easy and the school is currently facing a budget deficit which means all agency working arrangements are under review as well as the staffing structure in general.

47. We accept the claimant's evidence that she got tired when she was working full days for the respondent. When it was put to her, in cross examination, that there was nothing intrinsically different in working part time hours in the afternoon compared to the morning, the claimant said that, if she was at home in the mornings, she would do housework. It was put to the claimant that working 12 noon until 5 p.m. would have solved the problem of tiredness. She replied that she did not know, without trying it. She said she suspected it would not; she would do housework and it would still be a long day.

Submissions

48. Mr Campion, for the respondent, and the claimant made oral submissions.

49. In summary, the respondent's submissions were as follows.

50. The respondent agreed that, at some time, the claimant became substantially disadvantaged by the requirement to work full time; it was not clear when this was but it was likely it was by no later than 17 February 2017. The respondent submitted that the claimant was not put at a substantial disadvantage by the requirement to work afternoons. There was medical evidence to support part time working but this did not show any substantial disadvantage particular to working afternoons. The evidence pointed to the quantum of hours worked causing the problem rather than anything intrinsic to afternoon working.

51. Mr Campion submitted that the respondent knew of the claimant's disability once it received the consultant's letter dated 22 May 2017. He submitted that there was no evidence that the respondent knew that working in the afternoons was likely to put the claimant at a substantial disadvantage.

52. Mr Campion submitted that the respondent has now possibly done more than was legally required. The offer to work afternoons was likely to avoid the disadvantage caused by the requirement to work full time. When the claimant refused this offer, it was unlikely the respondent breached its duty by not giving the claimant exactly what she wanted.

53. Mr Campion submitted that the complaints of failure to make reasonable adjustments were presented out of time; time started to run when the school rejected her request in February 2017. He submitted it was not just and equitable to extend time.

54. Mr Campion submitted that the application for flexible working made by the claimant on 17 February 2017 does not meet the requirement in section 80F(2)(a) of stating that it is "such an application" and also that it does not meet the requirement in the Regulations in that it does not state whether the claimant has previously made any such application to the employer and if so, when. If it was a statutory request, it was disposed of by agreement.

55. Mr Campion submitted that the complaint relating to flexible working was presented out of time. The respondent says the claimant was notified of the decision in March 2017 so time started to run from then. If the claimant had not been notified of the decision, time would have started to run 3 months from the date of the application i.e. on 17 May 2017. Either way, the complaint was presented out of time. Mr Campion submitted that it had been reasonably practicable to present the claim in time.

56. The claimant made brief submissions. She said the respondent was aware in May 2015 she had leukaemia. She was struggling working so many hours. There was no adjustment until November 2017. Mrs Reynolds was willing to fulfil the hours the claimant would not be working. Mrs Reynolds was on the same grade and had the same job description as her. The respondent failed to comply with the Council's flexible working policy and failed to take into account the Equality Act. Although adjustments were made in April 2018, other members of staff had been allowed to change their hours in a matter of weeks and it had taken the claimant more than 2 years to get the change she wanted. The claimant said she felt she had received less favourable treatment than other members of staff.

The Law

57. The law we have to apply in relation to the complaint of failure to make reasonable adjustments is contained in the Equality Act 2010 (EqA).

58. Section 20 EqA and Schedule 8 contain the relevant provisions relating to the duty to make adjustments. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising "a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

59. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know, that the employee had a disability and was likely to be placed at the relevant disadvantage.

60. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

61. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

62. The provisions relating to the request for flexible working are in the Employment Rights Act 1996 (ERA) and the Flexible Working Regulations 2014 (the Regulations).

63. Section 80H(1) ERA allows an employee "who makes an application under section 80F" to present a complaint to an employment tribunal, amongst other things,

that “his employer has failed in relation to the application to comply with section 80G(1): s.80H(1)(a).

64. Section 80F(2) states:

> “An application under this section must –
>
> (a) state that it is such an application;
>
> (b) specify the change applied for and the date on which it is proposed the change should become effective; and
>
> (c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.”

65. Section 80F(5) allows the Secretary of State to make, by regulation, provision about the form of applications made under this section and when such an application is to be taken as being made. The Flexible Working Regulations 2014 are made under this provision, and regulation 4 deals with the form of the application. This states:

> “A flexible working application must –
>
> (a) be in writing;
>
> (b) state whether the employee has previously made any such application to the employer and if so when; and
>
> (c) be dated.”

66. The relevant part of section 80G ERA for the purposes of this claim is s.80G(1)(a) which requires an employer “to whom an application under section 80F is made” to “deal with the application in a reasonable manner.”

67. Section 80H(5) sets out the time limit for bringing a complaint which is three months beginning with the “relevant date” (subject to extension to take account of the period for early conciliation) or, if the tribunal is satisfied that it was not “reasonably practicable” for the complaint to be presented within that period, “within such further period as the tribunal considers reasonable.” Section 80H(6) defines the “relevant date” as being “the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.”

68. Subsection 80(H)(3) provides that no complaint may be made until either the employer has notified the employee of the employer’s decision on the application or the decision period applicable to the application has come to an end without the employer notifying the employee of its decision.

69. Subsection 80(H)(2) provides that no complaint may be made in respect of an application which has been disposed of by agreement or withdrawn.

Conclusions

Complaint of failure to make reasonable adjustments

70. Disability and the knowledge of disability were conceded.

71. We considered first the complaint in relation to the provision, criterion or practice of a requirement to work full-time. We concluded that this did put the claimant at a substantial disadvantage compared with people without the disability. We were supported in this by the consultant's letter typed on 3 May 2017. Certainly, by 17 February 2017, when the claimant made her request for flexible working, she was feeling tired due to her condition and this had probably been the case for some time prior to this.

72. We conclude that, from 17 February 2017, the respondent had the knowledge that the claimant was put at a substantial disadvantage by the requirement to work full-time. They knew this because of what the claimant wrote in her letter of 17 February 2017. In this letter, she made a sufficient link between her tiredness and the condition for the respondent to have the requisite knowledge of disadvantage. We conclude, therefore, that the duty to make reasonable adjustments arose from 17 February 2017.

73. In around mid March 2017, the claimant was offered part-time hours, albeit in the afternoons. We conclude that this was a reasonable adjustment to be offered in light of what the claimant had said, which was that full-time hours were causing her difficulty. She had not identified that working in the afternoons, rather than mornings, was a problem. Part-time hours working in the afternoon were offered but were not accepted. We conclude, therefore, that there was a period of about one month when there was a failure to comply with the duty to make reasonable adjustments.

74. We conclude that the time limit starts to run from the point when the part-time afternoon hours were offered i.e. when the respondent ceased to be in breach of the duty to make reasonable adjustments. We do not know the precise date of this but it was in March 2017. Taking this as being around mid March, the primary time limit would expire in around mid June 2017. The claimant did not start proceedings until December 2017. The claim is, therefore, considerably out of time. It can only proceed if we consider it just and equitable in all the circumstances that it should do so. We take into account all the relevant circumstances. If the claimant did not know about time limits and how to bring a Tribunal claim at the time, we conclude that she was in a position to find this out. She had already referred to googling matters in relation to her request for flexible working made in February 2017. She had looked at the Council flexible working policy after speaking to Mr Selby, in around April 2017, and had seen reference to going to an employment tribunal. Searches on the internet at this time told her about the Equality Act. By around May 2017, she was a trade union member and was able to get some advice from the trade union, although they would not support her in bringing this case. The final trigger for bringing a claim was the claimant's perception of unfairness in her treatment compared to that of Mrs Ashworth. In all the circumstances, we consider that it is not just and equitable to extend time to consider this complaint.

75. We turn now to the second provision, criterion or practice, this being a continuing requirement to work afternoons. We consider first whether this requirement put the claimant at a substantial disadvantage in comparison with persons who are not disabled. The only medical evidence we had related only to the requirement to work full-time hours. The consultant said nothing about the time of day when the hours would be worked. The claimant did not say in her letter of 17 February 2017 that afternoon working caused her a particular problem. Indeed, she wrote in that letter that she was flexible in her start and finish times. There is no medical evidence in support of the claimant's assertion that afternoon working caused her more difficulties than working earlier in the day. The evidence that the claimant has given about tiredness from the length of the working day is not sufficient for us to conclude that she would suffer disadvantage from working afternoons, rather than mornings, because of the claimant's condition. We do not feel able to use judicial knowledge, in lieu of other evidence, to find that she would be more likely to be tired in the afternoon; it may be that, if the claimant rested in the morning, she might not have been too tired to work in the afternoon. We, therefore, conclude that we are not satisfied that the continuing requirement to work afternoons put the claimant at a substantial disadvantage in comparison with persons who are not disabled. We conclude that this complaint is not well founded for this reason.

76. However, we went on to consider also the issue of the respondent's knowledge of disadvantage. We conclude that the respondent did not, and could not reasonably be expected to know, that the claimant was likely to be placed at the disadvantage by afternoon working. The claimant did not alert them to a particular problem about afternoon working, rather than morning working. For this further reason, this complaint would fail.

77. We conclude that the provision, criterion or practice continued to be applied until the change was made in April 2018, which was after the claimant had presented her complaint. We, therefore, have jurisdiction to consider this complaint, having regard to time limits, but the complaint fails on its merits for the reasons given.

<u>Complaint of failure to deal with a request about flexible working in a reasonable manner</u>

78. As previously noted, an application made under section 80F ERA must, amongst other things, "state that it is such an application" (s.80F(2)(a) ERA).

79. As previously noted, regulation 4 of The Flexible Working Regulations 2014 requires a flexible working application, amongst other things, to "state whether the employee has previously made any such application to the employer and if so when".

80. Considering first the requirement in section 80F(2)(a), we have considered what interpretation may be placed on this section. We are not aware of any legal authorities on the interpretation of the section which may assist us.

81. We consider that it is not necessary that the application should identify the specific section and name of the legislation, and, indeed, the respondent did not argue that this was required. We considered whether this provision could be interpreted widely enough that something which clearly says it is an application for

flexible working, as does the claimant's letter, would be covered, even though there is no reference in the letter to it being a statutory request. We note that the ACAS Code of Practice says, in relation to the request, that it must be in writing and must include amongst other things the following information:

> "…a statement that it is a statutory request and if and when they have made a previous application for flexible working."

82. We consider there is merit in the respondent's submission that there must be some reference to law in the letter to distinguish a request made under the legislation from a non-statutory request which could be made more than once a year. The respondent's submission appears to be supported by the wording of the ACAS Code of Practice.

83. We conclude, albeit with some reluctance, given the technical nature of the obstacles placed by the legislation, that the claimant's letter of 17 February 2017 did not satisfy this requirement of a section 80F application. This because the letter did not refer to this being an application made in accordance with legal requirements.

84. Also, we conclude, again with some reluctance, that the application does not meet the requirements of section 80F in that it does not state, as required by regulation 4 of the 2014 Regulations, that the claimant had not previously made any such application, in the sense of a statutory application, and if so when. We do not consider we can read this provision in any way other than that an applicant must expressly include a written statement in the application as to whether or not a previous application has been made. The claimant did not include such a statement in her letter.

85. Since we conclude the claimant's application did not satisfy the requirements of section 80F of the Employment Rights Act 1996, we conclude the claimant was not entitled to present a complaint under section 80H of the Employment Rights Act 1996. The Tribunal, therefore, does not have jurisdiction to consider the complaint and it must be dismissed. This is sufficient to dispose of this complaint. However, we go on to consider also whether we have jurisdiction, having regard to time limits.

86. We conclude that the claimant's application made on 17 February 2017 was rejected by what Mrs Thwaite said in a conversation in mid March 2017. Mrs Thwaite, on behalf of the respondent, refused the specific changes to working hours that the claimant had requested, albeit that she made a counter proposal that the claimant should reduce her working hours but work these hours in the afternoons. We conclude that the date of this refusal of the claimant's particularly requested working hours was when the time limit started to run. The primary time limit, therefore, expired in mid June 2017. The claim was not presented to the Employment Tribunal until December 2017. The claim was, therefore, presented out of time and we may only consider it if it was not reasonably practicable for the claimant to present it within the time period and it was presented within a reasonable time thereafter.

87. We conclude that it was reasonably practicable for the claimant to present the claim in time. There is nothing we have heard about which would have stopped the claimant bringing the claim within the time period. If she did not know about time

limits and bringing a claim to the Employment Tribunal, she had the tools to be able to find this out e.g. access to the internet. We, therefore, conclude that we have no jurisdiction because the claim is presented out of time.

88. If we had not found that the application had been rejected in mid March 2017, we would have found that it had been disposed of by agreement in September 2017 when the claimant changed her request and the amended request was agreed. We would, therefore, not have had jurisdiction to consider the complaint because of the provisions of section 80H(2) of the Employment Rights Act 1996. For this additional reason, therefore, we do not have jurisdiction to consider this complaint.

89. If we had had jurisdiction to consider the claimant's complaint about the handling of her flexible working application, we would have had concerns about the way that the respondent had dealt with the application. We understand that the school was experiencing many difficulties at the time. Nevertheless, if the claimant had made a statutory request, the respondent would still have been under legal obligations to deal with the application in a reasonable manner. We would have been concerned about what appeared to be breaches of the ACAS Code of Practice. There was a delay in speaking to the claimant about her request. There was no evidence that the claimant was invited to a meeting and informed that she could be accompanied by a work colleague to such meeting to discuss her request. We are doubtful that the respondent gave sufficiently careful consideration to the particular proposal the claimant had put forward. In particular, we would have considered a discussion with Mrs Reynolds' manager, and Mrs Reynolds to be appropriate as part of the process of considering whether the claimant's suggested working hours could be accommodated. The respondent failed to provide a response in writing to the claimant's request as is required by the ACAS Code if a statutory request is made.

90. However, for the reasons we have given, we do not have jurisdiction to consider the complaint that the respondent failed to deal with a request about flexible working in a reasonable manner.

Employment Judge Slater

Date: 13 July 2018

REASONS SENT TO THE PARTIES ON

23 July 2018

....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.