

EMPLOYMENT TRIBUNALS



Claimant
Mr. D. Thomas

V

Respondent
Tower Transit Operations Ltd

HELD AT: London Central

ON: 4 December 2018

BEFORE: Employment Judge Mason

Representation

For the Claimant: Mr. W. Brown (solicitor)

For the Respondent: Mr. Bailey (counsel)

**EMPLOYMENT TRIBUNAL
OPEN PRELIMINARY HEARING
(RESERVED JUDGMENT)**

1. The Claimant's claim for breach of section 80H Employment Rights Act 1996 (flexible working) is dismissed on withdrawal.
2. The Claimant's surviving claim of direct sex discrimination is in time and no deposit order is made.

REASONS

Background and issues

1. The Respondent operates bus services under contract for Transport for London and employs approximately 1,700 staff. The Claimant is employed by the Respondent as a bus driver; his employment commenced in July 2002. He works on the early rota on route 288, 5 days a week. He is paid £549 per week gross (£430 net).
2. Due to childcare responsibilities, on 7 July 2017 the Claimant put in a flexible working request so that he could finish his shift by 13:00 and not work split shifts at the weekend. On 10 August 2017, Ms. Helen Aska, Operations Manager, wrote to the Claimant agreeing to temporary working arrangements; however, the version of Ms. Aska's letter provided by the Claimant differs from the Respondent's in that the Respondent's version states that the temporary

working arrangements are not “guaranteed” whereas the Claimant’s version omits this. Both versions state that the “*temporary working arrangement will be subject to reviews and changes at any time*”.

3. On 17 November 2017, the Claimant was required to attend a meeting with his manager, Ms. Nisbett, to review the working arrangements. Following this meeting, Ms. Nisbett wrote to the Claimant acknowledging that “*not all parties had been made aware of the agreed temporary arrangement in place*” and agreeing to put this right and to continue the arrangement until 17 February 2018, but without any guarantee.
4. The Claimant says despite this he was still repeatedly allocated duties/shifts that finished after 13:00 and on 1 December 2017 he complained to Ms. Nisbett and in January 2018 he lodged a formal grievance. A number of meetings took place to try and resolve this issue including a grievance hearing following which Ms. Sue Bates, Operations Manager, wrote to the Claimant on 15 January 2018.
5. By a claim form presented on 10 April 2018 the Claimant brought complaints under section 80H of the Employment Rights Act 1996 (ERA) and for direct sex discrimination under the Equality Act 2010 (EqA).

6. Issues for the OPH

- 6.1 At a previous PH (private) on 12 September 2018, EJ Henderson listed this case for a final hearing on 9 to 15 April 2019 and made various directions. EJ Henderson also listed this case for an open PH (OPH) (3 hours) to hear the Respondent’s application for a deposit order under Rule 39 of the Employment Tribunal Procedure Rules 2013 on the grounds that the claims have little prospect of success. EJ Henderson noted that the Respondent wished to also have the issue of whether the claims have been made out of time determined at the OPH and that the Respondent would make an appropriate application at a later date if so minded. Mr. Bailey told me that the Respondent has in fact since made such an application and although there is no record on the Tribunal file, Mr. Brown confirmed he had seen the application and had no objection to this issue being dealt with at the OPH before me.
- 6.2 The agreed issues for the OPH were therefore as follows:
 - (i) are any claims are out of time and if so, is it just and equitable to extend time?; and
 - (ii) pursuant to rule 39 Employment Tribunals Rules of Procedure 2013, does any allegation or argument have little reasonable prospect of success and if so, should there be a deposit of up to £1,000 as a condition of the Claimant continuing to advance each such allegation or argument?

7. Agreed issues for the final hearing:

- 7.1 At the outset of the OPH before me, Mr. Brown withdrew the Claimant’s claim under section 80H ERA. The remaining claim is therefore one of direct sex discrimination.
- 7.2 The issues for the final hearing were agreed to now be as follows:
 - (i) Has the Claimant been treated less favourably by the Respondent contrary to s13 EqA 2010 because of his sex by:

- (a) rejecting his requests to work flexibly (10 August 2017, 17 November 2017 and 18 January 2018)?; and/or
 - (b) the failure on the part of management (i.e. Ms. Aska, Ms. Nisbett and Ms. Bates) to communicate with allocators the working arrangements agreed with the Claimant with the consequence that the Claimant had childcare problems on the following dates: 3, 9 and 10 September 2017; 24 and 29 October 2017; 4, 5 and 14 November 2017; 22 December 2017; 6, 7, 9, 15 and 16 January 2018; and 1 and 16 March 2018?
8. Judge Henderson also made various case management orders which the parties informed me had either been complied with or were still relevant and no further directions were required. However, both sides agreed to notify the Tribunal promptly after exchange of witness statements if it was considered that the full 5 days would not be required for the final Hearing. The Claimant also confirmed to me that he would bring to the final hearing the original of the letter dated 10 August 2017.

Evidence and procedure at the Hearing

9. I was provided with a bundle of documents [pages 1-217]. I was not provided with any witness statements. Mr. Bailey provided a chronology and written outline submissions.
10. Having established the issues and agreed the documents, I retired to read the documents. Both representatives then made verbal submissions and at the conclusion of the Hearing, I reserved my decision which I now give with reasons.

Conclusions

11. Having considered all the evidence in the round and having reminded myself that the standard of proof is the balance of probabilities, I have reached the following conclusions.
12. Presented in time?
- 12.1 Mr. Bailey submits that the sex discrimination claim is out of time. By reference to the issues (para. 7.2 above) he submitted that both (i)(a) and (b) are out of time but without conceding (i)(a) he proposed to argue only about (i)(b) at the OPH. He submits that the Claimant cannot rely on the letter of 10 August 2017 (or events prior to that date) as it is out of time.
- 12.2 Mr. Brown on the other hand submits that there is a clear link between the decisions made on 10 August 2017, 17 November 2017 and 18 January 2018 and therefore there was a continuing act extending over a period of time.
- 12.3 On balance, I agree with Mr. Brown. The letters dated 10 August 2017 and 17 November 2017 are both headed "Temporary Working Arrangement Meeting" and clearly relate to the same matter i.e. the working arrangements put in place in August 2017. The letter of 18 January 2018 [pages 120-123] also focuses on the working arrangements put in place. Hence, I believe there is sufficient evidence before me to show that this may be a continuing act.
- 12.4 The last act relied on by the Claimant is 18 January 2018. The ordinary time limit of 3 months would have expired on 17 April 2018. Section 207B of the Employment Rights Act 1996 extends the "ordinary" time limit for presenting a

complaint to an Employment Tribunal in order to facilitate conciliation through ACAS before proceedings are instituted and the time limit in this case was extended by one month. As the claim was presented on 10 April 2018 it was in time.

13. Deposit Order:

13.1 Rule 39(1) of the Tribunal Rules 2013 provides that where at a PH a Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

13.2 Mr. Bailey submits on behalf of the Respondent that the Claimant does not have sufficient evidence to show a prima facie case of direct sex discrimination.

(i) The Claimant says in his ET1 (Grounds of Complaint para. 12):

“The Claimant believes that other female employees, who have childcare responsibilities have been granted flexible working arrangements which are not subject to regular review and that the Respondent has not said that they cannot “guarantee” these arrangements. For example, the Claimant believes that Mrs. S. Mohammed, a driver, has been granted flexible working”.

The only comparator he relies on is Mrs. Mohamed but the evidence shows [page 193] that in fact she was also only given “temporary early working arrangements” for a period of 3 months. Also, she is not a true comparator given that she was requesting a reduction in full days from 5 to 3 whereas the Claimant was requesting a specific early finishing time every day which required adjustments to the rota.

(ii) Furthermore, the Respondent has provided statistics [page 30G] which show that in 2017/2018 the Respondent received 11 requests from men for flexible working (of which 2 were granted) and only one from a woman which was refused.

13.3 Mr. Brown submits that the Respondent treated the Claimant differently to Mrs. Mohamed as her hours were guaranteed whereas the Claimant’s were not.

13.4 On balance, I have decided not to make a deposit order as I am unable to conclude in the limited time available and without hearing all the evidence that this claim has little prospect of success. There are underlying factual disputes (such as the correct version of the letter of 10 August 2017) which need to be resolved at a full merits Hearing when all the evidence can be considered and properly tested.

Employment Judge Mason

4 November 2018

Sent to the parties on:
6 November 2018

For the Tribunal