EMPLOYMENT TRIBUNALS

Claimant: Mr J Walsh
Respondent: Network Rail Infrastructure Limited

Heard at: Liverpool **On:** 22 November 2019

Before: Employment Judge Buzzard
Mrs Ramsden
Mr Gates

REPRESENTATION:

Claimant: Miss R Owusu-Agyei (Counsel)
Respondent: Miss E Wheeler (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that when the claimant presented his claim under s80H of the Employment Rights Act 1996 (as amended) the claimant was not at that time entitled to present his claim, as a consequence of the operation of s80H(3)(b). Accordingly, the claimant's claim is dismissed as falling outside the jurisdiction of the Tribunal to consider.

REASONS

The Law

1. The claimant in this case makes a claim pursuant to s80H of the Employment Rights Act 1996 ("ERA").

2. The claim was listed for final hearing. A preliminary jurisdictional issue arose. This reserved judgment considers only that preliminary jurisdictional issue.

3. The claimant made a flexible working application, under the remit of s80F ERA, which states that:

> *80F Statutory right to request contract variation*
> *(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—*
> *(a) the change relates to—*
> *(ii) the times when he is required to work…*

4. The claimant sought a change to the times when he was required to work. There is no dispute that the claimant was a qualifying employee with a right to make

such an application, or that the application met the relevant further requirements of s80F to be a validly made application.

5. Under s80G ERA, there are listed a number of Employer's duties in relation to applications made under s80F ERA. The first of these duties relevant to the preliminary point that has arisen is found in s80G(1)(aa) ERA, as follows:

> *80G Employer's duties in relation to application under section 80F*
> *(1) An employer to whom an application under section 80F is made—*
> *(aa) shall notify the employee of the decision on the application within the decision period, …*

6. It was an accepted fact that the respondent's policy permitted the claimant to appeal the initial decision in relation to his application. It was further an accepted fact that the claimant had appealed. Accordingly, the 'decision' for the purposes of s80G ERA is defined by s80G(1A)(a) ERA as the appeal decision:

> *(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to—*
> *(a) the decision on the appeal….*

7. Given the claimant was permitted to appeal, and lodged an appeal, against the initial decision, the '*decision period*' referred to in s80G(1)(aa) ERA during which the respondent must dispose of the appeal is defined by s80G(1B) ERA as:

> *(1B) For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is—*
> *(a) the period of three months beginning with the date on which the application is made, or*
> *(b) such longer period as may be agreed by the employer and the employee.*

8. There is no dispute between the parties that the claimant's application was made on 11 February 2019. Accordingly, unless a longer period was agreed pursuant to s80G(1B)(b) ERA, the decision period ended on 10 May 2019.

9. The parties are agreed that no decision was reached before 1 July 2019. Accordingly, unless there was a longer period agreed for the decision period, the respondent will have failed to meet its obligations under s80F ERA, and the claimant's claim will be well founded.

10. The preliminary dispute is around whether the claimant and respondent had agreed a longer period for the decision period. In terms of agreement to a longer period, s80G(1C) ERA confirms that any agreement does not need to be reached prior to the expiry of the standard decision period. This section states:

> *(1C) An agreement to extend the decision period in a particular case may be made—*

> *(b) with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period that is being extended came to an end.*

11. Under s80H ERA, the claimant can make a complaint that the respondent failed to deal with his s80F ERA application in compliance with s80G(1) ERA, including the requirement to provide a decision within the decision period, as extended if applicable. Under s80H(3) ERA limits are placed on when a claim under s80H ERA may be presented to an Employment Tribunal. Specifically, s80H(3) ERA states:

> *s80H(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until—*
>
> *(a) the employer notifies the employee of the employer's decision on the application, or*
>
> *(b) if the decision period applicable to the application (see section 80G(1B)) comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.*

12. Consistent with s80G ERA, s80H(3A) ERA makes it clear that the decision referred to in s80H ERA would, for the claimant, be the decision on his appeal:

> *(3A) If an employer allows an employee to appeal a decision to reject an application, a reference in other subsections of this section to the decision on the application is a reference to the decision on the appeal or, if more than one appeal is allowed, the decision on the final appeal.*

13. In addition, s80H(3B) ERA makes it clear that the decision period for the purposes of s80H ERA is treated as any longer agreed period:

> *(3B) If an agreement to extend the decision period is made as described in section 80G(1C)(b), subsection (3)(b) is to be treated as not allowing a complaint until the end of the extended period.*

14. Accordingly, if there was an agreement to a longer decision period, the claimant could not present a complaint to the Employment Tribunal until the end of that agreed longer decision period.

15. The claimant in this case presented his claim on 25 June 2019. This means that if it is found the claimant had agreed to a longer decision period to a date beyond 25 June 2019, at the date he presented his claim it was not a claim he had the right to make. As such, the claim would have to be dismissed.

ACAS Codes and Guidance

16. ACAS Code of Practice 5 (2014) is titled "*Handling in a reasonable manner requests to work Flexibly*". Of relevance to this claim, paragraph 13 of the code states:

> *"The law requires that all requests, including appeals, must be considered and decided on within a period of three months from first receipt, unless you agree to extend this period with the employee."*

17. ACAS have published guidance titled "*The right to request flexible working: an ACAS guide (including guidance on handling requests in a reasonable manner to work flexibly)*" which is relevant to the claimant's flexible working application. This guidance includes the following relevant parts describing the time allowed for the determination of flexible working applications:

    Firstly, on page 5 of the guidance:

> *"On receiving a request, an employer should arrange to discuss it with the employee as soon as possible. If there is likely to be a delay in discussing the request it is good practice to inform the employee. It is important that an employer deals with requests in a timely manner as the law requires the consideration process must be completed within three months of first receiving the request, including any appeal. If for some reason the request cannot be dealt within three months then an employer can extend this time limit, provided the employee agrees to the extension."*

    Secondly on page 17 of the guidance:

> *"Any appeals should be dealt with as quickly as possible. Remember, although the law does not require an employer to allow an appeal, where they do the employer must consider the whole request including any appeal within three months of first receiving the original request for flexible working unless an extension is agreed with the employee."*

The Issue

18. The claimant gave evidence that he had agreed that an appeal hearing, to consider his appeal against the initial decision, could take place on 1 July 2019. If that amounted to an agreement that the period to make a decision on the appeal was extended to 1 July 2019 (or any later date) then he did not have the right to make his claim at the date it was presented.

19. The preliminary issue for consideration is therefore: did the claimant and respondent agree a longer period for the appeal decision on his application under s80F ERA to be reached?

The Relevant Facts

20. The claimant made his application under s80F ERA on 11 February 2019. The respondent refused that application at a meeting held on 6 March 2019. At that meeting the claimant's union representative stated the claimant intended to appeal the decision. This initial rejection of the claimant's application was

confirmed in writing by letter dated 7 March 2019. This letter stated the claimant had the right to appeal the rejection.

21. The claimant appealed against the initial decision on his application, confirming this in a letter dated 13 March 2019. The claimant then undertook early conciliation with ACAS commencing the next day, 14 March 2019, and running to 4 April 2019.

22. There then followed a period during which the claimant, his trade union representative and the respondent appear to have sought to agree a date for a hearing to consider the claimant's appeal. Much of this occurred via email, and the Tribunal had the benefit of sight of the emails as part of the documentary evidence before them.

23. On 5 April 2019 a Mr Cook of the respondent emailed the claimant's trade union representative to see if he would be able to attend an appeal hearing on the 15th of April if he could be released from duties. This was in response to an email of the same day from the claimant stating that as Mr Cook was "the hearing manager for the appeal hearing" could he arrange for the trade union representative to be released from duties. The claimant's representative responded the same day to say he was on leave that week, it being half term.

24. On 9 April 2019 Mr Cook suggested 26 April 2019 as an alternative date, and specifically stated in his email "Please let me know or if any other date is more suitable". Again, the claimant's Trade Union Representative was stated to be on leave, with Mr Potts (who would have to release the trade union representative from duties) suggesting, by email, that the 25 April 2019 would be possible. Mr Cook confirmed he would not be available on the 25 April 2019, as he was on leave that day. Mr Potts confirmed to Mr Cook that the claimant's representative was not due to be back from the period of leave that started on 26 April 2019 until 3 May 2019. This was a Friday prior to a bank holiday. Mr Cook confirmed he was on leave that day, and would be back on the 7 May 2019, the day after the bank holiday. Mr Cook suggested either the 7, 9 or 10 May to hear the appeal.

25. On 17 April 2019 Mr Cook chased a response to the suggested early May dates, that chasing email being copied to the claimant. On 29 April 2019, Mr Cook emailed the claimant and stated:

> *John, as per discussion I have on several occasions where you were copied in, tried to arrange a date for your appeal on flexible working to no avail, as neither [Mr Potts] or [the claimant's trade union representative] have replied to me. Therefore can I ask you to get in touch with your representative and get back to me with some dates of availability so as to get the appeal planned in.*

26. The claimant responded on 1 May 2019 to say his representative was due back from leave the next day and would make contact later that week "*to arrange availability for appeal date*".

27. There was no evidence that the claimant's representative did make contact until 16 May 2019, when he emailed details of his rostered hours to Mr Cook. In

response the same day Mr Cook suggested 20 May 2019, which the claimant's representative agreed subject to release.

28. On Friday 17 May the claimant's representative raised a concern that Mr Cook should not hear the appeal. This was on the basis his line manager was an individual that the claimant believed had prejudged the outcome. The basis for this belief is not relevant, and is disputed by the respondent. In response to this request, Mr Cook postponed the hearing scheduled for the following Monday whilst he sought advice from HR.

29. The claimant then took a period of leave, referred to in an email of 28 May 2019 as running to 10 June 2019. During the claimant's absence the respondent took steps to identify an alternative appeal manager, assigning a Mr Tony Jones, after exploring the availability and suitability of two other managers. One of these managers was not considered to be sufficiently separate from Mr Cook and his department, and the second was not available due to annual leave until mid-July 2019.

30. Mr Jones agreed with the claimant and his union representative that the appeal would be heard on 1 July 2019. This was confirmed in a letter to the claimant dated 24 June 2019. The fact that the date of 1 July 2019 was agreed by the claimant was explicitly confirmed by the claimant in oral evidence. His evidence was that at the point of agreeing this, and prior to presenting his claim, he had not been considering time or time limits for dealing with his application.

31. The claimant presented a claim to the Employment Tribunal on 25 June 2019. This claim specifically referred to the appeal hearing being scheduled for 1 July 2019.

32. It is common ground that there was not, at any point, any explicit discussion of the statutory rules. There was no explicit discussion of the 'decision period' or any extension to the decision period.

33. It is also common ground, stated by the claimant and his union representative during their respective cross examinations, that the claimant had positively agreed that the appeal hearing would take place on 1 July 2019. There was no suggestion that he had merely acquiesced, or attended that hearing under duress, or at that hearing suggested that the process was taking too long.

34. The appeal hearing upheld the decision to reject the claimant's application.

Respondent's Submissions

35. The respondent submitted that the claimant, in agreeing that the appeal would be heard on 1 July 2019, must have agreed that the time to hear the appeal was extended to at least 1 July 2019. The respondent rejected any suggestion that there had to be an express or explicit agreement to extend the decision period, and that extending the time for the hearing at which the decision is made to a date must imply agreement to extend the time for the decision to be made. The fact that was not expressly discussed or recorded, whilst unhelpful in the current circumstances, is not a bar to there being an agreement.

36. The respondent invited the Tribunal to reject the claimant's claim, as having been presented before the expiry of the decision period, and therefore at a time where the claimant had no right to present a claim. For this reason, the respondent argued the claim fell outside the jurisdiction of the Tribunal to consider.

Claimant's Submissions

37. The first submission made on behalf of the claimant was that there had to be express agreement to extend the decision period. Given it was common ground that there was no express agreement to extend the decision period, if express agreement is needed there can have been no extension. In the absence of an extension the claimant's claim was presented within the time limit of three months from the end of the basic decision period, which ran to 10 May 2019.

38. The claimant's representative invited the Tribunal to consider the ACAS code of practice and guidance, specifically referring to the parts of these set out at paragraphs 16 and 17 above. The submission made was that the wording of the ACAS code and the ACAS guidance could only make sense if there was a need for an express agreement to extend the decision period.

39. The claimant's representative further submitted, in support of the need for express agreement, that s80G ERA is titled "Employer's Duties". Accordingly, it was argued the obligation is on the employer, not the claimant, to ensure it is complied with in full.

40. The claimant's representative made alternative submissions, to be considered if the Tribunal concluded that an express agreement to extend the decision period was not needed. The alternative submissions made were labelled by the claimant's representative as having three strands, as follows:

    40.1. The Tribunal had not heard evidence from a respondent to explain the delay in the process between 13 March 2019 and 24 June 2019.

    40.2. The respondent had at paragraph 2.4 of their ET3 had set out a summary of the reasons why the claimant's application appeal had been delayed. The respondent had been represented by solicitors at that time and had not pleaded that there had been an agreement to extend the decision period, or that the claimant's claim was, at the date it was presented, outside the jurisdiction of the Employment Tribunal's to consider.

    40.3. The respondent's lists of issues prepared for the final hearing does not identify the question of implied agreement to an extension as an issue.

41. The claimant's representative went on to provide a reminder of several points of evidence. In particular, the claimant's representative set out a summary of the reasons for the delay and why they were not the claimant's fault. In addition, the Tribunal were reminded that the claimant had presented evidence that he had given no thought to the decision period. On this basis it was submitted the claimant could not have agreed to extend the decision period.

Conclusions

Is Express Agreement required?

42. It is not disputed that the date for the appeal hearing was agreed. That agreement was express, meaning that the claimant agreed the date of the hearing expressly. There was no dispute over this.

43. There is no principle of employment law identified by either party or within the knowledge of the Tribunal that would suggest that an agreement to extend the decision period, or any similar agreement of this nature, would have to be express, i.e. it would have to say something such as "*It is agreed that the decision period should be extended".* A requirement that the agreement between an employee and their employer for the purposes of extending time for a flexible working application has to be express would represent a level of technical formality that is absent from Employment law generally. In addition, it would appear to be contrary to the clear intent behind the flexible work application process, that being that employers and employees should seek to exhaust internal processes before making a claim to an employment tribunal.

44. The ACAS code and guidance do not, in the unanimous view of the Tribunal, in any way suggest that an express agreement to extend the decision period is needed. They both go no further than stating that an agreement is needed. Nothing in either document suggests such an agreement could not be implied.

45. Whilst the need to agree falls within a section of the ERA that is headed "Employer's Duties", the relevant specific point in that section relates to the need for agreement. It cannot be that when an agreement is needed, that is anything other than an obligation on both parties to agree. Regardless, it is unclear why the heading to this section referring to "Employer Duties" would suggest that any agreement to extend the decision period could not be implied.

46. For the above reasons, the Tribunal unanimously find that an agreement to extend the decision period can be implied.

Was there an Implied Agreement?

47. It was not disputed that the appeal hearing was the hearing at which the final step in the process started by the claimant under s80F ERA would be decided. There was no dispute that the process had not concluded within three months of the claimant making his application under s80F ERA.

48. That leaves the question of whether the claimant and respondent in this case did agree to extend the decision period. The appeal hearing was clearly a part of the process of dealing to the claimant's flexible working application.

49. It is not in dispute that the claimant agreed that the appeal hearing would be on 1 July 2019. The question is if the claimant could have agreed that the appeal could go ahead on 1 July 2019, without, by implication, agreeing that the time frame for that appeal to be heard was extended to include at least 1 July 2019. Whilst there could have been arguments that any such implied agreement would

have to have allowed for a reasonable time for the decision on that appeal to be reached after 1 July 2019, this further issue did not arise in this claim.

50. The Tribunal did consider the evidence relating to the reasons for the delay. This was almost entirely supported by contemporaneous emails, which were not disputed. Accordingly, the claimant's suggestion that the respondent had not provided witness evidence to the Tribunal to explain the delay could be of little material significance. The Tribunal were agreed that the parties had engaged in a constructive discussion to determine a date when the appeal could be heard in a way that satisfied the needs of both parties. No conduct by either party can be reasonably criticised as being in any way unreasonable. ET1 the Tribunal were not directed to anything predating the claimant's that suggested the claimant had identified or raised any concern or consideration of the time his appeal hearing was taking to progress.

51. The claimant's submission that the respondent had not raised the suggestion of an agreement in the pleadings or list of issues for this hearing is correct. That being noted, the respondent's ET3 does set out the reasons for the delay, which conclude by stating

> *"The reason the Respondent could not complete the appeal within the three months was therefore due to the Respondent's attempts to enable the Claimant to have his chosen representative at the appeal meeting, to accommodate the Claimant's request to have an alternative appeal manager and to accommodate the Claimant's holidays."*

52. Whilst this does not expressly state that the claimant agreed to an extension of the decision period, it does clearly suggest that the hearing was delayed to accommodate the claimant's requests and availability. Noting the evidence heard showed that delays were also partly to accommodate the respondent, the clear inference in the wording of paragraph 2.4 of the ET3 is that the 1 July 2019 date was mutually agreed. It is this agreement that is now argued to include an implied agreement to extend the decision period.

53. The issue is a jurisdictional one. The claimant is specifically not permitted to present a claim to the Employment Tribunal until the decision period has ended (including any extension) unless he had been given a final outcome for his application. Regardless, whether the respondent identified the jurisdictional issue when presenting its defence to the claimant's claim, or in preparing a list of issues in advance of a final hearing, or only at the hearing, cannot negate the validity of the point raised.

54. The Tribunal unanimously agreed that it is not credible for the claimant to have agreed to the flexible working application appeal could take place on 1 July 2019 without agreeing that the process, of which the hearing was part, could continue until at least that date. It is implicit in positively agreeing a date for a hearing, without raising any concern or objection to the date, that the process of which the hearing is part can continue until at least that date. Any analysis that suggested a date for the hearing could be agreed without an implied extension of time to permit the hearing on that date would be unworkable in practice.

55. This does not mean that the claimant could not have objected to the delay, but still attended a hearing such that the hearing took place after the expiry of the decision period. Such an approach could have been evident if the claimant had attended his appeal on 1 July 2019 because that was the date he was given, rather than it being a date had been expressly agreed by him following discussion with the respondent to find a date that met his requirements and the respondent's.

56. The Tribunal do not accept that the claimant had to specifically consider, or understand, the full legal impact of agreement in order to agree. Agreement in ignorance of the full impact of what is agreed is possible. In those areas of the Employer/Employee relationship where parliament has intended that fuller consideration or understanding is needed by either party before entering a binding agreement (such as in giving authority to make deductions from an employee's wages or agreeing to settle potential Employment Tribunal claims) the relevant statutory rules provide additional requirements for a valid agreement to be reached. In this case no requirement beyond the need to agree has been identified in either the statutory provisions or the accompanying ACAS code and guidance.

57. The claimant is found to have agreed the appeal decision could be made following a hearing on 1 July 2019. The claimant presented his claim on 25 June 2019. Accordingly, his claim was presented at a time when he had no right to present the claim made. Had the claimant waited for the appeal hearing and outcome to present his claim it would then have been presented at a time when he was entitled to make the claim.

58. The Tribunal noted that a significant part of the remedy the claimant seeks is an order that the respondent reconsider his application. Under the rules of s80F, the claimant is entitled to resubmit his application on 12 February 2020, at which time the respondent would be required under s80F to consider the resubmitted application in any event.

Employment Judge Buzzard
5 December 2019

JUDGMENT SENT TO THE PARTIES ON
10 December 2019

FOR THE TRIBUNAL OFFICE