EMPLOYMENT TRIBUNALS

Claimant: Mrs E Lowe

Respondent: Leicestershire County Council

Heard at: Leicester **On:** Friday 31 January 2020

Before: Employment Judge Clark (sitting alone)

Representation

Claimant: Mr D Patel of Counsel
Respondent: Miss N Owen of Counsel

JUDGMENT having been sent to the parties on 15 February 2020 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:

JUDGMENT

1. The Claimant's claims that the Respondent failed to comply with its duties under s.80G(1) of the Employment Rights Act 1996 and that its decision to reject her flexible working application was based on incorrect information **was presented out of time and is struck out for want of jurisdiction**.

2. The Claimant's claim of indirect sex discrimination proceeds unaffected by this judgment.

REASONS

1. Introduction

1.1 This is a hearing to determine jurisdiction. In particular, the time limit for bringing a claim under Part 8A of the Employment Rights Act 1996 ("the Act"). That is, a claim in respect of the employer's handling of Mrs Lowe's statutory request for a contractual variation.

1.2 The issue before me centres on the construction of the time limit provisions in section 80H of the Act, when the statutory cause of action accrues and therefore the meaning of the "relevant date". The issue before me is one of statutory interpretation. The facts are not in dispute and there is no alternative case advanced that it was not reasonably practicable for the claimant to have presented her claim in time. She says, on a proper interpretation of the statute, it was presented in time.

2. Chronology

2.1 The key dates in the chronology are agreed.

2.2 On 25 March 2018 the Claimant made an application to her employer for a contract variation under the statutory flexible working provisions in part 8A of the Act. In short, she wanted to reduce her working week to part time working spread over three full days per week.

2.3 On 6 June 2018 that application was considered by the employer and its decision communicated to the claimant. The decision was to refuse the application on its terms, but an alternative proposal for her to work 50% of full time hours per week was offered.

2.4 The Claimant lodged an appeal against that decision on 8 June 2018. Before the appeal was heard, the statutory "decision period", as defined by s.80G(1B) of the Act, expired on 24 June 2018[1].

2.5 On 12 July 2018 the appeal was heard. The employer's decision was, again, to reject the application for the same reasons as had been given when rejecting the initial decision. That was communicated on the day and the decision then confirmed in writing shortly afterwards.

2.6 The claimant commenced ACAS early conciliation on 11 October 2018, that day being "day A" for the purpose of sections 80H(7) and 207B of the Act. Early conciliation concluded on 25 November, that being "day B". The claim itself was presented on 19 December.

2.7 If time runs from the appeal decision, the claim is in time. If it runs from the end of the decision period, it is out of time.

3. The Statutory Provisions.

3.1 So far as is relevant to this matter, section 80H of the Act, as amended by the Children and Families Act 2014, provides as follows: -

> ***(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—***
>
> ***(a) that his employer has failed in relation to the application to comply with section 80G(1),***
>
> ***(b) that a decision by his employer to reject the application was based on incorrect facts***

[1] The hearing had proceeded on the parties' common position that the decision period expired on 25 June 2018 but it seems to me that the "beginning with" formula means it expired on 24 June 2018. Nothing turns on this in the circumstances of this case.

> ***(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).***
>
> ***(2) No complaint under subsection (1)(a) or (b) may be made in respect of an application which has been disposed of by agreement or withdrawn.***
>
> ***(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.***
>
> ***(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.***
>
> ***(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.***
>
> ***(3C) A complaint under subsection (1)(c) may be made as soon as the notification under section 80G(1D) complained of is given to the employee.***
>
> ***(4) . . . . . .***
>
> ***(5) An employment tribunal shall not consider a complaint under this section unless it is presented—***
>
> ***(a) before the end of the period of three months beginning with the relevant date, or***
>
> ***(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.***
>
> ***(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.***
>
> ***(7) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (5)(a).***

3.2 This statutory formula to calculating time limits, and therefore my jurisdiction to hear the claim, may be broken down into four stages. The first is to identify the type of complaint that the claimant brings. The second stage is to determine when that particular type of complaint accrues. That is the date of a particular event identified in the statute and before which no complaint may be brought. The third stage is to calculate the time limit by reference to section 80H(5)(a), as modified by section 207B. The fourth stage, in cases where it is engaged, is to apply the “not reasonably practicable” extension of time provisions in s.80H(5)(b).

3.3 Turning to the first stage, the type of claims brought in this case are brought under 80H(1)(a) and (b). That is a failure to comply with section 80G(1) and that the decision was based on incorrect facts. It is not a claim based on a defective notice as would apply in a claim under 80H(1)(c) which has its own rules for when the cause of action accrues.

3.4 The claimant's complaint has not been disposed of by withdrawal or agreement so we move on to the second stage which is to identify when her particular cause of action accrues.

3.5 This is where we encounter the detail of the area of dispute in this case. Section 80H(3) defines the date on which the cause of action accrues where the application has not been disposed of by agreement or withdrawn. It provides that no complaint (under subsection (1)(a) or (b) may be made until either of two options is satisfied.

3.6 Those two options are found in subsections 3(a) and 3(b) and are given in the alternative by use of the word "or". The effect is that before a claim can be presented, the employer must either notify the employee of its decision on the application or the decision period applicable to the application comes to an end without the employer notifying the employee of its decision. It is by that provision that the cause of action accrues and a claimant cannot bring a claim to the ET before the date on which the first of these two events occurs. By s.80H(6), whichever occurs first in time becomes the "relevant date" and determines when the cause of action accrues and when time then starts to run against the claimant.

3.7 In this case there was a written decision given to the claimant dated 6 June. As a matter of fact it may not have actually been received by the Claimant until 7 or 8 June although nothing turns on that in the facts of this case. In any event, that notice conveyed a decision to refuse the application. On the face of it, that would appear to be a decision which engaged subsection (3)(a), being the date on which the employer notified the employee of the employer's decision. That occurred within the decision period. It was therefore open to the Claimant to treat that date as the rejection of her complaint and to pursue her claim in the Employment Tribunal, the cause of action having then accrued. If nothing else had happened, I interpret the provision to say that the time limit for bringing such a claim would have then engaged and time would have started to run. However, one aspect of the suite of changes introduced by the Children and families act 2014 was to provide for an appeal process. Since June 2014, the amendments mean that where an appeal process is allowed against that *original* decision, subsection (3A) is then engaged to modify the meaning of "decision".

3.8 The Claimant did in fact appeal against that *original* decision and the Respondent, in the words of this section, "allowed the employee to appeal". By "allowed", the statute clearly means "to permit one to take place" rather than "to uphold on its merits". I suspect there are documents in existence which I have not seen which demonstrate an established appeal procedure for lodging appeals of this nature within this employer. In any event, it is not disputed that both parties were engaged in an internal appeal process. I am satisfied subsection (3A) is therefore engaged. The appeal hearing, however, did not take place until 12 July on which date the application was finally rejected. If that is the date on which the

cause of action accrues, it is common ground that the effect of early conciliation that then followed means the claim was presented in time.

3.9 The question in this case really boils down to whether that is indeed the proper accrual date and what effect subsection (3A) has on the interpretation of subsection 3.

4. The Competing Submissions

4.1 In summary the Claimant's position is this. Mr Patel says because the claimant appealed, she engaged subsection (3A) so that the proper reading of subsection 3(a) is that the cause of action did not accrue until the employer notified the employee of its decision *on the appeal*. The Claimant then goes on to say that subsection 3(b) can thereafter have no application, because the "decision period" dealt only with the *original* decision to notify her that her application had been rejected. It therefore serves no purpose in establishing the date on which the cause of action accrues because of an appeal which, by then, the parties were engaged in. Mr Patel argues on her behalf that because the employer had allowed her to appeal and the parties were then engaged in that appeal process, it is a matter of common industrial relations good practice that the parties should be able to resolve their dispute within their internal proceedings, rather than be forced to resort to law.

4.2 The Respondent says nothing in subsections 3(a) and (b) changes depending on whether the decision that marks the cause of action accruing is the *original* decision on the application, or an *appeal* decision, at least so far as the interplay between 3(a) and 3(b) is concerned. In other words, all the tribunal need do is apply subsection 3 and interpret 3(a) in accordance with its terms or as modified by (3A) as the case may be. The remaining provisions engage without further modification.

4.3 The respondent also points out that the entire suite of changes set out in subsection (3A), (3B) and (3C) and, indeed, the changes introduced elsewhere such as at s.80G(1)(aa), were all part of a single unified change to the procedural landscape introduced by the Children and Families Act 2014. It says that as one single amendment, it cannot possibly admit the conclusion that the meaning of "decision" in s.80H(3(a) and its relationship to the end of the decision period in subsection 3(b) can bear a different meaning depending on whether ss.(3A) is engaged or not. For that reason, the fact of the appeal has no effect on varying the application of subsection (3) and the alternative accrual dates it contains. The proper construction of subsection (3) is that if the *appeal* is not dealt with by the end of the decision period, it results in exactly the same situation as it would be the case if an *initial decision* is not dealt with within the decision period. In other words, the statutory cause of action accrues when the decision is communicated or, if it has not been communicated by the end of the decision period, on that date. The decision-making timescale, whether it be an original decision or the appeal decision, cannot in itself extend the decision period and the result is if the appeal is not decided by the end of the decision period, the statutory cause of action then accrues against the respondent and time starts to run against the Claimant.

5. Discussion and Conclusion

5.1 There is no dispute between the parties that the effect of subsection 3(a) and (b) on the original decision is that the first event in time to occur becomes the date on which the cause of action accrues and time starts to run. It is accepted that this is not a choice between two dates for the employee/claimant to decide on. However, the claimant says that the interpretation takes on a different character when the decision is an appeal decision.

5.2 On reading into this case, I confess I had some concerns about the Respondent's position and the effect it would have on the Claimant's ability to bring this claim. This arose principally out of the sense that the parties should be encouraged to resolve their disputes before resorting to law. That is, essentially, the claimant's argument before me. On a considered analysis of the provisions, however, my concerns have evaporated. It seems to me that the correct approach is that advanced by the Respondent and I come to that conclusion for these reasons.

5.3 The first flows from my reassessment of the principal that there would be force in the process of the appeal, as a means of good industrial relations practice, keeping the dispute within the parties and not needing the parties to resort to litigation. The difficulty in what I accept was also my instinctive starting point is the interpretation of "the decision". I accept Ms Owen's submission that the amended section 80H, so far as subsection (3A) is concerned, is such that it cannot be the case that the meaning of "decision" throughout the provision can carry a different meaning.

5.4 The second reason is the need for the application to be dealt with promptly in most, if not all, cases. The underlying application is one which typically involves children and their care needs and it is their interests that underpin such an application. The three months delay in reaching a decision may have consequences to the welfare and best interests of the child. Delaying that further because of any extended appeal process potentially undermines the aim of meeting their best interests further still.

5.5 The third reason emerges from the consequence the claimant's contention that section 3(b) does not engage where there is an appeal. If that is correct, the unscrupulous employer could simply reject an application within the decision time but then agree to, or even encourage, a state of affairs which leads to an appeal against that decision. If the claimant's argument is to prevail, the effect is that any delay in concluding that appeal would not trigger the cause of action accruing. The practical effect of that is that for as long as the employer was able to delay reaching an appeal decision, it would be able to delay any cause of action accruing, potentially indefinitely so. The effect of subsection (3A), on that analysis, would mean that no cause of action accrued until that employer eventually reached its decision on the appeal. Such an interpretation renders the statutory concept of a decision period otiose. The obvious solution to the problem of the potentially unscrupulous employer is to impose some separate time limit on the employer that it could not manipulate and which would force it to reach its decision. In my judgment, that is just what the "decision period" contemplated in subsection 3(b) does.

5.6 I should also say, in a way that is not meant to be critical of this respondent, that different employers deal with matters in different ways and in different timescales. In many

cases, applications for flexible working may well be dealt with within a few weeks and, if an appeal is lodged, that appeal may itself be dealt with within a few more weeks but, in totality, well within the decision period of 3 months. It may sometimes seem to be the case that the larger the employer and the more formal the process, the longer the process seems to take to resolve. I am not in any way saying this Respondent dragged its feet in dealing with Ms Lowe's appeal, this was no doubt a process that took its ordinary course. But the ordinary course of events in this case took something in the region of four months to conclude as opposed to the decision period imposed by statute of 3 months. Nothing in the 2014 amendments to the Act affected the decision period and I am satisfied the intention of Parliament was that the original decision period remained in place. Indeed, the very fact that further amendments gave the parties power to agree to extend the decision period, including explicitly after the event if necessary, has led me to conclude that those drafting this legislation did have in mind the fact that an appeal against an initial decision could take matters outside the decision period and there may be an unfairness to both sides if that period could not be extended. The structure of the legislation does not, however, automatically alter the decision period merely because there is an appeal.

5.7 On that point, I had considered whether there was any basis on which the mere fact of an appeal process could in itself gives rise to some form of implicit agreement to extend time as is permitted under 80G(1B) and (1C). That might be more likely to be so where there is a formal and structured appeal process as one might expect to see in a local government setting such as this. Indeed, the scope for retrospective agreement could mean such an agreement could be reached even after the time limit had already expired. However, I should make clear this point was not argued and it is a contention which the claimant pleads in her ET1 to the contrary. She says that there was explicitly no agreement to extend the decision period. The decision period must, therefore, remain in place in the way the statute provides for and unmodified by any agreement. That is, a period of three months beginning with the application.

5.8 For those reasons, and because the decision period was not explicitly or implicitly extended, I come to the conclusion that 80H(3)(b) was engaged as the date on which the cause of action accrued.

5.9 In summary, the decision period expired on 24 June. If an employer cannot organise an appeal within the decision period, and if the parties do not agree to extend the decision period, the expiry of the decision period is then the first date that arises under subsection (3) and becomes the date on which the statutory cause of action accrues. That is then the date the time limit starts to run. It follows that the claim under part 8A of the Act, presented on 19 December 2018, was presented out of time. As there is no case advanced to argue that it was not reasonably practicable to present the claim in time, that part of the claim must be struck out for want of jurisdiction.

EMPLOYMENT JUDGE R Clark

DATE 5 March 2020

JUDGMENT SENT TO THE PARTIES ON

……...……

.

AND ENTERED IN THE REGISTER

……...……

.

FOR SECRETARY OF THE TRIBUNALS