EMPLOYMENT TRIBUNALS

Claimant: Mr J Whitmore

Respondent: London Underground Ltd

Heard at: **Croydon** **On:** **15 January 2020**

Before: **Employment Judge Nash**

Representation
Claimant: In person
Respondent: Ms Brown of counsel

Judgment having been sent to the parties 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

1. Following an ACAS early conciliation period from 21 January 2019 to 15 February 2019 the Claimant presented his claim to the Tribunal on 16 February 2019.

2. At the hearing the Tribunal heard from the Claimant as his only witness. It also heard from Ms Owens, the appeal officer and at the material time an operations director.

3. The Tribunal had sight of 2 bundles of documents.

Claims

4. The only claim before the Tribunal was under section 80 H Employment Rights Act 1996 in respect of a flexible working request.

Issues

5. With the parties, the issues were agreed as follows:-

a. Was the claimant's first request for flexible working made in accordance with

section 80 F Employment Rights Act?

b. It was agreed that the claimant's second request for flexible working was made in accordance with section 80 F Employment Rights Act.
c. Did the respondent fail to deal with the application(s) under section 80 F in a reasonable manner, contrary to section 80 G (1) (a)?
d. Did the respondent reject any application under section 80 F on incorrect facts, in particular the number of positions available?

6. I explained to the parties that, where relevant the tribunal would take note of the ACAS code of practice on flexible working requests and, if advised, they should lead evidence and make submissions accordingly.

The Facts

Background

7. The Respondent provides public transport in London. It did not inform the tribunal of staff; the tribunal proceeded on the basis that it is a large and well-resourced organisation.

8. The claimant started work for the respondent on 1 February 2008. At the material time he was employed as a train operator, that is a train driver, working out of the Morden depot on the Northern line of the London Underground.

9. The respondent only recruits full-time drivers who work a five-day week. Once in post, a driver may apply to change their working pattern.

10. The respondent has a collective agreement with the trade union for up to 90 train operators to work a four-day week, as opposed to the standard five-day week. There is a limit of 3 such four-day positions at each depot. Accordingly, as there are 4 depots on the Northern line, there are in total, a possible 12 four-day positions available. If one depot did not use up its allocation of 4-day positions, any extra positions could be transferred to another Northern line depot. In addition, the respondent does offer other atypical working patterns such as job shares.

11. Drivers at the Morden depot, unusually for the respondent, work fixed shifts. There are around 250 drivers working shifts. In addition, there are about a further 20 dedicated "pool" drivers (together with drivers working a "pool day"); a pool driver is allocated to gaps which are known in advance, for instance pre-booked staff holiday. Further, there are spare drivers who are used to fill gaps which are unexpected, for instance when a driver calls in sick on the day.

The Flexible Working Requests

12. Following an advertisement by the respondent, on 19 August 2018 the claimant made a one-line flexible working application. In his application he asked the respondent to accept his application for a 4-day position at the Morden depot. The respondent

treated this request as being made under the collective agreement. The respondent refused the claimant's request in writing on 28 September 2018 on the basis that the 12-person limit on the Northern line was already used up. Accordingly, there was no capacity for any further four-day positions at the Morden depot.

13. The claimant has submitted a grievance in respect of this refusal on 2 October 2018. At a second grievance meeting on 15 November 2018 the grievance was rejected.

14. The claimant was subsequently advised to make a request for flexible working under the statutory scheme. This he did on or around 15 November 2018. The respondent accepted that this second request met the requirements of the flexible working statutory scheme. The claimant's second request was in the same terms as his first, that is a request to work a four-day week as soon as possible. He proposed that the fifth day be covered by pool drivers. He requested that the second request be treated as a continuation of his first request.

15. There was a meeting to discuss the flexible working request on 19 November 2018. The meeting was recorded as a flexible working interview.

16. The claimant's line manager at the Morden depot, Mr Manuel, refused the flexible working request on 21 November 2018 on the following grounds: –

a. the burden of additional costs on the respondent to cover the additional, fifth, day;
b. detrimental impact on business performance; and
c. an inability to recruit additional staff to cover the fifth day.

17. The respondent sent the claimant a letter confirming this decision on 21 November 2018 informing him of his right of appeal.

18. The claimant appealed against the refusal of his grievance and against the refusal dated 21 November 2018 by way of an appeal letter dated 23 November 2018. His grounds of appeal included that the respondent had not adopted a reasonable procedure, that the depot was oversubscribed (by which he meant that it had more than enough driver hours to cover its requirements) and that his request would not have a negative impact of respondent's business performance.

19. On 13 December 2018 the claimant met with Ms Owens (who was maternity cover as the operations director of the Northern line) to consider this appeal. As this meeting the claimant volunteered his reasons for making request. The reasons included the death of his father and the burden of a long commute from his home on the south coast.

20. The respondent refused the claimant's appeal and confirmed this by way of a letter of 3 January 2019.

The Applicable Law

21. The applicable law is found in the Employment Rights Act 1996 as follows: –

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—

(i)the hours he is required to work,

(ii)the times when he is required to work, …

(2)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.

80G Employer's duties in relation to application under section 80F

(1)An employer to whom an application under section 80F is made—

(a)shall deal with the application in a reasonable manner,

80H Complaints to employment tribunals

(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**…**

Submissions

22. Both parties made brief oral submissions.

Applying the Law to the Facts

23. The Tribunal considered the claimant's first request.

24. The tribunal accepted the respondent's submission that the first request did not meet requirements of section 80 F. Under section 80 F a request must state the change to working conditions which is sought and when the employee would like the request to come into effect. Further, the request must include the effect the employee thinks the requested change would have on the employer and how any such effect might be dealt with. Further, it must include a such a statement that this is a statutory request. The first request did not comply with any of these requirements.

25. Accordingly, the tribunal went on to consider whether the respondent failed to deal with the second request in a reasonable manner, as set out in the legislation.

26. The tribunal reminded itself of the decision of the Employment Appeal Tribunal in *Singh v Pennine Care NHS Foundation Trust EAT 0027/16* that an employment tribunal may not judge the reasonableness of an employer's refusal to provide flexible working in a S.80H(1)(b) claim: the tribunal may investigate the facts on which the decision was based. Further, while a tribunal can consider whether the facts underlying an employer's judgment were true under S.80H(1)(b), it had no power to interfere with the employer's business judgment. As long as the employer had considered correct facts, it was for the employer to weigh those facts and analyse the impact on its business.

27. The central question for the tribunal is whether the employer genuinely considered the request rather than approaching it with a closed mind. The tribunal must consider whether or not the employer acted in good faith. Whilst there is no case law stating that compliance with the ACAS Code creates a rebuttable presumption of reasonableness, and vice versa, the tribunal considered that the ACAS Code was a useful starting point.

28. Comparing the respondent's conduct with the ACAS code, the tribunal noted that the meeting had taken place promptly. The claimant was allowed a companion and offered an appeal. The respondent discussed the claimant's request with him. The tribunal was satisfied that the respondent had a good idea of what the claimant wanted because he had made a very clear request and one with which the respondent was familiar. Further, the claimant's suggestion was not in any way unprecedented or an unusual request.

29. The Code states that the employer should consider the request carefully, looking at the benefits of the requested changes in working conditions for the employee and for the business and weighing these up against any adverse business impact. At the first meeting the respondent identified reasons for rejection which were upheld, in effect, upon appeal and relied upon before this tribunal. This suggests a reasonable level of consistency in the respondent's thinking.

30. The respondent provided the claimant with its first instance decision promptly in writing and relied on a permitted reason.

31. The claimant contended, in effect, that his request had not been dealt with promptly because, having engaged the grievance procedure, it took longer than 7 days to receive the results of the appeal. However, the tribunal did not find that this amounted to the respondent dealing with the appeal in an unreasonable manner. The respondent's grievance procedure was unclear as to whether the 7-day time limit applied. Further, the respondent informed the claimant of the delay. Finally, the Code states that the request including the appeal should be finalised within a 3-month period.

32. On appeal, there appeared to be detailed consideration of and engagement with the points raised by the claimant, such as discussing that if pool drivers were used to cover the claimant's fifth day, there would not be enough pool drivers to cover other gaps.

33. The tribunal considered whether the respondent's rule that no more than 3 drivers per depot were permitted to work on amended hours constituted the respondent approaching the claimant's request with a closed mind. The tribunal found this did not constitute a closed mind on the respondent's part for the following reasons. The tribunal accepted the respondent's evidence that on occasion more than three drivers were working flexibly per depot. Accordingly, this was not an absolute bar and the respondent enjoyed some limited discretion.

34. The tribunal went on to consider whether the respondent made its decision on incorrect facts. There was no significant disagreement as to the primary facts concerning the number of drivers, and the practice concerning pool and spare drivers. There was no disagreement that the respondent does not pay overtime, which might enable it to cover the claimant's fifth day. Further, it was not in dispute that the respondent only recruits full time (that is 5-day week) drivers, although in the circumstances some drivers are allowed to reduce their hours once in post.

35. There was a discussion as to whether flexible working at Morden was oversubscribed. The respondent's evidence, which was not challenged by the claimant, was that the flexible working scheme was oversubscribed in the sense that there were more drivers who wanted a four-day week than could be accommodated. The respondent relied upon a list of atypical working practices at the material time which the claimant did not challenge.

36. The respondent relied on the fact that it had a number of drivers working atypical hours (for a number of reasons) which meant that pool and spare drivers were in effect spread thin. The claimant himself volunteered that, when he was working as a pool driver he was almost always out driving. In view of the tribunal, this supported the respondent's contention that there was little slack in the system as to driver hours.

37. In her witness statement Ms Owens stated that Morden did not have sufficient resources in place to cover all shifts because of the amount of flexible working at the depot. Further, the tribunal accepted her evidence that it was necessary to ensure that the uncovered shifts were not concentrated on 1 or 2 days a week. It was only practicable to cover all of the uncovered shifts if they were spread out reasonably evenly over the week.

38. Based on the above, the tribunal did not find that the respondent's decision was based on incorrect facts. The analysis and decisions reached based on those facts were not a matter for the tribunal. It was for the employer to weigh those facts and analyse the impact on its business.

39. Accordingly, the tribunal must dismiss the claim.

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Employment Judge Nash
Dated: 15 April 2020