EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4111283/2019

Claimant: Mr M Hopwood

Respondent: Met Office for and on behalf of the Secretary of State

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

In accordance with the power set out in Rule 69 of the Employment Tribunal Rules of Procedure 2013, I hereby correct the clerical mistake(s), error(s)or omissions(s) in the Judgment sent to the parties on 27 November 2020:

Page 47, Paragraph 201, Line 1 delete “Mr Douglas” and insert: “Mr Gibson”.

Page 49, Paragraph 205, Line 1 insert between the words “appears” and “to” the word not.

Page 49, Paragraph 205, Line 17 insert after the word “made.” “Mr Gibson submitted that the respondents had relied on permissible grounds.”

An amended version of the Judgment is attached.

Important note to parties:
Any dates for the filing of appeals or reconsideration are not changed by this certificate of correction or the amended Judgment or Case Management Order. These time limits still run from the date of the original Judgment or Case Management Order, or if reasons were provided later, from the date that those were sent to you.

Employment Judge **James Hendry**

Date **16 December 2020**

Sent to parties **16 December 2020**

EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111283/19

Held on 16,17 and 18 September and 19 November 2020

10 **Employment Judge J Hendry**
Tribunal Member K.Pirie
Tribunal Member S.Larkin

15 **Mr M Hopwood**	**Claimant** **In Person**
Met Office for and on behalf of the Secretary of State 20 **Human Resources Department**	**Respondent** **Represented by** **Mr.K.Gibson** **Advocate** **(Instructed by** **Foot Anstey LLP)**

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The Unanimous Judgment of the Tribunal is that:

1. **The complaint made under Section 80 G (1) (aa) of the Employment Rights Act 1996 being well founded the Tribunal awards the Claimant a weeks' pay amounting to Five Hundred and Eight Pounds (£508) to be**
30 **paid by the Respondent to the Claimant.**

2. **The complaint made under Section 80 G (1)(a) of the Employment Rights Act 1996 being well founded the Tribunal awards the Claimant a weeks' pay amounting to Five Hundred and Eight Pounds (£508) to be paid by the Respondent to the Claimant.**

35 3. **The complaint made under Section 80 H (1)(b) not being well founded is dismissed.**

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Reasons

1. The Claimant, a Meteorologist, made a claim for flexible working ('FWR') to his employers who turned it down. He raised Employment Tribunal proceedings under Section 80G of the Employment Rights Act 1996 ('the Act'') alleging that they had failed to deal with the application within the prescribed three-month period, had not dealt with the application in a reasonable manner and thirdly had rejected the application on incorrect facts.

2. The Respondent accepted that they had not complied with the three-month time limit but argued that no compensation should be paid. They denied the two other grounds on which the claim was based.

Issues

3. The issues for the Tribunal to determine were whether or not on the facts of the case:

   a) what compensation, if any the Claimant should receive because the decision made by the Respondent regarding his FWR took longer than three months to be dealt with,

   b) whether the FWR was dealt with in an unreasonable manner,

   c) whether the decision was based in incorrect facts.

Evidence

4. The Tribunal considered the evidence given by witness statement and orally of the following witnesses:

   - The Claimant
   - Martin Munro
   - Michelle Knight
   - Felicity Worsfold
   - Iain Forsyth

It also considered the documents produced by parties and contained in the Joint Bundle (JB 1-84) and the Agreed Statement of Facts lodged by parties (‘SAF’).

5 **Findings in Fact**

The Claimant

5. The Claimant’s employment with the Respondent commenced on the 1 May 2012. His Statement of Particulars of Employment (JBp70-86) is dated 8
10 October 2012.

6. The Claimant was previously employed as a Trainee Forecaster also known as a ‘RD031 Probationary Forecaster. This began after a period employed as an Apprentice Forecaster.

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7. The Claimant made a FWR in April 2018. At this time, he was employed as an ‘Operational Meteorologist) (‘OM’). His primary role as an OM continued throughout the period relevant to his claims.

20 8. The OM role was based in the Respondent’s Aberdeen Office although for part of the time during which his FLR was being dealt with he was working on detachment in the Falkland Islands. The Claimant was temporarily promoted to Senior Operational Meteorologist whilst on detachment. He returned to his OM role when the detachment ended and he returned to Aberdeen. That role
25 included shift work, which included working night shifts of 12.25 hours duration, officially commencing at 7am or 7pm respectively.

The Respondent

30 9. The Respondent is a weather and climate service which works closely with Governments, individuals and organisations to share scientific meteorological knowledge and advice.

10. It is the UK's national meteorological service, generating forecasts 24 hours a day, 365 days a year.

11. The Respondent's name is a Trading Fund of the Department for Business, Energy and Industrial Strategy (''BEIS''), operating on a commercial basis under set targets.

12. The Respondent operates across approximately 49 sites in the United Kingdom and approximately 10 overseas sites. The head office is in Exeter. The Respondent also has an office in Aberdeen in which the Claimant was employed.

Background

13. The office in Aberdeen worked closely with the head office in Exeter.

14. The Respondent organises work into teams called "Benches" which deal with the different services that re provided. Staff were generally assigned to a particular Bench. The only OM bench in Aberdeen was Aviation (referred to as 'A3') which provided services to Airlines and Airports. The other Benches were staffed by Senior Operational Meteorologists ('SOMs') who were more experienced and higher paid.

15. At the time of the FWR in April 2018 the Claimant was an OM assigned to the Aviation bench.

16. The Claimant had a period of detached working in St Helena just before he made his FWR. Thereafter the Claimant also had a period of detached working in the Falklands while his FWR was being considered.

17. The Statement of Particulars of Employment (paragraph 7) sets out the Claimant's hours of work. It provided that the Claimant would be likely to be

working in a shift pattern after he completed his training. The term states that the shift pattern would be determined by the location of his posting. He was contractually obliged to work a shift pattern as determined by the Respondent. In Aberdeen this meant that the Claimant was, along with other OM's, required to work nightshifts to cover the A3 Bench 24 hours a day.

18. At the time of the Claimant's FWR he worked 37 hrs per week gross of meal breaks. Rosters were based on a 42-hour week.

19. A typical 'ideal' shift pattern for the Claimant would be two-day shifts, two night shifts then three days off. The pattern could vary according to the demands of the work and variable like other team member's leave.

20. The Claimant's gross pay at the time of the FWR was about £3000 p/m gross. That was made up of Basic Pay and Shift Allowance or Unsociable Hours Allowance.

21. The Claimant and his colleagues, as shift workers, were entitled to a lump sum payment to compensate them for working unsociable hours including night shifts. That lump sum payment replaced a previous arrangement whereby the employees received shift disturbance allowance. The new arrangement applied from April 2018. The result was that any employee such as the Claimant and his colleagues would get the same lump sum payment regardless of the actual number of night shifts they worked. The new arrangement caused resentment because it was less financially generous than the previous arrangement.

The Aberdeen Office

22. The Respondent's office in Aberdeen had to fulfil several operational requirements broadly split into distinct areas with different responsibilities that reflected the work and skills needed to deliver customer services and meet demand.

23. The three areas were:

a. **Aviation** – Initially there were two Aviation benches in Aberdeen. In July 2018 one bench was moved to Exeter and the remaining Aviation bench (A3) was the one which the Claimant was rostered to. That was a bench requiring 5.4 or 5.3 people to deliver the contracted services. At the time of the Claimant's final appeal (in April 2019), the team was operating with 4 people, (3 working full time and, one on a 0.6 FTE contract). One member of the team was on maternity leave and the Claimant was on temporary redeployment to the Falkland Islands. The Bench was understaffed by 1.8 FTE in April 2019. In May 2019, when the Claimant's appeal was decided, the A3 Bench had 4.6 FTE and so a deficit of 0.7 FTE.

b. **PWS** [meaning Public Weather Service]

c. **Business Group Marine** and **Team Leaders**
Both PWS and Business Group Marine were staffed by upwards of 17 SOM's

24. The OM role was a more junior role than that of the SOM role. The roles had different profiles (JB p240-241 and p242-244). Once qualified individuals start as OMs they staff benches with less operational responsibility such as Aviation. The PWS and Marine benches have greater responsibility and are staffed by SOMs. The PWS Bench was responsible for issuing weather warnings and providing flood forecasting services. The Marine Bench was responsible for shipping forecasts, oil rigs and windfarms on a global basis. These two Benches are generally staffed by SOMs who receive additional training to ensure they are suitably qualified to deliver such services. They have a more comprehensive understanding of weather forecasting, customers and products and in addition they are expected to have leadership and management skills.

25. Whilst SOMs are qualified to carry out OM work. OM's were not fully qualified to carry out all SOM work. An OM might occasionally carry out some tasks usually carried out by a SOM but this was not a regular practice. When this occurred, it was as a stop gap measure and/or part of a process of allowing an OM to gain experience to progress to the role of SOM.

26. The Claimant and his colleagues on the Aviation Bench provided safety critical, operational forecasting services to a number of aviation customers within a set region. The service had to provide up to date information 24 hours a day throughout the year to meet customer demand. As a result, the Aviation Bench required to cover nightshifts. The PWS and Business Group Marine teams also worked night shifts. Their work was not only critical to the safety of individuals but related to multi-million pound commercial contracts for the provision of services.

27. The Aberdeen office had considerably reduced in size over a couple of years prior to the Claimant submitting his FWR. In or around 2016 the Respondent offered staff voluntary severance and a number of employees chose to leave at that time. This made it much more difficult for the Respondent to staff the benches and resulted in a higher workload for staff with significantly increased levels of overtime. The viability of the Office was in doubt. This was a particularly difficult period for staff and management. Staff morale was low.

28. In 2017, a new pay agreement was announced by the Respondent with key changes affecting shift workers such as the Claimant from April 2018. It removed shift disturbance allowances and replaced them with a lump sum unsociable hours payment. The criteria for payment of each was different.

29. Staff were unhappy with the change to their terms and conditions. Now that they were paid a lump sum, there was less financial incentive for staff to work additional night shifts. The lump sum did not vary according to the precise number of night shifts worked.

30. The Respondent's management was faced with difficulties in fully staffing benches resulting in one Aviation Bench (called A2) being moved to Exeter in or around July 2018. The Aviation Bench (A3) remained in Aberdeen.

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Rosters

31. Rosters setting out employee's work patterns were prepared in advance. The general aim was to even out the distribution of night shifts and weekend work
10 although this was not always possible and anomalies occurred.

Detached Working

32. The Respondent has customers such as the MOD and provides employees
15 to work closely with them on detachment.

33. The Claimant worked on detachment with the MOD in St Helena from March 2017 to October 2017. During that time, he did not work night shifts but still worked unsociable hours.

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The R's Flexible Working Policies

34. The Respondent's Flexible Working Policy which applied in April 2018 was dated May 2018 (JBp58-63). A further policy dated October 2018 (JBp64-69)
25 was issued after the Claimant's appeal against rejection of his FWR. The Respondent's Vicky Smiley recommended that the Flexible Working Policy should be amended to make it clearer for managers what the process was and that they should consult the employee relations team if unable to accommodate a FWR.

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35. The only substantive difference between the two policies was the addition in the later policy of the words added to the end (JB pg68) "*Please contact HR Enquiries if you have any comments about this policy.*"

36. The Policy set out the underlying principles and the procedure to be adopted. Para 1.3 set out potential grounds for refusal of an FWR which paraphrase the permissible statutory grounds for refusal found at section 80G (1) (b) of the ERA. Para 1.4 provides:

> *"Unless otherwise stated this will be a permanent change to the employee's terms and conditions of employment. Therefore, a trial period would usually be recommended."*

37. The policy recommended a trial period where an FWR was to be approved to provide flexibility for adjustments on the basis of how the trial worked or did not work. The policy did not recommend a trial period to see if a proposed flexible working arrangement which had been rejected on one or more of the statutory grounds might nonetheless work.

   a. Para 1.5 of the policy (JB pg60**)** provides that there is to be a meeting to discuss the FWR where it cannot be granted or is to be only partially granted. The purpose of that meeting is to discuss the FWR and try to find an outcome that meets the needs of the business and the employee.

   b. Para 1.7 (JB pg60) gives the right of appeal within 10 days of the notification of the management decision. There is no reference to 10 working days.

   c. Para 1.8 (JB pg60**)** reflects the terms of *section 80F (4) ERA*. It provides that "*Another flexible working request cannot be submitted within the 12 month period".*

The C's Flexible Working Request

38. Over the years the Claimant found it more difficult to adjust moving back and fore from days to nights. He made informal enquiries about how shifts were

allocated and if there was a different pattern he could work. He asked the roster writer if he could work a month of days then a month of nights but was told that it was not possible. In about 2017 the Claimant became concerned that the allocation of shifts was unfair as he was working more than 50% on nights. He was concerned that there did not appear to be a record being kept so he began to keep records and compile a spreadsheet of nights worked. At about the same time as he raised these concerns he investigated raising a Flexible Working Request (''FWR'') to remove the requirement to work nightshifts. On the 5 April 2018 Ms Monika Martelus of the Respondent's HR department emailed the Claimant with advice on how to make a FWR. A form was provided for him to complete which he did.

39. The Claimant submitted his FWR on 15 April 2014(JB p86 -90).

40. In terms of the FWR, the Claimant wanted to stop working night shifts completely and to work his contractual hours exclusively during the day. The FWR did not mention any alternative position that the Claimant would prefer to work which had a requirement for fewer night shifts if he could not avoid working night shifts completely.

41. In the FWR the Claimant described his then current work pattern thus:

24/7/365 Shift worker
12.25 hour shifts starting 7am or 7pm (Days and Nights)
Average 42 hours per week.

42. The Claimant then stated the pattern he requests to work as

Day shift worker
12.25 hour shifts starting 7am or 7pm (Days only)
Average 42 hours per week.

43. The Claimant stated that he wanted the new pattern to start *"…as soon as is practical, based on roster publishing dates, I believe starting (at least a trial period) on the 1st July would be reasonable. This would allow me to change within 3 months of making an application."*

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44. The Claimant's FWR met the statutory requirements prescribed in section 80F (2) of the *Employment Rights Act 1996* and *Regulation 4 of the Flexible Working Regulations 2014. (*Statement of Agreed Facts (''SAF'') para 21).

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45. The Claimant as an OM, along with his colleagues, was required to undertake shift working to include night shifts. If the Claimant did not work night shifts (or worked fewer night shifts) his colleagues would be required to do more night shifts as a result. The Claimant appreciated that this would be the result
15 but asserted in his FWR at section 4 that the night shifts he did not want to do should be allocated to his all his colleagues working in Aberdeen. This included SOM's and not just the OM staff on the Aviation bench (at that time a maximum of 5.4 employees if the bench was fully staffed).

20 46. The Claimant's line manager ("1RM" in the Respondent's terminology) was Paul Arbuckle. The FWR was sent to him. He was a new 1RM and the next line manager ("2RM") was Martin Munro. It was decided that Mr Munro would deal with it as he was more experienced.

25 47. On 19 April 2018 Paul Arbuckle sent the FWR to Mr Munro.

48. This was a very busy period for the service and Mr Munro as it was the end of the reporting years which entailed him attending a number of meetings. He was unable to progress the request immediately.

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49. On 10 May 2018 Mr Munro contacted HR by email to arrange a time to discuss the FWR (JB p96).

50. On 24 May 2018 the Respondent's HR Associate Monika Martelus emailed Mr Munro with questions seeking clarification of the nature of the request for a meeting which by email of same day he answered (JBp95).

51. Also on the 24 May Ms Martelus responded by email to Mr Munro saying: *"All Flexible Working Requests require HRBP's approval so Charlotte Cottrell, who is the HR Business Partner for FSD might be able to help or advise whether this request can be accommodated"* (HRBP means "Human Resource Business Partner").

52. The response from HR led Mr Munro to believe that the Human Resource Business Partner, Charlotte Cottrell, was to advise him whether the FWR could be accommodated. She had not been alerted to it's existence.

53. Mr Munro believed that he was responsible for making the decision on the FWR and if it could be accommodated then only at that point would he need to speak to Ms Cottrell. This was a misunderstanding on his part. He was unaware that any FWR would have to be approved by her.

Complaint about excessive nightshifts

54. On 28 May 2018 **(**JBp319-320**)** the Claimant emailed Paul Arbuckle (1RM) asserting that he did more night shifts than others except for one colleague who preferred night shifts. He asked if this could be evened out. In his witness statement (at para 6) the Claimant recorded that from July 2016 to March 2017 he did 44 night shifts out of 79 shifts ie 55.7% night shifts. Paul Arbuckle sent the email to Mr Munro on 29 May (JBp319).

55. On 30 May 2018 (JBp319) Mr Munro responded to the Claimant's email. The response was broadly that they were seeking more personnel. He wrote that his concerns were not 'falling on deaf ears' (JBp319) Nevertheless the Claimant felt that his concerns were not being properly addressed. He later made a formal complaint about the matter.

56. Mr Munro also wrote:

"This doesn't help you with your night shifts in the short term but I must at this stage point out a flaw in your calculations. You can only compare like for like. So comparing individuals who we are legally bound to give set runs to, others on a return to work program and individuals who also have an admin commitment does not give a true figure. As we know the balance is effectively 50/50, keeping you within 10% of the mean. I do not feel that this is excessive as it equates to one extra night shift per month.

That said, in the wake of the new pay deal, there is a strong argument to ensure parity across the whole of the night shift and weekend hour spread. This is something acknowledged locally and why Ken has now created a breakdown of all these elements (and others) in his pay sheets. We are now in a position to ensure everything is as balanced as possible, although with some fluctuations due to leave and detachments.

Any other questions please ask.

Martin"

57. Mr Munro had mentioned the figure of 10% variation from the mean as he had already had an informal discussion with Claimant about this matter during which the Claimant had asserted that he did 10% more nights shifts than colleagues. Mr Munro took that at face value at the time. He had not checked the position. There was variation from 50% night shifts and 50% day shifts for each employee as the rosters did not allow a perfect split between nights and days. There was no rule that a variation of 10% from mean was acceptable but variation did occur.

58. Mr Munro looked further into the matter. A spreadsheet was prepared for April 2017 to April 2018 (JBp249**)**. Twenty-Nine employees were listed including the Claimant. The second last column gives a percentage of nightshifts worked. It showed that 13/29 did a higher percentage of nightshifts than the Claimant. 2/29 did the same as him and 14 of the 29 did a lower percentage of nightshifts than he did. The Claimant did not pursue this issue by raising a grievance.

59. On 2 June 2018 (JBp99) the Claimant chased HR for a response to his FWR. The Claimant was concerned that as rosters are written as far in advance as

possible that it might take a number of months to put the new arrangement into place if it was accepted. While waiting for an outcome he asked Mr Munro when he could expect a decision and was told to ask HR.

5 60. On 4 June 2018 **(**JBp99**)** HR responded indicating that they did not have the request.

61. On 5 June the Claimant emailed a copy of the FWR asking HR to confirm that they did not have it pointing out his 1RM and 2RM had acknowledged
10 receiving it.

62. On 5 June 2018 (JBp98) HR emailed the Claimant to say HR Enquiries did not have the FWR. It was suggested that Martin Munro might have sent it to the HR Business Partner "for approval".

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63. On 5 June 2018 (JBp98) the Claimant emailed Mr Munro with the chain of correspondence and asked about progress. He asked if he could have an idea of the timescales.

20 64. Mr Munro responded by email of the same date **(**JBp97) that the decision was initially made by him with an agreement/approval of the HR Business Partner to see if the business could support the request. He indicated that he would review the request and get back within the three-month time limit.

25 65. The Claimant was concerned at the delays and felt that this was deliberate. He was left with the impression that the process was confused and disorganised.

The decision on the FWR taken by Mr Munro

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66. The FWR was considered by Mr Munro. He wanted to give a decision within the three-month decision period which he was aware of. There was a further delay caused by a busy time at work and two weeks annual leave being taken

by Mr Munro. He met the Claimant on 28 June 2018 which was the first available day the Claimant was rostered to work. The Claimant was not given advance notice of the meeting and was unprepared for it. At the meeting he discussed the request and told the Claimant that the FWR was rejected. He gave reasons for the decision. He said he was happy to discuss the decision with him. At that point Mr Munro did not appreciate that a formal meeting was required. The Claimant was unhappy at the decision. He was disappointed that Mr Munro did not seem accept his figures for nightshifts worked describing this as how he 'felt'. He thought that the decision was not in line with the Respondent's policy or his understanding of the law.

67. Mr Munro emailed confirming his decision on 6 July 2018 (JBp100**)**. He mentioned that the Claimant had produced no medical evidence as to why he could not work nights. This surprised the Claimant as he had not asked for the change because of any medical difficulty. The Claimant had made Mr Munro aware that he believed he was struggling with nightshift work. He told the Claimant that granting his request would have a negative impact on his colleagues, the team, and on the business and particularly the resilience of the team. He did not accept that the impact would be minimal as there was only one Aviation Bench staffed by 6 OMs. He mentioned that the Claimant was aware of staff concerns regarding weekend and night shift working. He expressed concern as to how the proposed change could be managed during the Claimant's upcoming Falklands detachment. During that detachment the Claimant would be required to work nightshifts.

68. Mr Munro did not agree with the Claimant's calculation that the impact on his colleagues would only be one extra nightshift per person every four months. In doing so he underestimated the number of SOM's that regularly covered the Aviation bench. His own calculation was that the Aviation team accrued between 600 and 800 hours of overtime because of a bad winter and the move of the A2 Bench to Exeter. He believed that the five others on the Bench with the Claimant would have to pick up at least one or two night shifts a month based on an undiminished service and not accounting for sickness and

annual leave. He believed that the resultant change would impact negatively on the staff's work/life balance, be unfair. He was aware that the staff had low staff morale. He considered that any such change would adversely affect performance.

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69. Mr Munro set out the following reasons at the later Appeal:

"I confirmed that I had applied the "work can't be re-organised among other staff" and the "business is planning changes to the workforce" reasons. I explained that I had recently moved one of the benches to Exeter due to staffing issues and for the first time in several months, we had the right headcount."

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First Appeal

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70. The Claimant did not have confidence in any appeal process nevertheless he appealed by email on 9 August 2018 (JBp101-102). The appeal was submitted late and not within the 10 day period following the date of the decision as envisaged in the policy. The Respondents accepted the appeal.

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71. The Claimant wrote: "*My application made on 15 April did not receive a written reply until the 6th July. In the event of refusal the decision should have been made quicker. I hope my request for an appeal will be dealt with in a more reasonable time period*". The grounds of appeal stated that the Respondents:

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a) did not handle the request in a reasonable manner; and

b) rejected the application on incorrect facts.

The grounds of appeal were expanded upon in the email. The Claimant complained about the length of time the process had taken, the way in which the decision had been dealt with and that the reasons given did not match the legal reasons available for refusal.

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Other Flexible working requests

72. The Claimant asserted that other employees had been granted FWR including those that meant they worked fewer night shifts. In one case it had been agreed following the submission of supporting medical evidence that a female OM should work single night shifts. This was not agreed following a formal FWR but in the context of her recruitment.

73. Another employee referred to by the Claimant was an SOM. There had been an agreement in 2008 for him to have certain days off to facilitate child care following divorce. This was not agreed though a FWR. In practice he worked fewer nights so that he could do the required number of hours over a period but it was not a formal arrangement.

74. The Claimant also referred to an employee who was a SOM who worked only days. This arrangement was in fact agreed in 2008 was not through a FWR. It was agreed in the context that his former post involved day shift only which was made redundant and he was moved to a new post that would normally involve night shifts.

75. The Claimant referred to another SOM Team Leader who had returned to work after maternity leave and moved from 1 FTE to 0.8 FTE but still did night shifts in proportion to her 0.8 FTE role i.e. there was no reduction in night shifts as a proportion of her hours to FTE; her request was made 28 January 2018.

76. The Claimant in an email dated 23 May 2019 sent by Mr Munro to Linda Caley (p 221) made an informal request for similar blocks of shifts i.e. runs of unmixed days or nights. This was not a FWR and there was no reduction in night shifts in such an arrangement.

77. A married couple mentioned in the email (JBp221) had indicated that they preferred not to be on shift together for childcare reasons. The arrangement made was not through an FWR but an informal arrangement which was

accommodated as far as possible. It led to no reduction in night shifts worked as one of the couple tended to do night shifts if the other did not. Between them they did the same number of night shifts as expected by the two roles.

78. Another employee mentioned (JBp221) referred to an employee who had reached an agreement that she work short broken shift runs meaning one night on and one night off rather than blocks of nights. This was not agreed following an FWR and there was no reduction in total night shifts.

Appeal Process

79. The Claimant's Appeal was acknowledged on 9 August 2018 and he was asked to provide the original FWR form.

80. The Claimant sent the form on 13 August 2018 (JBp104).

81. On the 13 August 2018 Ms Martelus HR Associate emailed the Claimant confirming she had forwarded it to Jo Harris of HR.

82. On 3 September 2018 (JBp108-109), a notification of an Appeal Meeting was sent to the Claimant by Jo Harris emailing the letter of same date signed by Vickey Smiley. The meeting was proposed for 14 September in Exeter but was varied later at the request of the Claimant to 8 October (JBp111). The Claimant was to attend by Video conference.

83. The Appeal was to be heard by Vicky Smiley, Head of Operational Delivery (Defence) as chair joined on the panel by Sarah Leach, HR Operations Manager.

84. Mr Munro was to represent management to explain the reasons for the original decision. Jo Harris, an Employee Relations Adviser, was to attend to advise on policy and process and Ms Martelus, HR Associate, was to take notes.

5 85. The Claimant was asked to confirm his attendance and the name of his companion. The right to be accompanied had not been expressly mentioned.

86. The Claimant was to get an agenda and documents which would be considered at the meeting/hearing.

87. The date of the hearing was moved to 8 October 2018 at the Claimant's request. No reference was made by him to requiring a companion.

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88. The Claimant was sent the Appeal Meeting Pack by email dated 4 October 2018 (JBp112). The Appeal Meeting Pack was in six parts. It was explained that parts one and two were with that email and the rest was to follow due to their size.

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89. On 5 October 2018 (JBp112) the Claimant e-mailed to complain about the fact that the Respondents were sending the papers so close to the meeting and to say that he did not yet have parts 4 and 5.

20 90. On 5 October 2018 (JBp112) parts 4 and 5 were sent to the Claimant. It was said

"The only information you may have not seen before would be from Martin Munro as the management submission.

25

We provide the pack as soon as possible to individuals however if you feel you need more time to read it and hence wish to postpone Monday's meeting please let me know today."

30 91. The Claimant chose not to change the date of the meeting.

Appeal Meeting 8 October 2018

92. Ms Vicky Smiley met the Claimant on 8 October 2018 to hear the appeal along with panel member Sarah Leach.

93. The meeting was minuted (JBps116-120). The Minutes are an accurate summary of the meeting.

94. Ms Smiley who was Head of Operational Delivery (Defence) chaired the meeting. Sarah Leach was a panel member. They upheld the first ground of appeal and found that the appropriate process had not been followed, specifically regarding the time taken to deal with the request and the absence of a formal meeting to discuss the request. They recommended the flexible working process should be restarted and conducted by a different manager. The panel did not comment on the second part of the Claimant's appeal (ie the allegation that the FWR was decided on incorrect facts) in light of the recommendation to re-start the process.

95. At the hearing the Claimant suggested that he might work fewer night shifts rather than none at all. This was the first time he had expressed this position to the Respondent's managers. He found the appeal a positive experience and felt that for the first time he had been able to fully set out his position.

96. On 11 October 2018 Ms Smiley sent an email to Jo Harris (JBp121) to say that the Respondent's Manager Pat Boyle would be tasked to consider the Claimant's FWR again. She suggested she should get the papers, meet the Claimant and if possible also meet a group of the Claimant's colleagues to ascertain their views on the proposed change. It was noted that she was on annual leave the following week.

97. The Appeal outcome letter confirmed to the Claimant that the appeal was upheld (JBp122-133). Ms Smiley and Ms Leach acknowledged that the FWR had not be dealt with timeously and noted that there had been no formal meeting arranged between the Claimant and Mr Munro to discuss the FWR. They recorded their recommendation that the FWR process should be

restarted and Ms Boyle was to deal with it. It was recommended that she consult the Claimant's team as to their willingness to take on extra night shift work.

5 98. At that stage the Appeal panel thought that the process ought to be able to be concluded quickly. They suggested it should take less than a month.

99. The Appeal Panel made three recommendations made designed to improve the way that FWR were handled in the future:

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1) To amend the Flexible Working Policy and MetNet to make it clearer for managers what the process is and that they should consult Employee Relations Team if unable to accommodate a flexible working request. I can confirm that this work is already underway.

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2) To undertake internal training for HR Enquiries Team and Business Partners on Flexible Working policy and procedure.

3) To update all 1 RMs so they are aware that they need to consult with
20 *Employee Relations Advisor when dealing with flexible working requests.*

100. The first of those recommendations resulted in the review and minor change to the FWR policy (JBp64-69).

25

101. On 25 October 2018 (JBp124) an email was sent from HR to Pat Boyle with seven documents attached. The email was designed to allow Ms Boyle set up a meeting with the Claimant to discuss his FWR.

30 102. On 25 October 2018 (JBpg126) an email was sent from Pat Boyle to the Claimant asking for his availability to meet. It was made clear he could have a companion or Trade Union representative with him.

103. Between 29 October 2018 to 6 November 2018 email correspondence took place between Vickey Smiley and Jo Harris about the Claimant not responding to the email sent to him. It was suggested by Ms Smiley that perhaps the Claimant had not responded because of leave. It was thought he probably had not seen the email of 25 October from Pat Boyle (JBp126). It was noted he would be on shift on 13 November but that he was due to leave to work in the Falklands on 15 November 2018. There was some discussion about whether the FWR might be dealt with while the Claimant in the Falklands. The outcome was to offer the Claimant the chance to resolve the matter now rather than wait for his return from detachment. Ms Smiley was of the view it should be addressed while he was on detachment because he had complained about the time taken to deal with his FWR. It was agreed to give the Claimant the option of having the FWR dealt with the notwithstanding that he was due to be working in the Falklands until May 2019.

The Claimant starts work in the Falkland Islands

104. The Claimant began work in the Falkland Islands on the 15 November. His line manager was Michelle Knight.

105. After a delay Jo Harris sent an email on 20 November 2018 (JBp131). The Claimant was told that Ms Boyle would discuss matters with the team in Aberdeen while Ms Knight would deal with the FWR meeting. He was offered the option of leaving the matter to be dealt with when he came back from the Falklands. The Claimant indicated that he wanted to continue with the process rather than wait.

106. By email 26 November 2018 (JBp130) Jo Harris asked Michelle Knight to set up a formal meeting with Claimant. He was to have at least five days' notice. Ms Harris would attend by telephone.

107. On 26 November Michelle Knight proposed 7 December 2018 as a date for the meeting to Jo Harris.

108. On 3 December 2018 Ms Knight contacted the Claimant about the proposed meeting on Friday 7 December 2018 saying Jo Harris was called away and they might need to postpone the meeting.

5

109. On 4 December 2018 a sent letter was sent inviting the Claimant to a meeting 7 December. Although it did not give the required 5 days' notice the Claimant had discussed the date with Ms Knight before the letter was sent and it was agreed as a potential date for the meeting.

10

110. On 4 December 2018 an email was sent by Patricia Boyle to Martin Munro advising that "unusually" they were splitting the investigation and that she was to speak to the team (JBp135). She asked for the names of the employees on the Aviation Bench.

15

The email giving the pool of colleagues

111. On 4 December 2018 an email was sent by Mr Munro to Pat Boyle with a list of employees (JBp135). It explained that he did not have a full complement
20 of staff because of leavers and detachments. He said he was moving people across benches to fill gaps. The list he gave was a list of those covering Aviation for the next couple of months namely:

"

25 ***1.*** *Gavin Geddes*
2. *James Dabbing (last day shift 13/12 before resigning)*

The rest are FSD and BG SOM's
30 ***3.*** *Evangelos Tremoulis*
4. *Je Broy Brookes*
5. *Dave Eddy*
6. *Filotas Paschos*
7. *Luke Norris*
35 ***8.*** *Matt Roe"*

Mr Munro included SOMs as the Respondents were very short staffed and they were needed to fill the roster. There was an acute shortage of staff. The list of 8 names was not the wider pool of employees in the Aberdeen Team which the C asserted should be used to consider the potential impact of his FWR.

5

112. Mr Munro used the six SOM's for cover because of staff shortages in relation to the Aviation Bench. Using SOM's could be problematic as they did not all have the skills to cover all of the work to be done on the A3 Bench. The practice was also unsatisfactory as those SOM's were being taken from other work 10 which would have to be re-organised or covered. His view was that running SOM's across the A3 bench was not a sustainable practice.

113. Pat Boyle canvassed staff by email (JBp185). She began the email by saying that Martin Hopwood has made a flexible working request to move to day shift 15 working only. It indicated that his initial request had been refused by Met Office Management but he had appealed and the Respondents had agreed to look again at the request. It explained that due to work commitment she could not meet staff but invited written comments or for them to telephone. Some staff did not immediately respond occasioning further delay. She 20 prepared a summary of the views expressed (JBp153). Those who responded (one did not) expressed negative views to the suggestion that they might be asked to work more night shifts.

25 **Flexible working meeting 7 December 2018 with Michelle Knight**

114. On 7 December 2012 Ms Knight met the Claimant to discuss the FWR. The meeting was minuted (JBp137-139). They are an accurate summary of what was discussed. Prior to the meeting the Claimant had been informed of a 30 right to be accompanied (JBpg134) but did not take anyone with him.

115. The meeting was conducted in part remotely and was chaired by Ms Knight (who was at that time Operational Meteorology Manager). The Claimant and Ms Knight were in the same place together. Ms Linda Caley and Ms Martelus were on the telephone.

5

116. The minutes disclosed that the Claimant asserted that ideally he wanted to avoid night shifts completely. He appreciated that no one liked to do night shifts.

10 117. The Claimant said that he believed that there was an intention to gradually move to day shift working anyway and that nights would go away (p138). He also mentioned that one bench had already been dropped and moved to Exeter. At that time the Respondents were exploring different ways of working to try and improve staff's well-being and cut down on night shifts if possible.
15 There was no proposal to remove night shifts completely. When pressed on what would be reasonable as regards working fewer nights the Claimant said less than half i.e. 1 night shift in 4 shifts. i.e. 3 days followed by 1 night shift.

118. It was important to the Respondents to have sufficient staff to cover shifts and
20 especially night shifts as there was often short notice need for cover caused by matters such as sickness. The Claimant was not willing to consider doing night shift cover when needed if his FWR was granted or partially granted.

119. At the meeting the Claimant asserted that working night shifts impacted on
25 his health. He denied he had seen a doctor about the impact of night shifts on his health. An Occupational Health referral was suggested. The Claimant did not agree to an OH referral. After the meeting it was agreed that the Claimant would consider if he wanted to be referred to OH.

30 120. On 7 December 2018 there was an exchange of emails between Ms Martelus and Pat Boyle. Ms Martelus told Ms Boyle that there had been a meeting with the Claimant. Ms Martelus asked about Pat Boyle's talks with team and what the feedback was. Pat Boyle explained that she had emailed the team to offer

a telephone a discussion or to suggest they could email her. She mentioned in her email that if they seemed to prefer to meet in person. She could not do this until the New Year.

121. On 17 and 18 December 2018 (JBg141) there was another exchange of emails between Ms Martelus and Pat Boyle in which Ms Martelus asked about progress. Pat Boyle said she had had only one response and that she was going to chase others. She asked what the position would be if nobody else responded. It was suggested she chase them for a response and give them a deadline. If they still did not respond they should be told that the Respondent would assume they were content with the change.

122. By 19 December 2018 Ms Boyle had three responses from colleagues and had dead-lined responses for 26 December 2018. That meant that there were 3 responses outstanding at 19 December 2018.

123. By 3 January 2019 the Respondent had the requested feedback (JB p157–155).

Meeting 9 January 2019

124. On 9 January 2019 Ms Knight met the Claimant to discuss whether he wanted to be referred to Occupational Health in connection with his application and if so suggested the Claimant contact HR.

125. Ms Knight emailed the Claimant on 9 January summarising what was discussed (JBp144). The Claimant was to consider whether he wanted to have such a referral. He was unsure at the time if he wanted one. It was offered that if he took up the offer the FWR would be paused and they would consider any “reasonable adjustments” suggested. The second option was not to have such a referral and to set up a meeting and discuss the feedback from Pat Boyle and give the Claimant a decision/outcome.

126. The Claimant was to consider matters and then speak to Jo Harris. The FWR was in abeyance while the Claimant considered whether he wanted an OH referral.

5 **Discussion with Jo Harris 15 January 2019**

127. The Claimant emailed Jo Harris on the 9 January 2019 to discuss the Occupational Health process. On 15 January 2019 the Claimant arranged to speak to Jo Harris. Following that discussion on the 16 January 2019 Jo
10 Harris emailed a summary of the discussion to the Claimant. It set out the options and was clear that nothing would happen until the Claimant communicated how he wanted to proceed.

128. On 18 January 2019 the Claimant confirmed he did not want to proceed with
15 the referral.

129. The Claimant was asked on the 21 January 2019 for his availability for a meeting to reconvene. The letter told the Claimant that Felicity Worsfold would deal with the meeting. The Claimant was advised of his right to be
20 accompanied. He was reminded of the Respondent's employee assistance programme.

130. On about 11 January 2019 Ms Knight left the Falkland Islands and the Respondent's Ms Felicity Worsfold became the Claimant's line manager. As
25 a result, she took over consideration of the Claimant's FWR. She was the Principal Met Officer in the Falklands at the time. She was a Senior Operational Meteorologist employed by the Respondent since November 2006.

30 131. As Principal Met Officer, Ms Worsfold was responsible for leading and managing all Met Office services in the South Atlantic for the MOD, the Falkland Island Government and the Ascension Island Government. Her

primary role was as an SOM. She managed about 10 employees. She directly managed 5 employees.

132. At the time Felicity Worsfold took over dealing with the Claimant's application she was not working in the team that would be affected by the request if it was granted. The Claimant was due to return to his role in Aberdeen in April or May 2019.

133. In her previous role as Aviation Service Manager (March 2017 to November 2017) Ms Worsfold had responsibility for the provision of services to civil aviation and the work undertaken by the Aviation bench in Aberdeen fell within her remit, although it was directly managed by Mr Martin Munro. She had a good understanding of the Aberdeen office, the aviation operations and how work was administered. She felt able to deal fairly with the Claimant's FWR.

134. Ms Worsfold agreed a pause in the process with the Claimant until he got used to his new role. Ms Worsfold's statement recorded:

> *"On around 31 January 2019 Martin and I met and discussed his availability for the meeting. We initially proposed 8 February but Joanna was unavailable* ***(pg150)*** *and we agreed it would actually be helpful to have a short delay to allow us both to settle in to our new roles. It was agreed* [the reconvened FWR meeting] *would be held on 18 February 2019 (**p. 151**).*"

135. By 7 February 2019 there were emails being exchanged to try and arrange a suitable date for meeting. The first date agreed was the 8 February 2019 but Jo Harris was unavailable and it was rearranged for the 18 February. Ms Worsfold asked if the Claimant was to get the redacted evidence ahead of meeting.

136. On Friday 15 February 2019 at 16.34 hours the Claimant received the redacted evidence/feedback by email (JBp153). Ms Worsfold had an informal chat with the Claimant about his feelings concerning the Pat Boyle feedback and the process.

137. Ms Worsfold obtained access to Aberdeen rosters.

138. As the Claimant had complained that he was doing more night shifts than was fair Ms Worsfold discussed the issue with Mr Leitch and she also spoke to Ms Smiley about the issue. Her view was that that element of his complaint was a matter sitting outside the FWR.

Flexible Working Meeting 18 February 2019 with Ms Felicity Worsfold

139. On Monday 18 February 2019 at 14:01 (JBp154) the Claimant was emailed an agenda (JBp155) for the meeting due to start at 15.00. On the same day at 14:32 (JB p156**)** the Claimant was emailed a timeline for the meeting (JBp157).

140. The meeting started around 3 pm (JBp161-167). At the outset the Claimant complained that he had not had sufficient notice of the feedback and that he had just received the Agenda and Time-line. The Claimant was asked if he wanted to postpone but he declined the offer. He felt that this was the least bad option available to him given the delays. He was concerned that on a number of occasions delays and postponements were offered which if accepted would lead in turn to further delays. He raised the issue of his confidentiality being breached by Ms Boyle and that he felt he had been publicly shamed. He asked for the basis on which the various employees contacted had been selected.

141. Prior to the meeting Ms Worsfold had considered the relevant documentation including the FWR application, rosters, previous minutes and the feedback from the Aberdeen team. She considered the benefits of the request for the Claimant and the Respondents including the saving on pay they would make if the request was granted. She approached the matter positively in the hope of trying to find a way of approving the request.

142. The meeting was accurately minuted (JBp161–167). It was agreed that the Claimant would get a note of what Pat Boyle had asked his colleagues when seeking their feedback. It was also agreed that Ms Worsfold would try to get draft ‘dummy’ rosters to illustrate what they would look like if the Claimant’s night shifts were re-distributed. The Claimant raised the issue of what he regarded as being confused methodology being used (p165).

143. Ms Worsfold spoke to Ms Smiley after the meeting to highlight the Claimant’s concerns that he believed he was doing an unfair number of night shifts.

144. There was then email contact between Jo Harris and Graeme Leitch, Head of Operational delivery (Civil) who was based in Exeter aimed at getting draft rosters prepared confidentially and quickly as has been discussed with the Claimant. Mr Leitch said it could not be done quickly and without input from Aberdeen.

145. On the 19 February Mr Leitch wrote (JBp170):

“Hi there,
As mentioned yesterday it wouldn't be possible to write rosters as quickly as this out as far as 3 months from scratch, or without Aberdeen knowledge. However, here's some additional info below: -
We are significantly short of OMs in Aberdeen, when Martin returns we will have 3.5 FTE to run a 5.4 FTE roster. Currently we augment this roster using SOMs from BG [Business Group Marine] *and we're now having to drop a team leader shift and move some work to Exeter to maintain this. Therefore currently Aberdeen is running an overtime roster, removal of nights from 1 individual will significantly increase the ratio of days to nights for others.*

Of course Martin would need to work more days to compensate, but as he's an OM not a SOM, therefore he can't cover the SOM roster and he'd need to take more
OM day shifts, which skews the balance even further for the other OMs.

In addition, one of those on the roster receives medical treatment and needs appropriate time off after each treatment to recover and therefore it would not be possible to add additional nights for this individual.

If we had a standard roster of 5.4 FTE and all available to do any shift, that may be possible, but we don't envisage this in the near future.

We are trying to increase resources at Aberdeen (as we are elsewhere) by bringing
in more trained Op Mets, but this may or may not come to fruition.
I'm happy to chat this through if needed.

5

Regards,
Graeme Leitch"

10 146. The email was an accurate description at that time of the Respondent's staffing arrangements and problems in relation to the A3 Bench.

147. Mr Leitch told Jo Harris that even if the Aberdeen Roster writer was to do the roster he would need more information on resources, which information was
15 not available, and it would take 3 or 4 days' work. (SAF para 60) It would take weeks to be able to produce them. Jo Harris was asking for them for a re-convened meeting the next week.

148. The email exchange was sent to Felicity Worsfold. Ms Harris suggested
20 putting choices to the Claimant as to how to progress matters. Her email was as follows:

"Hi Fliss,

25 *Considering Graeme's response below, we are obviously not going to get the draft rosters before next week's meeting. Hence, we have a couple of options which you will need to put to Martin and ask him how he wishes to proceed. I suggest you speak to him and follow up with an email so we can his written confirmation.*

30

1. Request the draft rosters be written by the Aberdeen roster writer and hold the meeting once we get this information. Given that it is going to be few weeks until we get the draft rosters plus 5 days to consider then as a minimum, that is likely to add 4 weeks onto the time scale and hence a
35 *meeting would likely be w/c 25 th March.*

2. Request the draft rosters be written by Jon O'Rourke and hold the meeting once we get this information as detailed above. It is likely this will take a similar amount of time as the Aberdeen roster writer but if Martin would like
40 *us to pursue this option we can.*

3. Proceed with next week's meeting on 26th and make a decision based on the information you currently have, including the information Graeme has just sent through.

5 *4. Reschedule next week's meeting from 26th to allow you to speak to Graeme Leitch in more detail about rostering at Aberdeen and how it works with Exeter and to send a copy of the notes from that discussion to Martin at least 5 days before the meeting.*

10 *5. Proceed with next week's meeting on 26th and speak to Graeme Leitch as above and send notes to Martin as soon as practically possible and Martin accepts this will not be 5 days before the meeting.*

I am out and about this week so you will get my out of office but I will look out
15 *for your emails as a priority.*

Let me know what you think and what Martin decides.

Thanks
20 *Jo"*

149. Ms Worsfold said she would speak to the Claimant that afternoon. She did so and followed this up with an email dated 19 February 2019 (JBp173**)**. The email reflected their discussion:

25

"

- *We will not be able to get the 3 months of draft rosters written in time for our meeting on the 26th Feb.*
- *As such we discussed the option of waiting up to 4 weeks for them which*
30 *you felt was too long.*
- *We agreed that I will look at current rosters as evidence of shift runs and consider what it might look like re -distributing your nightshifts.*
- *We also spoke about me arranging some phone calls with senior managers to talk about resourcing.*
35 - *I will write up this evidence and as soon as I can but you are aware that it will not meet the 5 days' notice before our meeting on the 26th Feb.*"

150. On the 22 February 2019 Ms Worsfold spoke to Graeme Leitch. A note was
40 taken (JBp177) which was emailed to the Claimant on 23 February (JBp175). Ms Worsfold raised the Claimant's concern that he did an unfair number of night shifts. Mr Leitch said they did record and monitor the pattern of shifts to allow balancing.

151. Following these discussions with Mr Leitch Ms Worsfold formed the view that the Aviation bench was heavily under resourced, that steps had already been taken to try and alleviate staffing pressures for example by an SOM team leader shift being stood down and arranging short term for work to be given to Exeter. She also noted that the Aviation team in Aberdeen should have a 5.3/5.4 FTE staffing arrangement but that even when the Claimant returned from his detachment, it would still only be staffed at 3.5 FTE and existing arrangements with staff militated against any flexibility. She noted that SOMs did work on the OM benches when there was a staff shortage but that was not a sustainable staffing solution and was only to ensure that the work was resourced. She considered that with high levels of projected overtime this was not sustainable long term. She took into account Mr Leitch's views that changing the balance of days and nights would have a detrimental impact on the OM team as its resources were the tightest. He had also explained to her that work could, and did, flow between Exeter and Aberdeen and due to the staffing levels at Aberdeen and the Claimant's bench's work was occasionally moved to Exeter. On occasion and at short notice Aberdeen sometimes took over a marine shift (which was a SOM bench) from Exeter. She summarised this information in a note (JBp177) which was provided in advance of the meeting on 25 February 2019.

152. On 25 February 2019 there was an exchange of e-mail about moving the time of the meeting as the Claimant had a conflicting appointment.

Reconvened meeting 26 February 2019 and the decision

153. Ms Worsfold and the Claimant met again on 26 February 2019 to continue their discussion. The Claimant had been provided with copies of the additional roster information/feedback obtained by Graeme Leitch, Head of Operational Delivery (Civil). He confirmed he had considered it. He was given an opportunity to discuss his Application, put forward his case and respond to and challenge the information relating to the staff rosters. The Claimant said

that he felt that the process was inconsistent in terms of the staff who were considered in the process. He believed the evidence was unfocussed. He said it was just the OM team at one stage, which was made up of five individuals, but that eight people were asked for feedback and only one of them was an OM. This had been put to Patricia Boyle who in turn had confirmed the position with Martin Munro, Operational Meteorology Manager, on 4 December 2018. Mr Munro had explained that they did not have a full complement of OMs due to detachment and leavers so he was moving people across benches and provided a list of people who would be covering the aviation bench over the following couple of months. During the meeting the Claimant was concerned that previous queries he had made about Ms Boyle's role were not being addressed. In response the email from Pat Boyle to staff was read out. He had not seen it before. Ms Harris conceded that an 'inappropriate' level of information had been ''shared''.

154. Ms Worsfold made it clear that the decision would be based on the current situation as she had found it. She had conducted her own investigations. She had used the Aviation bench as her starting point but then also looked at the implications and practicalities of incorporating the other SOM benches in Aberdeen and how it would affect their rosters and how they work. She had also considered how it would flow across the whole aviation team (i.e Exeter and Aberdeen) and the impact it would have on the network.

155. Ms Worsfold considered the Claimant's argument that his night shifts could be distributed to a wider group of employees than those covering the A3 Bench but rejected the idea. She considered the feedback evidence obtained by Pat Boyle but did not place much weight on it.

156. After an adjournment, Ms Worsfold considered matters further. She made a decision and then resumed the meeting to explain the decision she had made. Having considered the evidence she concluded that due to the limited resources available, the size of the team and the likely negative effect granting the FWR would have there would be a negative impact on the team

and on the service being provided. She expressed the view that the roster information was more objective than the information from colleagues obtained by Ms Boyle. The meeting was accurately minuted (JBp178- 182). The Claimant was advised of his right of appeal.

157. On the 5 March 2019 Jo Harris emailed the Claimant with the information received from Pat Boyle. The Claimant was advised Ms Worsfold was on holiday and her letter confirming the decision would come out later. He had 10 days to appeal and that period would not start to run till then.

158. A letter confirming the outcome of the FWR dated 15 March 2019 handed to the Claimant on 20 March 2019 (JBpg194).

159. The letter dated 15 March 2019 (JBp187-189) provided reasons for the decision:

"

> • *the business won't be able to meet customer demand,*
> • *there will be a negative effect on quality and performance, and*
> • *the work can't be reorganised among other staff.*
>
> *The reason why these are relevant to your application for flexible working is that without being able to resource a full 24/7 roster at Aberdeen there may be a requirement to drop non-essential work for customers to provide cover with reduced staffing levels and/or alternative arrangements, such as cover via Exeter. Staff have indicated that they would not be willing to take on further nights and lose days changing their work life balance. Either of these would potentially Impact on the quality and performance of FSD."*

160. Ms Worsfold considered that time was critical to the work being carried out. This meant that the resilience of the system was very important and that there had to be flexibility to reorganise work to meet customer demand. If this could not happen then the organisation would be unable to meet customer demand and deliver all of their services. This would have a negative effect on customers, quality and performance. She did not accept that work could be organised among the other staff or that it was appropriate for the work to be

reorganised / divided amongst the other benches in Aberdeen or the wider team in Exeter. The SOM position was a senior role and it was important that those who undertake SOM duties to do so in so far as is possible in order to maintain their skills and expertise and for their own professional and personal development. She believed that it would reduce resilience when the Respondent came to have to try and fill SOM shifts (which cannot be worked by OMs).

161. She also considered the possibility of the wider team (i.e Exeter and Aberdeen) picking up some of Martin's shifts but was concerned that it was not proven enough to be a genuine solution to the problem. This practice had only ever been used when there were resourcing issues and not for "business as usual". After seeking feedback from Mr Leitch it was clear to her that this solution would not work on a permanent basis at this time. In addition, she believed that it would be detrimental to the other benches as we would then need to find cover for the benches they would usually work on and it would reduce overall resilience in the wider team. At this point her understanding was that Exeter was also struggling to fill its night shifts.

162. Ms Worsfold considered that everybody should be trained to do the work on their own bench, for example in relation to individual products and/or regional/local knowledge for the areas each bench covered. To upskill staff to work in new or different areas (which would have been required in order for the arrangement to work on a more permanent basis) would be a drain on resources. It would involve the rest of that team having to double up on shifts and effectively remove one person from the roster while they shadow another member of the team. This could have a significant impact on resourcing, especially when struggling to fill rosters. It would involve additional cost.

163. Ms Worsfold did try and consider whether a compromise was possible and discussed this with the Claimant at their first meeting but he was clear he did not want to work any nights. He said his "last choice" would be a compromise of 1 in 4 night shifts. She formed the impression that the Claimant was not

actually prepared to accept any compromise as he always reverted to the position that he did not want to work any night shifts at all. Given her grounds for refusing the request, she did not feel a trial period would have been appropriate and/or feasible.

5

164. The Claimant emailed Jo Harris seeking an electronic copy of documents. He also wanted advice about how to progress matters outside the scope of the FWR He was upset and annoyed that Ms Boyle had not preserved his anonymity when seeking feedback.

10

Appeal

165. 4 April 2019, the Claimant appealed the decision.

15 The grounds of appeal were:

"I make the application on the following grounds:

1. *That the decision did not follow the Met Office Policy on Flexible*
20 *working.*
2. *That the Met Office has failed to provide the statutory rights I am entitled to as an employee.*
3. *That the delay in making the decision was unreasonable, unlawful and led to a reduced chance of my application being successful.*
25
4. *That the decision made was incompatible with the fact s and with incomplete information.*
5. *That these failures have caused a detriment to me."*

166. At this time the Aviation bench was operating with 4.0 people, a shortfall of
30 1.4, one member of the team was on maternity leave and the Claimant was on temporary redeployment. Staffing levels had fluctuated since the RWR had been lodged and continued to do so between April and May 2019.

167. 11 April 2019 Linda Caley emailed the Claimant to acknowledge his email of
35 4 April (JBp193). She said she would contact him during the following week with the next steps.

168. 16 April 2019 an email was sent to the Claimant from Linda Caley of HR seeking more information about his appeal grounds (JB p192- 92). Linda Caley queried the Claimant's assertions about not receiving papers as it appeared to her that he did receive them. She asked for more specification of the grounds.

She wrote:

"I appeal my decision against the flexible working decision made against me on the letter dated 15th March 2019, which I received by hand and not by email on the 20th March 2019.

I note that the documentation I was given was incomplete, it does not include any notes of the meeting held on the 26th February as it suggests, these were provided to me today."

I believe you were in receipt of both the outcome letter and the notes of the meeting (in paper form) on 1/4/2019 as stated in your email to Jo Harris on 1/4/2019 and not as you suggest in your email 4/4/2019 (below). Please can you outline why you are stating that you didn't receive these until writing your appeal via email on 4/4/2019?"

Linda Caley asked for specification about the statutory rights the Claimant had asserted that he did not receive. She asked him to specify the failures and detriments he mentioned and put a time limit on his response of 9am on 18 April 2019.

Claimant provided further information about his grounds of appeal

169. On the 17 April 2019 the Claimant provided further information about his grounds of appeal (JBp190-191). He emailed Paul Arbuckle and Martin Munro about a possible meeting to discuss Pat Boyle having disclosed his name to his colleagues.

170. Between 18 April 2019 and 14 May 2019 there were emails exchanged between Linda Caley, the Claimant and Martin Munro about arranging a date for an appeal hearing (JBp205 and 204).

171. A meeting which had been arranged with Martin Munro and Paul Arbuckle was cancelled pending the appeal. The Claimant was told that the papers for appeal would be in his inbox from Monday.

172. The Claimant returned to work in Aberdeen from detachment 1 May 2019.

173. Steps were taken to try and arrange a suitable date for an appeal hearing. The 21 May was finally identified. On the 16 May the Claimant received an invitation to the meeting.

174. It was arranged that Iain Forsyth Associate Director for Operations was to chair the meeting and that Richard Hunt Interim Employee Relations Consultant was to be on the panel. Iain Forsyth was an experienced manager having worked for the Met Office for 35 years. He had a good understanding of the teams involved. Iain Forsyth had chaired a number of grievance, disciplinary and appeal hearings at the Met Office and was experienced in dealing with HR matters. As Associate Director for Operations, he also had a good understanding of the operations centre including the structure, resources and the services provided by the civil aviation forecasting team Mr Forsyth had no previous knowledge of the case and Claimant was not known to him. Mr Hunt had no previous connection to the Claimant.

175. It was arranged that Ms Worsfold would join the hearing by Skype from the Falklands to explain the reasons for the original decision. Linda Caley, Employee Relations Adviser was to attend to advise on HR matters. There was also to be a note taker.

176. The letter to the Claimant mentioned his right to have a companion. An agenda and copies of papers were attached to the letter:

"1. Table of enclosures (JBp 239)
2. Appeal Hearing Agenda (JBp 209)
3. MH Appeal Email (JBp 194 and 190-191)
4. FWR Application (JBp 87- 90)
5. Correspondence (JBps200-205)

6. Outcome letter and notes from FW meetings (JBp187-189 and the minutes at JBp137-139, JBp161-167 and 178-182).
7. Appeals Policy (JBps 58-63)
8. Timeline (JBps237 - 238)"

177. The Claimant was asked for more detail in the grounds of appeal (JBp208) by:

"The panel has requested the below information.

Please could you ask for more detail on the grounds for appeal. Could you ask that specific reasons for the appeal are provided:

- *Did not follow policy – including a positive approach –* ***specifically what?***
- *Failed to provide statutory rights –* ***specifically what?***
- *Delay unreasonable –* ***Specifically what aspects had a negative impact***
- *Incomplete facts-* ***specifically what***

Please can you prepare these for the Appeal hearing or send these through to me prior to the hearing commencing.

Many thanks"

178. Before the Appeal Hearing Iain Forsyth was aware of and reviewed documents relevant to it.

Appeal Hearing 21 May 2019 Iain Forsyth and Richard Hunt

179. The appeal hearing took place as arranged on the 21 May. It had been difficult arranging a date. The Claimant had been on detachment and other work commitments for the participants had to be considered.

180. The Claimant attended by video conference from Aberdeen. Iain Forsyth, chaired the meeting and Richard Hunt was a panel member. The Minutes of the Appeal Hearing are an accurate summary of what transpired. (JBp210 – 217). The Claimant had an opportunity to state his case. His appeal points were all aired. The meeting then closed with an agreement that the Claimant

would send documents identified as not being included in the papers available to Mr Forsyth and Mr Hunt.

181. Mr Forsyth and Mr Hunt discussed the appeal after the meeting ended. They noted a difference in position between Ms Worsfold and the Clamant on the appropriate pool of employees to use when considering who could take on extra night shifts in place of the Claimant.

182. The Claimant had complained that Pat Boyle had breached confidentiality when she approached his colleagues for feedback. Mr Forsyth was aware that the Claimant had been told he could raise a grievance about that so he considered that it was not relevant to the appeal. In any event it was clear in his view that Ms Worsfold had not relied heavily on the information from Pat Boyle concerning the attitude of colleagues. Mr. Forsyth advised the Claimant that if he believed there were grounds for a Grievance then he should raise one as a separate matter.

183. Mr. Forsyth and Mr. Hunt discussed matters together on the day of the hearing. They decided to make some further investigations. As a result on 22 May 2019 (JBp218) an email sent by Linda Caley to Mr. Martin Munro asking for information:

"

• *Number of OM and SOM 's in the production team (and the vacancies)*
• *A breakdown for the production benches, the job roles that are assigned to this work and the number of OM/SOM required for each bench*
• *How resilience is maintained by cross training /working shifts on other benches.*
• *Sample rosters*

We believe there are 4 benches but only one of these teams is OM?
Aviation - Op Met
PWS-SOM
Marine- SOM
Team Leader – SOM

This information is important as the impact of MH 's request for flexible working should consider impacted colleagues (the Aviation team of O M's) and any business impact on this team.

5 *SOM's may regularly cover aviation due to resource shortages/resilience planning but management should aim to have staffing level that matches business need. Clarity on the numbers will help the panel understand if Martin Hopwood assumptions are correct."*

10 Also a second email was set (JBp218) was sent:

"Hi Again this is 2 of 2 emails

Regarding the MH appeal hearing still

15

Please would you be able to

- *Provide rosters for April - August 2018 and also April to July 2019*
- *What are the primary duties of the people on these shifts e.g. PWS or*
20 *Business Group etc*
- *What are their job levels?*
- *How often do they cover for each other only when necessary, or on a regular basis?*
- *Are SOM's covering on a regular basis e.g. is this the 'norm' now?*
25 *How are the people assigned to…"*

184. Mr Munro responded on 23 May 2019 (JBp220 to 221). In his response he made the general point that the Aviation Bench was such that there was a 0.7 deficit of OM staffing. That was expected to reduce to 1.7 deficit because
30 headcount would drop with effect from September 2019 and the start of the winter season as the R would need to support the Traffic Scotland winter service, one person was going on maternity leave and one temporary contract was ending and at that time it was not expected to be extended. He said that from September / October onwards there would be 3.6 OMs covering the
35 Aviation Bench and the R would therefore need to request that the remaining 1.7 was covered by Exeter (which he said was not ideal and reduced resilience but was hopefully a short-term measure). He further advised that any SOM cover on OM benches was only provided as necessary to cover fluctuating imbalances or sickness. It was not the "norm" and in order to
40 maintain skills, only a few SOMs were able to cover a whole shift. Many were

only able to cover a few tasks to help cover breaks or busy spells. He wrote that most people were assigned to particular benches and it was not a fluid roster. The staffing position had changed from the one in April 2019.

5 185. Mr. Forsyth saw the email from Mr. Munro dated 23 May 2019. He suggested he would draft a decision to discuss with Richard Hunt and Ms Caley.

186. The Claimant was not shown the e-mail dated 23 May 2019.

10 187. Mr. Munro also provided rosters (JBp223-231).

Other Flexible Working Requests/Arrangements

15 188. Mr. Forsyth investigated the question of whether there were other FWRs which had been made during the Claimant's FWR. Mr Munro confirmed that he had not received any other formal flexible working requests from staff in Aberdeen Office during the period that the Claimant's application was being considered (ie April, 2018 – May 2019). He had received some informal
20 requests. He set these out (JBp221):

"Also have a few informal requests such as asking for similar blocks of shifts (so runs of days and nights but not mixed) married couple who can't work on shift due to child issues (although one is on reduced hours so easier to do),
25 *and an individual who would prefer short broken shift runs."*

189. He explained that while he tried to accommodate these as far as possible, they were subject to the caveat that operational requirements came first, and that the Respondent could not guarantee that they would be able to
30 accommodate them all of the time. They were not permanent changes to the person's terms and conditions.

190. The background to these arrangements was that in March 2018 the Respondent had agreed during the recruitment process of an employee to
35 the role of OM into the Aviation Team that she would only be required to

complete single night shifts (rather than consecutive night shifts): such a request was supported by a medical certificate.

191. In or around 2008. the Respondent agreed to an employee's request to work an even number of night and day shifts to support his childcare arrangements following a divorce and becoming a single parent. This employee was employed by the Respondent as a SOM for the Business Marine Group.

192. Although not made through a flexible working request, the Respondent agreed that an employee engaged on the Traffic Desk could continue to work days only when moving to the role of SOM as part of redeployment exercise when the employee's previous role was made redundant. This arrangement was put in place prior to March 2011.

Appeal Hearing Decision Letter

193. On 29 May 2019 the appeal decision letter was issued (JBp232-235). It was a decision made jointly by both Mr Forsyth and Mr Hunt.

194. The panel had considered the Claimant's reasons for appeal as set out in his email of 17 April. They did not uphold the appeal. They accepted that relevant timescales had been exceeded the delays were in the interests of both sides to ensure a fair consideration of the matter. They concluded that the Claimant had agreed to delays at various stages in the process.

195. Mr. Forsyth considered the evidence from management and the Claimant in his application and appeal for flexible working. MH was employed at that time as part of a team required by the Met Office to operate 24x7 to deliver a resilient service for aviation customers. Management assessment by FW was that reducing the number of people available on the operational roster (OM) would have compromised Operational resilience. It was not reasonable or practical to reorganise the work and maintain operational resilience. Secondly, colleagues on the OM team would have been negatively impacted

by having to cover more nights and less days if MH request had been approved.

The Appeal panel considered the process and how decision had been taken to decline the request and found that it was reasonable to reject the request for flexible working (fewer night shifts) for the business reasons stated by FW in her original letter on 15 March and Appeal Decision letter on 29 March 2019. The panel decision was that there was no benefit to the business or colleagues in approving the request.

196. Mr.Forsyth explained in his statement at para 40 that he and Richard Hunt recommended a review of how the flexible working request process could be expedited in the future. Iain Forsyth raised the issue of the importance of dealing with FW requests in an expedited way and managers working with HR.

Witnesses

197. We found all the witnesses in general, to be credible and mostly reliable witnesess. The Claimant in particular displayed an impressive grasp of detail that the Respondent's witnesses found difficult to match and was a reliable historian of events although one that saw these events very much from his own perspective. We were also impressed with the evidence of Ms Worsfold and Ms Knight which displayed no antipathy whatsoever towards the Claimant and which no doubt reflected their own professionalism and desire to investigate the Claimant's position properly and give a fair decision on the FWR. We concluded that we could place considerable reliance on their evidence.

Submissions

198. Mr Hopwood began his submissions by indicating that he was directing the Tribunal's attention both to his witness statement and the grounds of appeal that he had submitted to the Respondents. In his view he had always been open to a reasonable compromise. He made reference to section 80F of the Employment Rights Act 1996. His position was that there was a clear breach of section 80G (aa) in that the decision on his FWR had not been dealt with within the three month period envisaged by the Act. He went on to look at the detailed chronology referring where appropriate to the delays in the process commenting that these delays were stressful and difficult for him and that he was in a difficult position in relation to timing as he was really in the hands of his employer. He felt that reasonable steps could have been taken to have the matter dealt with before Christmas. There was he said a lack of urgency throughout.

199. He then took the Tribunal through the detailed history. Indicating that in general there was a lack of communication and there was also a lack of any agreement as to the various extensions. The problem of so many people dealing with his case as they had to get up to speed in relation to the background. He took the Tribunal through the appeals. The documents were lodged late and in complete. He submitted the Respondents had dealt with the FWR in an unreasonable manner. He made reference to the evidence of Mr Munro. He had pressed Mr Munro in relation to delays and raised the issue of when his FWR would be dealt with on a number of occasions. He reiterated that the delays were not helpful to him. He saw no benefit in those delays. His position was that the decision was taken on incorrect facts. In particular one seemed to engage with his argument that SOMs required to carry out some work on the aviation bench to remain qualified and this could go a long way to circumventing the need for him to carry out nightshift. He expressed the view that he looked back on this period as being a horrible time.

200. The Claimant then considered the various appeals taking the Tribunal through the history and commenting on the process, delays and problems late documentation. He was particularly critical of the actions of Ms Boyle.

The questions posed by her to staff were posed negatively and he was named making it difficult to work then work with those staff. He questioned the evidence on which the decisions were made and suggested that these decisions were made on incorrect. He suggested a trial should be allowed to test whether there was any difficulty in removing him from nightshift. He did not believe that the roster information had been properly applied or understood. For example, Mr Munro at page 221 indicated that SOMs were only used when necessary. That was simply not the case and they were regularly used to keep their own skills up-to-date of the fact of him not carrying out nightshift was overstated and wider "pool" should have been considered. The picture painted was not a correct one. In relation to aviation bench A2 moved back and forth. The matter overall there was plenty of room for compromise to have been reached.

201. Mr Douglas helpfully prepared written submissions. He addressed the issues, the law and the application of the law to the facts. He said at the outset that since the Respondents did not notify the Claimant of his decision on the FWR within the decision period as prescribed by the Act. The Claimant must succeed on his first point and is entitled to a declaration to that effect. However, once the Tribunal decides the merits of the claims the issue of remedy arises which is governed by section 801 ERA. There is a discretion in making an award. If the Tribunal decides to make such an award the Tribunal may award a sum of up to eight weeks pay. A week's pay was to be calculated in terms of section 225(6) ERA in the subject of the maximum sum of £508 as at 15 April 2018 when the FWR was made.

202. Counsel then turned to a detailed consideration of the law. The Tribunal is entitled to consider the reasons for rejecting the FWR and whether their objection was based on incorrect facts. He made reference to the case of ***Commotion Ltd v. Rutty*** EAT [2006] ICR, ***Singh v. Pinnine Care NHS Foundation Trust*** EAT 6 December [2016 UKEAT/0027/16/DA]. It is not permissible for the Tribunal to decide the reasonableness of the refusal (***Commotion Ltd v. Rutty***, paragraph 37). In other words it was submitted the Tribunal was not permitted to disagree with the Respondents in respect

of the Respondent's judgment of the business case whether granting or refusing the FWR and substitute it's decision. The Tribunal may reconsider the reasonableness that otherwise of the manner in which the FWR was dealt with but not the reasonableness of the Respondent's decision itself. The Tribunal was entitled to have regard to the ACAS Code of Practice.

203. Turning to the application of the law to the facts Counsel suggested that although the decision had not been made within the three month decision period the Tribunal should look at the whole matter and suggested that it would not be appropriate to award the Claimant compensation if the Tribunal disagreed with this view any compensation should be considerably less than the statutory maximum. The Tribunal should recall that the appeal was lodged out of time. It was nevertheless accepted by the Respondents. The process that took place allowed for full exploration of the issues and to that extent was of some benefit to the Claimant. The position was thoroughly investigated and considered. Counsel then took the Tribunal through the chronology and pointed to the fact that once a decision had been made to rehear the application certain delays were caused by a series of circumstances and events all of which were in the control of the Respondents. It was relevant the Claimant was on detach duty in the Falklands Islands and there was less urgency to deal with the FWR than might have been the case while still in Aberdeen on the working pattern that he wanted altered. Counsel gave the Tribunal details through the process. The submission was that the reasonableness of the manner in which the FWR was dealt with was reasonable. It resulted in a robust and reasonable consideration of the FWR. It was accepted that Mr Munro had made a mistake as to the understanding of what should happen. Nevertheless, his decision was effectively upheld through the later process and appeals. The Tribunal should not interfere with the Respondent's business or commercial view of the pool of employees potentially affected by the FWR proposal or look at the business of commercial view but it would not reorganise work to give those employees more nightshifts. They generally did not want to do more nightshifts. The Respondents believed that allowing the Claimant to change his work pattern would negatively impact on the resilience of the aviation bench.

204. The Claimant, he continued, seeks to argue that the Respondents dealt with the FWR unreasonably because he disagrees with their views. If something is possible it does not mean it is unreasonable to decide it cannot be done where it would be unpopular and would adversely affect the quality and performance of work.

205. The Claimant appears to argue that the Respondents rejected the FWR for reasons which are impermissible. Reasons for rejection must he said engage permissible grounds. The appeal panel ultimately upheld Ms Worsfold's decision. It was not unreasonable not to offer the Claimant a trial. Counsel then addressed the question of whether or not the decision was based on incorrect facts. The decision was made in good faith which pool of employees would require to cover the Claimant's nightshifts. He was entitled to take that view. The primary facts which the Respondents relied were correct. The alternative for the Tribunal upholds this leg of the claim then the remedy should be restricted to a declaration to that effect and no award of compensation should be made.

Discussion and Decision

206. The statutory basis for a flexible working request is contained in the Employment Rights Act (''The Act'').

"*The 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,

(iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations,

(b). . . . .

(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,

(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, ...

(d). . . . .

(3) . . . .

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

(5)The Secretary of State may by regulations make provision about—

(a)the form of applications under this section, and

(b)when such an application is to be taken as made.

(6) . . . .

(7) . . . .

(8)For the purposes of this section, an employee is—

(a)a qualifying employee if he—

(i)satisfies such conditions as to duration of employment as the Secretary of State may specify by regulations, and

(ii)is not an agency worker (other than an agency worker who is returning to work from a period of parental leave under regulations under section 76);

(b)an agency worker if he is supplied by a person (" the agent ") to do work for another (" the principal ") under a contract or other arrangement made between the agent and the principal.

(9)Regulations under this section may make different provision for different cases.

(10). . . . .

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,

(aa)shall notify the employee of the decision on the application within the decision period, and

(b)shall only refuse the application because he considers that one or more of the following grounds applies—

(i)the burden of additional costs,

(ii)detrimental effect on ability to meet customer demand,

(iii)inability to re-organise work among existing staff,

(iv)inability to recruit additional staff,

(v)detrimental impact on quality,

(vi)detrimental impact on performance,

5 *(vii)insufficiency of work during the periods the employee proposes to work,*

(viii)planned structural changes, and

(ix)such other grounds as the Secretary of State may specify by regulations.

(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 10 *application is a reference to—*

(a)the decision on the appeal, or

(b)if more than one appeal is allowed, the decision on the final appeal.

(1B)For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is—

15 *(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.

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

20 *(a)before it ends, or*

*(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.**]***

(1D)An application under section 80F is to be treated as having been 25 *withdrawn by the employee if—*

(a)the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the application and the next meeting arranged for that purpose, or

(b)where the employer allows the employee to appeal a decision to reject an 30 *application or to make a further appeal, the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the appeal and the next meeting arranged for that purpose,*

and the employer has notified the employee that the employer has decided to treat that conduct of the employee as a withdrawal of the application.

35 ***80 H 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

(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

80I Remedies

(1)Where an employment tribunal finds a complaint under section 80H well-founded it shall make a declaration to that effect and may—

(a)make an order for reconsideration of the application, and

(b)make an award of compensation to be paid by the employer to the employee.

(2)The amount of compensation shall be such amount, not exceeding the permitted maximum, as the tribunal considers just and equitable in all the circumstances.

(3)For the purposes of subsection (2), the permitted maximum is such number of weeks' pay as the Secretary of State may specify by regulations.

(4)…. "

207. The Tribunal is obliged under section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 to have regard to any provision of any Code of Practice issued by ACAS which appears to be relevant to any question arising in the proceedings we are determining. Accordingly, we have taken into account the ACAS Code of Practice headed "Handling in a reasonable manner requests to work flexibly" published in June 2014. The Guidance is short and reflects the statutory provisions. It is clear that employers are expected to deal with requests quickly and within the time scale of three months provided by the Regulations.

208. The Tribunal was assisted by the helpful guidance contained in the case of **Commotion Ltd v Rutty** as to the correct approach to taken by the Tribunal in considering the background to the employer's decision.

209. Turning to the first part of the claim namely the time taken to give the Claimant a decision on his FWR it was conceded that the Respondents were in breach of Section 80G(1B) in that the decision was not communicated within the 'decision period' of three months as required by the Act. Indeed, the stark

chronology here was that the FWR was submitted on the 15 April 2018, the meeting with Mr Munro and his decision given on the 6 July, the appeal granted 17 October and the reinstituted process concluded on 26 February 2109 followed by a final appeal intimated on 29 May 2019 more than a year after the original FWR.

210. We would observe that the initial confusion round the proper process and the role of HR was a significant factor here. The lack of communication between Mr Munro and what appear to be two different branches of HR was not impressive or what should have happened in an organisation such as the Respondents. Matters were not helped as the staffing situation appears to have been fluid during this whole lengthy period making it difficult to agree exactly what the situation was at any particular point.

211. It was argued that despite this breach of their obligation the Claimant should receive no compensation and should only entitled to a declaration from the Tribunal confirming the breach. The Tribunal considered the circumstances carefully. Problems arose from Mr Munro's genuine but mistaken belief in what the law required and how the internal process should operate. We have no doubt that he acted in good faith and that there was no deliberate attempt to delay matters. Nevertheless, he should have been more proactive in bringing matters to a conclusion, checking his understanding of the policy and ensuring that HR, or rather the correct section of HR, were involved.

212. At the outset we would say that it is clear that Parliament envisaged a careful but speedy consideration of an FWR no doubt to try and avoid what we have seen here namely that a prolonged period of consideration benefits no one as during this period, which is bound to be one of uncertainty, neither side can get on with dealing with the consequences of an agreed work pattern.

213. We had some sympathy with the submission that the process that occurred allowed a robust and careful consideration of the issues, and to some extent we agree, but it was noticeable that at the end of the day Mr Munro had

identified the resourcing problems and difficulties reorganising staff associated with the proposal namely it was not a good idea for more qualified and highly paid SOM's to be forced to pick up more night shifts (which were unpopular) and/or for OM's to do so which would be necessary if the Claimant were allowed to stop doing such nightshifts all against a background of recruitment and morale problems and the likely impact in the quality of the service being provided. We are not sure what of substance was added to this in the months that followed although there was more detail and the proposal examined at length.

214. This was clearly a stressful time for the Claimant being, as he perceived it at odds with his employers over the matter and over such a prolonged period. In this context we accepted that the Claimant did formally raise the issue of delay but raised it on a number of occasions. We would observe that given his position he was not really in a position to be bullish about that matter as to do so he would risk alienating the Respondent's Managers on whom he relied to consider his application sympathetically. We also accept his evidence that he was offered further delays and postponements throughout. We do not interpret this as sinister but it seems to emphasise an underlying reluctance to get on with the reconsideration of the FWR quickly. We have no doubt that there were factors that contributed such as the fact that the Managers tasked to deal with the FWR did not have first-hand current knowledge of the situation in Aberdeen and secondly by matters such as the disputes over detail (the number of SOM's, Rosters etc) and issues around the process such as the complaint about breach of confidentiality.

215. Looking at the matter with the benefit of hindsight there did in general appear to a lack of urgency overall in getting to grips with the issue and dealing with it. The Tribunal may award up to eight weeks pay as compensation if it believes it was just and equitable to do so. For these reasons considering the matter in the round and judging the matter as meriting an award on the lower scale we will award the Claimant one weeks' pay as being a just and equitable

award in these circumstances. A week's pay under the Regulations is calculated with reference to Section 225 of the Employment Rights Act 1996. We understood that it was not disputed that this was £508 as at 15 April 2018 when the FWR was submitted. We will also make the appropriate declaration.

216. Moving on to the question of whether the application was dealt with in a reasonable matter the principal feature was once more delay. The initial failure of Mr Munro to use the correct process together with delays thereafter does ,however, have to be balanced out against the process that was adopted and what might be regarded as the quality of the ultimate decision-making process. This includes the fact that the Claimant's final appeal was lodged out of time yet still considered. The Respondents were no doubt aware that they had failed to adhere to the statutory process and that an appeal could try and rectify matters. It also includes the readiness of the employer's managers to try and carefully consider the points being made by the Claimant and to have some regard to his welfare when suggesting he might take advantage of their Occupational Health Providers. The process was not by any means perfect but we were particularly concerned that a more rigorous timetable was not put in place particularly given the recognition of the initial failure at the Claimant's first appeal.

217. In passing we note that the Regulations provide that in a situation where there are appeal(s) (Regulation 80G) agreement can be reached to extend the time period in which a decision should be made. In the present case there was no such agreement although at points the Claimant felt obliged to accept some short delays.

218. There were also other inadequacies in the way the matter was handled which we noted. The canvassing of the Claimant's colleagues for their views on carrying out more nightshifts was a perfectly proper exercise but telling them that he was the colleague who wanted the change was bound to be embarrassing. It should have been kept impersonal. This was correctly recognised by Ms Harris.

219. In assessing whether any sum should be paid the Tribunal considered that although it took many months from the start of the process to its ultimate conclusion there were good reasons for some of the delay but not for all. This was not a case where an employer was deliberately slow at addressing the issue but we could detect no real urgency. For these reasons we concluded that the process was not handled reasonably overall, although adequate in parts. We regarded a weeks' pay as being a just and equitable award expressing as it does a level of censure for the way in which the FWR was handled. If we had looked at the matter cumulatively, we regarded the matter as two separate breaches of the section we would have awarded two week's pay.

220. Finally, we considered whether the decision was made on incorrect facts. The Claimant had some basis for his position in that Mr Munro did not seem to appreciate how many SOM's actually worked on the Aviation desk who were therefore available to cover the additional nightshifts that would arise if the FWR was granted. He had underestimated the number as was clear in cross examination. Related to this he also seemed to fail to engage with the argument that as SOM's had to continue getting some experience on Aviation (which was a benefit to the Respondents and ensured that in times of necessity they could be called on to work on that important bench) and that the nightshifts which would be lost if the Claimant ceased working them could be used to ensure that some SOM's kept up their skills by working those nights. The obvious flaw in that being that the SOM's would not necessarily welcome keeping their skills up to date by working nightshifts when other relief work in the form of covering for sickness absence etc during the day might be more palatable and it might therefore deter them from remaining accredited.

221. We considered that while there might be room for debate on the details, and the staff situation fluctuated but the essential facts were clear. The Respondents are entitled as part of a commercial consideration to take the view that SOM's (who are more highly paid and skilled than OMs) are kept as

much as possible on SOM work and that requiring them to cover nightshifts on the Aviation bench would be generally unpalatable to them and be a less efficient use of their skills. The Claimant's FWR was also likely to lead to more night shifts for the existing OM's (the exact number was disputed but we preferred the Respondents ultimate calculation of this to the Claimant's) which would be generally unpalatable to them and make recruitment and retention more difficult against a background of difficulties with both. This boils down to a difficulty in reorganising staff to provide cover which was Mr Munro's initial conclusion. The decision was not dependent on any particular fact which if wrong would invalidate the decision. For these reasons the third part of the claim fails.

Employment Judge **James Hendry**

Date of Judgement **27 November 2020**

Date sent to parties **27 November 2020**