EMPLOYMENT TRIBUNALS

Claimant: **Mrs Emma Arnett-Davies**

Respondent: **Ministry of Defence**

Heard at: **Newcastle (Via CVP) (v)** **On:** **10 February 2021**

Before: **(1) Employment Judge A.M.S. Green**
(2) Mr SJ Lie
(3) Ms D Winship

Representation
Claimant: Mr D Patel – Counsel
Respondent: Ms R Mellor – Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The claimant's claim under Employment Rights Act 1996, section 80H(1)(a) is well founded in that the respondent failed to notify the claimant of the outcome of her appeal against its decision regarding her request for a contract variation within three months (or as extended by agreement) beginning with the date on which her application was made, contrary to Employment Rights Act 1996, section 80G (1) (aa). The respondent shall pay the claimant compensation of £376.40 pursuant to Employment Rights Act 1996, section 80I(1)(b).

2. The claimant's claim under Employment Rights Act 1996, section 80H(1)(a) is dismissed in that the respondent refusal of the claimant's application regarding her request for a contract variation was in accordance with Employment Rights Act 1996, section 80G(1)(b).

REASONS

Introduction

1. For ease of reading, we have referred to the claimant as Mrs Arnett-Davies and the respondent as the MoD.

2. The Tribunal conducted a remote final hearing via the CVP platform. We worked from a digital hearing bundle. Mrs Arnett-Davies and Lt Col Colquhoun adopted their witness statements and gave oral evidence. Mr Patel tendered written submissions and both representatives made closing oral submissions.

3. In reaching our decision, we have considered the oral and documentary evidence and the representatives' submissions. The fact that we have not referred to every document in the hearing bundle should not be taken to mean that we have not considered it.

4. Mrs Arnett-Davies must establish her claims on a balance of probabilities.

The claims and the response

5. When Mrs Arnett-Davies presented her claim form to the Tribunal she made the following claims under the Employment Rights Act 1996 ("ERA") and the Equality Act 2010 ("EqA"):

    a. A claim under ERA, section 80 H (1) (a) in respect of the MoD's alleged failure to consider her request to vary her contract of employment.

    b. A claim under ERA, section 80 G (1) (b) in respect of the MoD's alleged failure to specify one or more of the prescribed grounds for refusing her application to vary her contract of employment.

    c. A claim under ERA section 80 H (1) (b) in respect of the MoD's rejection of our application being based on incorrect facts.

    d. A claim of indirect discrimination under the EqA.

6. On 12 October 2020, Mrs Arnett-Davies withdrew her claim of indirect sex discrimination. That claim has been dismissed.

7. During the hearing, Mrs Arnett-Davies confirmed to Ms Mellor that she was no longer relying upon her claim under ERA section 80 H (1) (b) in respect of the MoD's rejection of our application being based on incorrect facts.

8. The MoD does not accept that its decision to refuse Mrs Arnett-Davies' request to vary her contract of employment was notified to her outside the decision period. They say that the decision period was extended by agreement. They also say that they refused the application on one or more of the grounds set out in ERA, section 80 G (1) (b).

The issues

9. These are the issues that the Tribunal must determine:

    a. What was the decision period for the purposes of determining whether the refusal was made in time? Mrs Arnett-Davies says that the decision on her request was made outside the decision period.

    b. Is a claim under ERA, section 80 G (1) (b) in respect of the MoD's alleged failure to specify one or more of the prescribed grounds for refusing her application to vary her contract of employment freestanding? The MoD says that such a claim cannot be freestanding.

    c. If a claim under ERA, section 80 G (1) (b) is freestanding, did the MoD fail to specify one or more of the prescribed grounds for refusing her application to vary her contract of employment?

Findings of fact

10. Mrs Arnett-Davies began working for the MoD in 2007. She resumed working for them in February 2010. At the relevant time in respect of her claims, she was employed as a Specialist Instructional Officer. Her role primarily involved delivering Category B driver theory training to infantry recruits to prepare them for the driver theory test. She was also required to process the paperwork to prepare for the training. She worked at the Infantry Training Barracks in Catterick.

11. The MoD operates a policy in respect of flexible working called "the Statutory Right to Request Flexible Working Arrangements" [84] (the "Flexible Working Policy").

12. Mrs Arnett-Davies went on maternity leave and returned to work in September 2017. On returning, she requested a change of hours in October 2017 [123]. The MoD refused her request.

13. On 6 November 2017, Mrs Arnett-Davies made a formal flexible working request under the Flexible Working Policy [124-127]. At the time, she was working full-time 37 hours per week and wanted to reduce her hours to 14 per week. Her request was refused, and she appealed the decision. She attended an appeal hearing on 5 March 2018. Her appeal was successful, and the MoD allowed her to return to work on a part-time basis.

14. On 24 May 2018, the MoD wrote to Mrs Arnett-Davies confirming that her contract was varied with effect from 30 April 2018 so that she would be required to work 14 hours per week split over Tuesday to Thursday [119]. The letter confirmed that she was now employed on a part-time basis. It also stated that her alternative working pattern should be reviewed at least every six months and should be discussed at her half yearly performance review. It stated that if her working pattern no longer met the needs of the business, her line manager should discuss this with her and, where possible, agree an alternative working pattern which met the needs of the Department.

15. Mrs Arnett-Davies had her annual performance review with her Line Manager, David Cross, which was signed off as agreed on 24 April 2019 [141]. During the review it was indicated that her working hours would need to be increased. Lt Col Colquhoun, the commanding officer, countersigned the performance review on 30 April 2019 confirming that her working pattern would need to change.

16. Mrs Arnett-Davies met with Mr Cross on 4 June 2019 to discuss her working pattern. Notes of the meeting were taken [145]. Later the same day, Mr Cross emailed Mrs Arnett-Davies to confirm what was discussed at the meeting [147]. In summary, he said that the business required her to increase her hours to a full-time basis because of the increase in the number of recruits and a shortage of instructional officers. He also stated that the business would be willing to give some leeway to the effect that she could start working on Monday lunchtime and finish at Friday lunchtime. He also referred to her request to work some of her time from home during periods of instructor downtime.

17. On 5 June 2019, Mrs Arnett-Davies submitted a formal flexible working request under the Flexible Working Policy [192]. She proposed the following working pattern:

> *Due to Decreased Staffing Levels and (as I am told) an increase in recruit intake, I have been advised that I must return to working full-time. My concern with this is that I am the primary caregiver to my two-year old son, however I am eager to meet the business needs and would like to propose the following working pattern: Tuesdays, Wednesdays, Thursdays, 26 hours per week 8.00-17.10 (1/2 hour break daily), alternating between one week working at STW, one week working at home.*

18. On 4 July 2019, Lt Col Colquhoun wrote to Mrs Arnett-Davies to tell her that her working pattern needed to change to meet increased demand in recruits. He asked her to return to working full-time (37 hours per week) starting from 15 July 2019 [156].

19. Mrs Arnett-Davies replied to Lt Col Colquhoun on 24 July 2019 [162]. She disagreed with what he had said concerning the need to change her hours and requested a meeting.

20. Lt Col Colquhoun met Mrs Arnett-Davies on 22 August 2019 to discuss the points that she had raised in her letter. She then wrote to Lt Col Colquhoun on 29 August 2019 stating that she was willing to work a trial period of 26 hours per week, Tuesday to Thursday starting in October 2019. She said that this would be a temporary arrangement. She requested that on occasions where she did not have to deliver training, she wanted to work from home to undertake administration.

21. Lt Col Colquhoun replied to Mrs Arnett-Davies on 2 September 2019 [182]. He was unable to agree to a three-month trial period on increased hours nor her proposal to work from home. He asked her whether she would be willing to continue to work 14 hours per week. He proposed that she should work

from Tuesday to Thursday, two weeks in every four with a view to reviewing this work pattern after three months. He also requested her agreement on the new proposal or to agree an extension for the response period for the flexible working application by a further two weeks to 19 September 2019.

22. On 4 September 2019, Mrs Arnett-Davies replied to Lt Col Colquhoun's letter [184] stating that she was unwilling to remain working 14 hours per week under the existing arrangement and agreed to his request for a two-week extension.

23. On 19 September 2019, Mrs Arnett-Davies met Lt Col Colquhoun to discuss her flexible working request. Lt Col Colquhoun refused it and completed section 6 of the flexible working request form entitled "Line Manager's decision". Included was a section called "Reason for Refusal-if refused you must select one or more of the business reasons for this decision". The list contains several different reasons for refusing an application against each of which is a tick box. Lt Col Colquhoun ticked the box "Detrimental effect on ability to meet customer demand". In the box entitled "any additional comments relating to the reason for dismissal" he wrote the following:

> *I am not willing to agree homeworking on the basis that Mrs Emma Arnett-Davies cannot deliver instruction from home and this would be detrimental to the CBT department's ability to meet customer demand.*
>
> *It was agreed that Mrs Emma Arnett-Davies would maintain the current 14 Hrs working week contract, but with a changed working pattern [illegible word] Tuesday-Thursday 07 30-1720 hrs on alternative weeks.*
>
> *This working pattern will be reviewed after three months with a view to increase to 28 hours working week contract, if this was mutually agreeable, thus enabling her to work every week rather than alternative weeks.*
>
> *The new working pattern would start from week beginning 14 October 2019. Mrs Emma Arnett-Davies will work in LBT wing under their management.*

Mrs Arnett-Davies did not countersign the form. At some stage during the meeting, Mrs Arnett-Davies told Lt Col Colquhoun that she intended to appeal the decision.

24. On 25 September 2019, Mrs Arnett-Davies emailed Lt Col Colquhoun to appeal the decision to refuse her application [216]. She stated that she believed that she had 10 working days in which to appeal. During her oral evidence, she was asked why she believed she had a right of appeal as the Flexible Working Policy did not confer an appeal right. She was taken to the MoD's grievance procedure which does include a right of appeal and was asked whether she had appealed under that policy. She could not remember why she thought she had a right of appeal within 10 working days. However, even if she had no right of appeal under the Flexible Working Policy, the MoD accepted her appeal through its subsequent actions. Initially, Mr Phil Small was assigned the role of appeal officer. He was replaced by Mr Clive Roberts.

Lt Col Colquhoun confirmed this change to Mrs Arnett-Davies in an email dated 22 October 2019 [221].

25. There is no evidence to suggest that the parties agreed to extend the period within which the MoD was required to issue its decision under appeal.

26. Mr Roberts heard Mrs Arnett-Davies' appeal on 31 October 2019. Notes of the appeal meeting were taken [265].

27. On 5 November 2019 Mr Roberts wrote to Mrs Arnett-Davies to confirm the outcome of her appeal [269]. He stated, amongst other things:

> *Firstly, your appeal in respect of the number of hours (14) per week was not upheld because the MOD is allowed, under the regulations, to offer a specific number of hours to meet business requirements.*
>
> *…*
>
> *Secondly, your appeal in respect of homeworking is partially upheld, as from our evidence it appears that there are some tasks that can be reasonably undertaken at home, although we agreed the classroom instruction would necessitate your presence at the Infantry Training Centre (ITC). This should be arranged with the agreement of your Line Management. It is not a contractual right, nor is it necessarily an arrangement that can be regularly relied on and is subject to the demands of the business. This means that your Line Manager should discuss with you those tasks/outputs they could be delivered from home, in the context of the requirements of the ITC course timetable.*

28. In summary, her appeal was partially successful.

Applicable law

29. Section 80G ERA 1996 provides:

(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,
(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 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—

(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—

(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.

30. Section 80H ERA provides as follows:

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—

(a) that his employer has failed in relation to the application to comply with section 80G(1) ,

(b) that a decision by his employer to reject the application was based on incorrect facts , or

(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).

(2) No complaint [under subsection (1)(a) or (b)]4 may be made in respect of an application which has been disposed of by agreement or withdrawn.
(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until—

(a) the employer notifies the employee of the employer's decision on the application, or

(b) if the decision period applicable to the application (see section

80G(1B)) comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.

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

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

31. ACAS has produced a statutory Code of Practice on "Handling in a reasonable manner requests to work flexibly" (the "Code"). The Code must be taken into account by the Tribunal when it is relevant to a question arising in proceedings. The Code supplements the basic statutory duty on employers to consider requests reasonably. Its recommendations are not compulsory but set out best practice. For example, it recommends that employers provide a right of appeal even though this is no longer a legal obligation. What is reasonable will depend on the circumstances of individual cases and the employer's resources.

32. An employer can only refuse the employee's flexible working request for a valid business reason. The Code simply advises that, when refusing an application, the employer should put the decision in writing. This is a change from the previous regime, which required the employer to set out in writing the grounds on which the application was refused and to provide sufficient explanation as to why those grounds applied. This level of detail is no longer required under the new procedure.

33. The Code states that employers should deal promptly with requests. However, this is circumscribed by ERA section 80G (1) (aa). Section ERA 80 (G) (1A) clarifies that if the employer allows the employee to appeal against a decision to reject the application, the reference to the "decision on the application" in ERA section 80 G (1) (aa) is a reference to a decision on the appeal. This means that all requests, including any appeals, must be considered, and decided upon within three months of receipt of the application, unless a longer period has been agreed.

34. The upshot of these provisions is that the employer must have concluded the process of dealing with a flexible working request within three months of receiving the application (unless otherwise agreed).

35. The time limit can be extended under the provisions of ERA section 80 G (1B) (b) and section 80 G (1C). This means that an agreement with retrospective effect may be entered into after the original decision period. In **King v Tesco Stores plc ET case no 230 1268/17** the Tribunal held that if the employer cannot deal with the request in three months, then it is for the employer to seek the extension to which the employee can then agree or disagree. We appreciate this is a decision of the Tribunal and is not binding but it is illustrative of the approach to be taken when agreeing an extension.

36. Turning to the question of remedy, the Tribunal has the power to make an award of compensation. The amount of compensation will be such amount as the Tribunal considers just and equitable in all the circumstances of the case, but this cannot exceed eight weeks pay. The number of weeks' pay is subject to the upper limit specified in ERA section 227 ERA which is currently £538. According to the Explanatory Notes to the Employment Act 2002, in deciding the amount of compensation to be awarded, the Tribunal should take into account the behaviour of the employer (e.g. whether it has lied) and of the employee (e.g. his or her willingness to consider acceptable alternatives).

Discussion and conclusions

37. *What was the decision period for the purposes of determining whether the refusal was made in time?*

    The decision period for determining whether the refusal was made in time ran from 5 June 2020 until 19 September 2020. There had been a mutually agreed two-week extension entered into on 4 September 2020 (which was the end of original decision period) which ended on 19 September 2020. On 19 September 2020, Mrs Arnett-Davies verbally expressed her intention to appeal the decision which she subsequently followed up in writing to Lt Col Colquhoun. Although there were no appeal provisions set out in the Flexible Working Policy, the MoD accepted her appeal which was heard by Mr Roberts on 31 October 2020 with the outcome being communicated to Mrs Arnott-Davies in a letter dated 5 November 2020. On 19 September 2020, the MoD would have known that the decision period was about to expire and having been presented with Mrs Arnette-Davies' verbal request to appeal, it should have requested an extension for the decision period. After all, this is what Lt Col Colquhoun had done on 4 September 2020 so it cannot be said that he was ignorant of the procedure regarding extensions. In the absence of a further agreement to extend the decision period, the appeal had to be concluded no later than 19 September 2020. That did not happen and, consequently, the decision was out of time and, therefore, in breach of the requirements of ERA, section 80 G (1B).

38. *Is a claim under ERA, section 80 G (1) (b) in respect of the MoD's alleged failure to specify one or more of the prescribed grounds for refusing her application to vary her contract of employment freestanding?*

    Section 80H ERA clearly sets out alternative grounds upon which an employee may complain to the Tribunal. The wording does not suggest that each complaint is contingent upon or a subcategory of another complaint. They are freestanding. The only conditionality under the first four grounds of complaint is that they cannot be made in respect of an application that has been disposed of by agreement or withdrawn and until the employer has notified the employer of its decision on the application or where an appeal is allowed, has notified the employee of its decision on the appeal or final appeal. Finally, the only other condition is where an employer fails to notify the employee of its decision on the application or (where applicable) appeal, at the end of the decision period. Mrs Arnett-Davies met those conditions. Her application had not been disposed of by agreement or withdrawn. She delayed presenting her complaint to the Tribunal until after the MoD had

notified her of the outcome of the appeal which had been notified to her outside the decision period.

39. *If a claim under ERA, section 80 G (1) (b) is freestanding, did the MoD fail to specify one or more of the prescribed grounds for refusing her application to vary her contract of employment?*

Mr Patel has argued that liability arises because of the lack of any explicit reference to one of the statutory grounds of refusal in the appeal outcome letter dated 5 November 2020. Ms Mellor invited us to take a more holistic approach and to view the appeal outcome letter in the context of the antecedent discussions and negotiations that had taken place between the parties. Whilst Mr Patel's analysis is superficially attractive, we do not think that he is correct. Mrs Arnett-Davies was specifically appealing the decision that Lt Col Colquhoun reached on 19 September 2020. In the section of the form setting out his reasons for refusal he ticked the box "Detrimental effect on ability to meet customer demand". This is one of the statutory reasons that an employer may rely upon in refusing a flexible working request. Mr Roberts upheld that original decision and whilst he gave a somewhat vague explanation, we do not think that this detracts from the rationale provided by Lt Col Colquhoun. An appeal is, by its very nature, an examination of an earlier decision which will result in the appeal officer either wholly or partly dismissing or allowing the appeal. It has to be viewed in the context of the original decision which is being appealed. The appeal outcome letter must be read in conjunction with and in the context of the decision dated 19 September 2020. Consequently, we prefer Ms Mellor's submission in this regard.

40. *Remedy*

When considering compensation, we must make an award that is just and equitable. We have not seen any evidence of the MoD acting unreasonably or disregarding Mrs Arnett-Davies' application to vary her contract out of hand. There is no suggestion that it acted in a perfunctory manner. In fact quite the contrary occurred. The parties engaged in correspondence and had meetings to consider what Mrs Arnett-Davies wanted. These had to be set against the needs of the business. It accepted her appeal when it did not need to, given the absence of appeal rights in the Flexible Working Policy. That suggests a spirit of compromise. Overall, this breach is little more than a technicality. It arises from the MoD's failure to ask for an extension to the time period to enable it to consider Mrs Arnett-Davies' appeal. Given that Lt Col Colquhoun was aware of the need to ask for extensions of time having previously done so on 4 September 2020, he should have followed that practice when faced with the appeal. He failed to do that.

41. Mrs Arnett-Davies has asked for eight weeks pay in her schedule of loss. That is the maximum that the Tribunal can award and must be reserved for the most serious cases. In her closing submissions, Ms Mellor suggested an award of 2-3 weeks' pay should be made if liability in respect of both claims was established.

42. We think that given the nature of the breach and the fact that Mrs Arnett-Davies has only established one of her claims, it would be just and equitable to make an award of two weeks' pay. In the counter-schedule of loss prepared by the MoD it is stated that Mrs Arnett-Davies was employed to work 14 hours per week on a gross annual salary of £9,825.35, or gross hourly rate of £13.50. She confirmed her monthly take home pay is £753.78, but according to https://www.thesalarycalculator.co.uk/salary.php this should give a net monthly pay of £815.53, and a net weekly pay of £188.20 as opposed to her claim that her weekly pay was £488.13 as per her schedule of loss. We prefer the MoD's calculation. Our award of two weeks' pay on this net weekly figure gives a total amount of £376.40.

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Employment Judge A.M.S. Green

Date 16 February 2021