EMPLOYMENT TRIBUNALS

Claimant: Mrs P Slater

Respondent: Learning Curve Group Limited

Heard: Remotely (by video link) **On:** 17, 18 and 19 May 2021

Before: Employment Judge S Shore
NLM Mrs C Hunter
NLM Ms S Mee

Appearances
For the claimant: In Person
For the respondent: Mr P Clark, Solicitor

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal for the reason or principal reason that she asserted a statutory right (contrary to section 104 of the Employment Rights Act1996 ("ERA")) was not well-founded and fails.

2. The claimant's claim of unfair dismissal for the reason or principal reason that she submitted a flexible working request (contrary to section 104C of the ERA) was not well-founded and fails.

3. The claimant's claim of breach of contract was not well-founded and fails.

4. The claimant's claim of indirect discrimination because of the protected characteristic of sex (contrary to section 19 of the Equality Act 2010 ("EqA")) fails. The respondent did not apply the PCP alleged by the claimant.

5. The claimant's claim that she was victimised by the respondent by being subjected to a detriment because she had done a protected act (contrary to section 27 of the EqA) fails. The claimant did not do a protected act.

6. The claimant's claim that the respondent failed to deal with her flexible working request in accordance with its duties under section 80G of the ERA (contrary to section 80H of the ERA) is not well-founded and fails.

REASONS

Introduction

1. The claimant was employed as Learning and Development Manager by the respondent from 1 October 2018 to 29 November 2019, which was the effective date of termination of her employment. The claimant started early conciliation with ACAS on 10 December 2019 and obtained a conciliation certificate dated 23 January 2020. The claimant's ET1 was presented on 25 February 2020. The respondent is a private training provider that employs over 400 people.

2. The claimant presented claims of:

    2.1. Automatic unfair dismissal (contrary to sections 104 and 104C of the ERA);
    2.2. Breach of contract contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994;
    2.3. Indirect discrimination because of the protected characteristic of sex (contrary to section 19 of the EqA);
    2.4. Victimisation (contrary to section 27 of the EqA); and
    2.5. Failure to deal with her flexible working request in accordance with its duties under section 80G of the ERA (contrary to section 80H of the ERA).

3. The claimant had intimated a claim of direct sex discrimination, but this was withdrawn.

Law

4. The relevant law relating to the claims of indirect discrimination and victimisation is contained in sections 19 and 27 of the EqA:

> ***19. Indirect discrimination***
>
> *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c) it puts, or would put, B at that disadvantage, and*

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

27. Victimisation

A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

5. We have reproduced the relevant parts of sections 80F-80H of the ERA concerning applications for flexible working:

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…

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,
(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.

80H. Complaints to employment tribunals

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

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

(b) that a decision by his employer to reject the application was based on incorrect facts, 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) may be made in respect of an application which has been disposed of by agreement or withdrawn.

6. The law relating to automatic unfair dismissal because the claimant asserted a statutory right is set out in section 104 of the ERA:

104. Assertion of statutory right

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a)whether or not the employee has the right, or

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

7. The law relating to automatic unfair dismissal because the claimant made an application for flexible working is set out in section 104C of the ERA:

104C. Flexible working

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a)made (or proposed to make) an application under section 80F,

(b). . . . . .

(c)brought proceedings against the employer under section 80H, or

(d)alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.

8. Breach of contract is a concept that has developed under the common law of England and Wales and has been formed by case law.

9. We were referred to a number of precedent cases by Mr Clark, which we considered and applied when appropriate:

9.1. Smith v Hayle Town Council [1978] IRLR 413;
9.2. Maund v Penwith DC [1984] IRLR 24;
9.3. Spaceman v ISS Mediclean Limited (UKEAT/0142/18/JOJ);
9.4. Ladbroke Courage Holidays v Asten [1981] IRLR 59;
9.5. Murray v Foyle Meats [1999] IRLR 562;
9.6. Ishola v Transport for London [2020] IRLR 368;
9.7. MOD v MacMillan (EATS/0003/04);
9.8. Essop and others v Home Office (UK Border Agency);
9.9. Naeem v Secretary of State for Justice [2017] IRLR 558; and
9.10. Eweida v British Airways [2010] IRLR 322.

Issues

9. The issues (questions that the Tribunal has to find answers to) were agreed and set out in the case management order of Employment Judge Morris dated 23 August 2020 (and using the numbering from the case management order) are:

Unfair dismissal

7.1 What was the reason (or, if more than one, the principal reason) for the dismissal?

The claimant asserts that the reason was that she submitted a flexible working request and/or had attempted to assert a statutory right. Those reasons would be what is often termed 'automatic unfair dismissal' by reference to Sections 104 and 104C respectively of the Employment Rights Act 1996 ("the 1996 Act"). The respondent asserts that the reason for the dismissal was that the claimant was redundant.

7.2 It is noted that the claimant was only continuously employed by the respondent from 1 October 2018 to 29 November 2019 and, therefore, does not have the necessary continuous period of service required by Section 108 of the 1996 Act to pursue a complaint of 'ordinary unfair dismissal'. In the circumstances the considerations contained in Section 98(1) and (4) of the 1996 Act do not arise.

Indirect discrimination on grounds of sex: Section 19 of the Equality Act 2010

7.3 Did the respondent apply the following provision, criterion or practice ("PCP") generally: namely that its employees must work standard hours; the application of that PCP following the respondent's withdrawal of the claimant's previous flexible working arrangement which had allowed her to work from 8.00am until 4.00pm?

7.4 Does the application of that PCP put other women at a particular disadvantage when compared with men?

7.5 Did the application of that PCP put the claimant at that disadvantage in that, as a mother, being required to work standard hours did not accommodate her childcare arrangements, which predominantly fell on her?

7.6 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies upon the need for the People Team within which the claimant worked to cover working hours from 8.00am to 5.00pm in accordance with their contracts of employment and a staff rota.

Victimisation: Section 27 of the Equality Act 2010

7.7 Has the claimant carried out a protected act? The claimant relies upon her having

> *7.7.1 objected to the withdrawal of her flexible working arrangement and having sought to work flexibly to accommodate her childcare difficulties especially given the absence of her husband from home from time to time, and*
>
> *7.7.2 raised discrimination complaints at a meeting on 6 November 2019.*

7.8 If there was a protected act did the respondent subject the claimant to detriment because she had done such a protected act; the claimant relies on the detriment of having been dismissed by reason of redundancy and the respondent's failure to address her flexible working request.

Failure to deal with a flexible working request: Section 80F of the 1996 Act

7.9 Did the claimant make a flexible working application in the form required by Section 80F of the 1996 Act and the Flexible Working Regulations 2014?

7.10 If so, did the respondent deal appropriately with that application in accordance with Section 80G of the 1996 Act?

Breach of contract

7.11 Was the claimant previously contractually entitled to work flexibly as she has described?

7.12 If so, did the respondent breach the claimant's contract of employment by removing that flexibility of her working arrangements?

Remedies

7.13 If the claimant succeeds in whole or in part the Tribunal will be concerned with issues of remedy.

7.14 There may fall to be considered reinstatement, re-engagement a declaration in respect of proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

10. As we did not find in favour of the claimant on any of her claims, we did not consider issues related to remedy.

Housekeeping

11. The claimant was unrepresented at this hearing, although she had been represented by solicitors at the time that she lodged her claim and at the preliminary hearings held on 11 May 2020 (EJ Aspden) and 12 August 2020 (EJ Morris). We advised her that the Tribunal operates on a set of Rules made in 2013. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

12. On the first morning of the hearing, we discussed the claims and issues with the parties. The issues were agreed and the claimant confirmed that her claims were as set out in the case management order of EJ Morris of 23 August 2020. These are set out above.

13. The parties produced two agreed bundles. The first bundle ran to 413 pages. A supplementary bundle was produced very late in the proceedings and was only submitted to the Tribunal in its final form on the first morning of the hearing. It ran to an additional 84 pages. The bundles were numbered sequentially. If we refer to a pages in the bundle, the page number(s) will be in square brackets [ ].

14. The claimant gave evidence in support of her claim. Her witness statement dated 7 April 2021 consisted of 130 paragraphs. The claimant also produced a witness statement from Andrew Stephens dated 23 October 2020 that consisted of 5 paragraphs. He was employed by the respondent as External Recruitment Manager until July 2019. We explained to the claimant that because Mr Stephens had not attended the hearing and made himself available to be cross-examined, we could attach little weight to his statement.

15. The respondent called 5 witnesses who gave live evidence:

    23.1. Hannah Morgans, who is the head of Curriculum and Online Services for the respondent. Her witness statement dated 8 February 2021 consisted of 11 paragraphs;

    23.2. Brenda McLeish, who is Chief Executive of the respondent and dealt with the claimant's appeal against her dismissal. Her witness statement dated 16 February 2021 consisted of 14 paragraphs;

    23.3. Gail Crossman, who is Director of Quality and Performance for the respondent and interviewed the claimant for hr role in August 2018. Her witness statement dated 16 February 2021 consisted of 14 paragraphs;

    23.4. Catherine Dixon, who is an Employment Relations Advisor for the respondent. Her witness statement dated 9 February 2021 consisted of 14 paragraphs; and

    23.5. Louise Clough, who is Director of People for the respondent and was the claimant's line manager. She was also the dismissing officer and her witness statement dated 25 March 2021 consisted of 54 paragraphs.

16. All the witnesses gave evidence on affirmation. We permitted Mr Clark to ask a couple of his witnesses supplementary questions about documents that had been added to the bundle very late at the insistence of the claimant. All witnesses were cross-examined by Mr Clark or the claimant. The Tribunal asked some questions of most of the witnesses. As the claimant was representing herself, we gave her the opportunity to clarify or amplify any of the answers she had given to questions asked by Mr Clark and the Tribunal at the end of her evidence. Mr Clark was offered the opportunity to ask re-examination questions of his witnesses.

17. At the end of the evidence on the afternoon of the second day of the hearing, the claimant was not ready to make closing submissions and Mr Clark had not finished his written submissions. We therefore adjourned the hearing to the third day to enable both sides to prepare.

18. Both parties produced written submissions on the morning of the third day and we heard closing submissions from Mr Clark and Mrs Slater, who spoke to their written submissions. We then adjourned to consider our decision and asked the parties to re-join the video link at 2:30pm on the third day of the hearing. As we have dismissed all the claimant's claims, there was no remedy hearing.

19. The hearing was conducted by video on the CVP application, with some technical issues. We are grateful to all who attended the hearing for their patience and good humour in the face of the intermittent problems.

Findings of Fact

20. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine.

21. We should note that the claimant presented a lot of evidence in her witness statement that did not appear to be relevant to the issues that we had to determine. We were mindful of the fact that she was representing herself and that the case dealt with some difficult points of law. We tried to be flexible in the way we approached the evidence and offered guidance to the claimant on the law and procedure of the Tribunal where appropriate.

Claimant's Terms and Conditions

22. It was agreed that the claimant was employed by the respondent as a Learning and Development Manager from 1 October 2018 to 29 November 2019, when her employment was terminated for the stated reason of redundancy. The claimant worked in the People Team and reported to Louise Clough.

23. It was agreed that the claimant was engaged after a telephone interview with Ally Young (who was the respondent's HR Manager and who is no longer with the respondent) on 24 August 2018 and an interview in person with Ms Young and Gail Crossman, (who was the respondent's director of Performance and Development at the time) on 28 August 2018. On 30 August 2018, Ms Young rang the claimant and told her she had got the job and sent her an email on the same date confirming that an offer letter and contract would be sent in the following days.

24. We find that the evidence does not show on the balance of probability that Ms Young made a statement to the claimant in their telephone conversation on 24 August 2018 that constitutes a binding contractual agreement that the claimant could work a flexible working schedule. We make this finding because:

25.1. The claimant's evidence at its height, in paragraph 18 of her witness statement, was that she had asked if the respondent offered a flexible working schedule for managers and that Ms Young had said that it did. That exchange is insufficient to create a legally binding agreement between the claimant and the respondent that allowed her to work in the flexible way that she alleged she did;

25.2. The claimant did not say what the flexible working arrangement was to be and it is therefore highly unlikely that an HR Manager would have agreed to an undefined and open-ended agreement on working hours;

25.3. There was no mention of flexible working in either Ms Young's or Mrs Crossman's notes of the interview [115-123] or in the confirmation email dated 30 August 2018 [124];

25.4. The claimant's contract of employment dated 30 August 2020 [125-133] sets out her working hours at clause 5 as 9:00am to 5:00pm with up to 30 minutes for lunch. The claimant accepted that she never queried or objected to this term;

25.5. In January 2019, the People Team moved offices and three of its members (including the claimant) were no longer required to start at 8:00am to cover staff ringing the Team to notify sickness absence, as the procedure was changed so staff were required to ring their managers instead. At the time of the move, staff were provided with a changed contract that allowed them to start at 8:30am and take an hour for lunch instead of starting at 9:00am and taking 30 minutes. The claimant accepted the new terms and raised no point with the respondent that her hours were not those set out in the amendment; and

25.6. Clause 27 of the contract [132] states that "This contract replaces all terms agreed by you and the Company", which we interpret as meaning that even if the claimant had agreed flexible working with the respondent on 24 August or 28 August, such agreement would have been cancelled and replaced with the 9:00am to 5:00pm hours in the contract.

26. We find that the claimant has not understood the difference between flexitime (which it was agreed that the respondent never operated), a change of contractual terms to allow flexible working under sections 80F to 80H of the ERA (which the claimant applied for on 1 November 2019) and the ability to flex her working day on an ad hoc basis with the prior permission of her manager (which we find to be the situation that the claimant was actually in). We make this finding because:

26.1. We find that the claimant was never clear about the actual hours she worked and certainly did not show that she had a permanent agreement that she exercised to work from 8:00am or 8:30am to 4:00pm or 4:30pm;

26.2. She used the terms interchangeably;

26.3. Even the evidence of Mr Stephens, the claimant's own witness, said that she was "*almost always* (my emphasis) in the office working before my arrival (around 8:30am daily)". By deductive reasoning, this evidence means that the claimant would arrive at work after 8:30am on some occasions;

26.4. The claimant's diary entries [154a-154m] had a number of appointments after 4:00pm in the afternoon;

26.5. The claimant accepted that she asked the permission of Mrs Clough on many occasions to leave early. She would not have done this if she did not think that she had to; and

26.6. The claimant apologised when she was challenged for leaving early.

27. The claimant was never in a contractual position of being able to work in the flexible way she indicated. It therefore follows that if such an agreement never existed, it could not be confirmed or agreed in meetings with Mrs Clough in October 2018 and December 2018, as alleged in paragraph 27 of the claimant's witness statement or revoked on 30 October 2019, as the claimant also alleged.

Protected Act

28. We find that the claimant did not do a protected act in either her meeting with Ms Clough on 30 October 2019 or in a subsequent meeting between them on 6 November 2019. We make that finding because:

28.1. We find that if we accept as a verbatim record, the claimant's account of her conversation with Mrs Clough on 30 October 2019, which is set out at paragraph 87 of her witness statement, her words do not make an allegation (whether or not express) that the respondent has contravened the EqA. We find her words to be an expression of her frustration that she cannot spend more time with her son. There is no mention (express or implied) of any form of discrimination or other act in contravention of the EqA;

28.2. We find that if we apply the same test to the claimant's account of her conversation with Mrs Clough on 6 November 2019, her words again are an expression of her frustration that she cannot spend more time with her son. There is no mention (express or implied) of any form of discrimination or other act in contravention of the EqA; and

28.3. We agree with Mr Clark's point that if the protected act related to a discriminatory act around an application for flexible working under sections 80F to 80G, this could not be a protected act because the application for flexible working had been made on 1 November 2019.

29. If the claimant did not do a protected act, she cannot have been victimised for it.

30. In the alternative, if either of the protected acts contended for had been such, we would have found that the claimant did not suffer a detriment because she had made the protected acts.

Working Relationships

31. The claimant's witness statement went on at some length about her working relationships with colleagues. We note that her complaints about matters that do not form part of our consideration of the issues relevant to her actual claim start in January 2109 and are headed "Start of Victimisation". She then goes on to make various complaints about the way she was treated by various colleagues. We are unsure why the claimant thought these matters are relevant or why she has included so much evidence about them. We have not considered any of the claimant's evidence from paragraphs 35 to 78 or 92 to 103 of her witness statement.

Assertion or Statutory Right and/or Making of an Application under section 80F ERA

32. The claimant must prove that the principal reason for her dismissal was either:

    38.1. her flexible working request on 1 November 2019; or
    38.2. her assertion of her statutory right under the flexible working provisions in Part VIIIA of ERA.

rather than redundancy or any of the other reasons that she suggested.

39. We find that the claimant did not assert a statutory right at any time during her employment as she alleged. We also find that the statutory right that she alleges she asserted has to have been the right to make an application for flexible working under section 80F of the ERA. We make that finding because the claimant answered a question from the Tribunal by saying that the right to apply for flexible working was the same thing as the right to work flexibly. It is not. There is no statutory right to work flexibly.

40. We agree with Mr Clark's submission that the statutory right is that set out in section 80F of the ERA, so both legs of the claimant's claim relate to the same thing.

41. The claimant claimed that she asserted her statutory right to flexible working at the meeting on 6 November 2019 when she complained about the alleged removal of her flexible working arrangement. It was agreed that she had submitted her flexible working request on 1 November 2019. She is therefore wrong in law to suggest that there had been a breach of a statutory right or an assertion that such a right had been breached.

42. In any event, we have found that such an arrangement did not exist. We agree with Mr Clark's submission that what the Claimant really complained about was not being able to leave work when she wanted after being reminded that she needed permission to do so from her manager and invited to submit a flexible working request [213-221]. We make that finding from our analysis of the contemporaneous documents and the respondent's evidence on the subject, which we preferred to that of the claimant.

43. We find that the claimant did not complain about the respondent infringing her statutory right to make a flexible working request at the time. We make that finding partially because the exchange of e-mails between the claimant and Mrs Clough, following their meeting on 30 October 2019 do not indicate any such dispute [199-204].

44. It was agreed that the claimant submitted a flexible working request on 1 November 2019 [202]. In doing so she asserted her statutory right to request contract variation under section 80F of the ERA. The right was therefore upheld rather than infringed.

45. Further, we find that her alleged complaint about the removal of her flexible working arrangement could not in any event amount to an allegation that her statutory right *had* been infringed for the purposes of section 104(1) of the ERA.

46. We find that there is no material evidence that the claimant's flexible working request in any way influenced her dismissal. Our reason for that finding is:

    46.1. She did not raise the issue of the automatic unfair dismissal on those grounds until after her dismissal [245];
    46.2. The claimant raised herself that her performance was an issue;
    46.3. She also raised that her capability was an issue;
    46.4. She raised that her relationship with Mrs Clough was broken. We do not find that Mrs Clough agreed with this analysis, as she only went as far as saying that following their disagreement on 6 November, it would have been hard to rebuild trust between the claimant and herself.

    The flexible working matter was a relative non-issue for the claimant, as evidenced by the amount of evidence she produced about other matters. We find it was highly unlikely that the flexible working issue was even on Mrs Clough's radar as a reason for dismissing the claimant, when compared with the need to look at the costs in her part of the business.

    <u>Redundancy</u>

47. We find that the respondent's financial year ended in February. We find that it carried out a review of its financial on the production of its half-year results. This evidence was not disputed by the claimant.

48. We find that at the half-year for 2019/2020, around August 2019, the respondent was performing at approximately two-thirds of where it planned to be. We make that finding on the basis of the half-year accounts that were produced and not challenged [309]. We also find that the respondent had previously operated Project 500 to seek costs savings of £500,000 in the business (including staff costs) and that this was repeated in 2019 as "Project 501". Again, this evidence was not challenged.

49. The claimant had doubts about the extent to which the respondent looked at headcount across the whole business, but we find that the document at page 312 of the bundle showed that staff cuts were being considered across at least six departments, one of which was the claimant's department.

50. The claimant alleged that her dismissal was related to her performance and/or capability (which weakened her actual claim), rather than redundancy, but we find that the respondent has shown on the balance of probabilities that redundancy was the reason for dismissal. The need for work of the type undertaken by the claimant had ceased or diminished, or was expected to cease or diminish.

51. The other side of that coin is that the claimant has not shown on the balance of probabilities that the reason for her dismissal was because she asserted a statutory right or made an application for flexible working.

Indirect Sex Discrimination

52. We find that the respondent did not apply the PCP contended for by the claimant: that its employees must work its standard hours. This was palpably not the case for the following reasons:

    52.1. The claimant did not work the claimant's standard hours. She was allowed to finish early with the permission of Mrs Clough; and

    52.2. The claimant's colleagues did not have to work standard hours. We were shown unchallenged examples of male and female colleagues who had applied for and been granted requests for flexible working.

53. Further, the respondent did not withdraw an agreement to allow the claimant to work flexibly because we find that no such agreement existed.

Breach of Contract

54. It follows that as we have found that there was no contractual agreement in place that allowed the claimant to work flexibly as she alleged, there could have been no breach of such a clause.

Failure to deal with a Flexible Working Request

55. Section 80H provides that an Employment Tribunal can hear a claim in respect of the following three matters concerning a flexible working request:

    55.1. that an employer has failed to comply with section 80G(1);

    55.2. that a decision was based on incorrect facts; or

    55.3. 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) or (b)

56. The claimant did not dispute that the request had to be dealt with within three months and that at the date of the termination of her employment, three months had not passed since she had made the request. We do note that the respondent's own policy stated that the application would be dealt with within 28 days.

Applying Findings of Fact to Law and Issues

57. We find that the principal reason for the claimant's dismissal was redundancy. There may have been other issues, but the respondent demonstrated that a redundancy situation existed and that it was reasonable in selecting the claimant's post for redundancy. Redundancy was the principal reason by a large margin.

58. We found that a review of the respondent's financial position under Project 501 had begun in late summer 2019 and that Mrs Clough decision that the claimant's post was at risk and then that it should be removed was made before her discussion with the claimant on 30 October 2019. We find that the issue of process is not relevant to this case.

59. The respondent did not apply the PCP contended for by the claimant.

60. The claimant did not do a protected act.

61. The respondent did not fail to deal with the claimant's flexible working request.

62. There was no contractual term between the respondent and claimant relating to flexible working as alleged by her.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
19 May 2021