EMPLOYMENT TRIBUNALS

Claimant: Mrs F Kelly

Respondent: Norfolk & Norwich Hospital NHS Foundation Trust

Heard at: Bury St Edmunds (CVP) **On:** 17-19 August 2021

Before: Employment Judge S Moore
Mr C Davie
Ms S Timoney

Appearances
For the Claimant: In person
For the Respondent: Mr C Adjei, Counsel

This has been a remote hearing on the papers to which the parties/consented did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

(1) The claim of constructive unfair dismissal is dismissed.

(2) The complaint under section 80H of the Employment Rights Act 1996 in respect of a request for flexible working is dismissed.

REASONS

Introduction

1. This was a claim of constructive unfair dismissal and a complaint under section 80H of the Employment Rights Act 1996 (ERA) that the Respondent failed to comply with its duties in respect of the Claimant's request to vary her contract. We heard evidence from the Claimant and, on her behalf, from Catherine Kinsey and Rhiann Goodman (both senior Biomedical Scientists), and we were also referred to witness statements of Professor Richard Ball (Consultant Histopathologist), Julie Burton (Histopathology Network Manager), Joseph Goodwill (Chief Biomedical Scientist), and Adam Kelly (the Claimant's husband). For the Respondent we heard evidence from Mark Lankester (ML) (Histopathology, Mortuary and Bereavement/Medical Examiner Services Manager) and Philip Hinson (PH) (now Service Operations Manager).

Facts

2. The Claimant is a Biomedical Scientist (BMS). Her employment with the Respondent commenced in September 2000 and in 2004 she was appointed to a Senior BMS position for Quality and Training at the Respondent's hospital in Norwich, Norfolk. For the last 14 years her husband has owned a pub in Cornwall and they live at the premises of the pub with their 9 year old son. In order to travel between her home in Cornwall and her work in Norwich (a distance of 370 miles) the Claimant relied on the flight service between Norwich and Exeter operated by Flybe.

3. During the years of her employment the Claimant made a number of flexible working requests. In August 2009 she requested changing her working week to four days. In January 2011 she requested a temporary part-time working arrangement following her return from maternity leave. In August 2015 she requested earlier and start and finish times on Mondays, Thursdays and Fridays. In January 2017 she requested a working pattern of three short days (5 hrs and 50 mins) and two long days (10 hours and 30 mins). In September 2018 she requested a working pattern over 4 weeks: weeks 1 & 2: three long days (11 hrs + 30 mins lunch) and one short day (4 ½ hrs); week 3: four long days (11 hrs + 30 mins lunch) and week 4: two long days (11 hrs + 30 mins lunch) and one other day (9 hrs). All these applications were granted and the requests from August 2015 onwards were dealt with and granted by ML, who at all material times for the purposes of this claim was the Claimant's line manager.

4. In October 2019 Flybe cancelled its flights between Norwich and Exeter which meant that the Claimant was reliant on trains and/or driving to travel between Cornwall and Norwich.

5. On 5 November 2019 the Claimant sent ML an email informing him that Flybe had stopped the Exeter flight and that she was therefore expecting problems, particularly, in the winter months, regarding her travel. The email states:

"…My travel there and back is going to be considerably longer and difficult and I don't feel that I will be able to continue my current travel arrangements for very long.

I was therefore wondering if you would consider a request for me from January 2020 to work one week in the department and the following week at home in Cornwall on a repeating pattern. I could work 5 very long days Mon-Fri within Histo and make up the other hours off-site in order to remain full time. I feel that I have enough work that I could prepare work to take home for completion…

I do enjoy my job and I really don't wish to leave but my circumstances are now such that it's becoming difficult to continue. I don't feel that being away from Finn & Adam for long periods is an option for me, so could only really think of my suggestion above as an alternative…

I would be most grateful if you could consider the viability of my request before I apply formally as I don't wish to waste anybody's time."

6. ML responded the following day stating that he would give the matter some thought. His initial reaction was that the request went quite far outside the usual flexible working request the team was normally asked to consider. In particular, he was concerned that the Claimant being out of the office on alternate weeks left the team exposed to cover issues, and also whether there was sufficient work that the Claimant could conduct from home. However, he discussed matters with other senior staff members, including PH (now Service Operations Manager) who at the time worked very closely with the Claimant. Although some raised concerns about cover issues, it was clear nobody wanted to lose the Claimant who was well respected and well liked.

7. On 15 November 2019, after that preliminary consideration of the feasibility of the Claimant's proposal, ML confirmed it was OK for her to submit a formal flexible working request (FWR), though he stated that he would need to see a summary of the work she thought she could do from home.

8. The Claimant submitted her formal request on 10 December 2019. As well as including details of the work she believed she could do from home, the request also included her proposed working pattern which was: week 1: 55 hrs Mon-Fri (11hrs + 30 mins lunch); week 2: 20 hrs Mon-Fri (4hrs no break). Her requested start date was 6 January 2020. When the Claimant was asked why she took so long to submit this formal request (over 3 weeks), given her evidence that she required the new working pattern as a matter of urgency, she said that she was busy, and also that she regarded the application as a formality. In this latter respect we consider that the Claimant failed to appreciate the significance of the change she was seeking: her request was not only to work at home (on an ongoing permanent basis) every alternate week, but also to create a very significant imbalance in her working weeks, one week of 5 days of excessively long hours followed by a week of 5 days of very short hours. It is inevitable, in our view, that such a request would require careful consideration by management and that the Claimant's expectation that the new arrangement would start on 6 January 2020 was unrealistic, particularly given the intervening holiday period.

9. Between 19 December 2019 and 2 January 2020, the Claimant was on annual leave.

10. On her return to work the Claimant sent ML an email asking if there was any news regarding her FWR. Under the Respondent's Flexible Working Policy (FWP), a meeting should be arranged to discuss any request within 28 days of submission – which in this case was 7 January 2020.

11. On 9 January 2020, not having received a reply to her earlier email, the Claimant sent ML another email saying; "Sorry to be a pain, I know you are busy, but can I work from home next week? It's just I'm really struggling travel wise and I need to sort out some leave next week if not".

12. ML replied immediately stating, "Sorry about the delay, unfortunately I have had to divert a lot of my attention to mortuary and bereavement recently, including getting involved in the routine work, to keep the flow going. I have got several flex requests I need to get on with, I should be able to start to look at these today." ML did not respond to the Claimant's request to work from home the following week, and the Claimant did not pursue the matter. As regards ML's workload, he gave unchallenged evidence that at the relevant time he was line manager for 66 employees across 2 departments. Further the mortuary and bereavement department was very busy that time of year, and also understaffed because of someone being on long-term sick, a vacant post, and a new recruit,

13. At some point shortly after 9 January 2020 ML spoke to the Claimant and in that conversation came to fully appreciate the difficulties and stress she was experiencing, travelling back and forth to Cornwall. On 13 January 2020 he arranged a formal meeting with the Claimant to discuss her FWR for the 21 January 2020. As the Claimant was on annual leave between 14-18 January 2020, that was the earliest date that they were both available.

14. In the meantime, on 16 January 2020 ML sent the Claimant's formal proposal to the seniors in the team. The Claimant took issue with that on the basis that since ML had already canvassed the views of the seniors once it was unnecessary for him to do so again. We consider that criticism misplaced. The Claimant's proposed working arrangements had not been specified until she submitted her formal FWR, nor had she previously identified the work she proposed doing from home. As stated above, we consider that her request amounted to a significant change in her working pattern and was likely to have a significant impact on her colleagues. We consider ML was entirely justified in canvassing the views of the Claimant's colleagues on the formal proposal and may well have been open to criticism if he had not done so. In any event, ML received positive feedback from that canvassing exercise and came to the view that he could authorize the Claimant's request. Since, however, he had reservations about the impact on the team cover options and availability of work that could be done remotely, he considered a trial period would be necessary to ensure the arrangement could work smoothly without impacting too heavily on the team's functionality and workloads.

15. Accordingly, at the meeting on 21 January 2020, ML informed the Claimant that her requested working pattern was agreed for an initial 6-month period. He undertook to get together all the relevant policies and paperwork that needed to be completed, including a risk assessment for home working. He also told her that he needed to check certain matters with Human Resources and said that the new arrangement would start from 3 February 2020. The Claimant was not happy with what she perceived to be a further two-week delay in the start of the arrangement, but nevertheless agreed.

16. On 22 January 2020 ML confirmed what he had told the Claimant at the meeting in an email, namely that he had agreed to her FWR initially on a 6-month basis, with a review at 3 months and 5 months. Notably under the Respondent's FWP, following the meeting with the employee, the line manager must respond to the employee's request in writing within 14 days. The Respondent's FWP therefore provides for a 6-week timescale between receipt of a formal FWR and a written decision. In this case, we note that 6 weeks from the date of the Claimant's FWR on 10 December 2020 was 21 January 2020, so that ML's response on 22 January 2020 was in fact only 1 day outside that 6-week window.

17. On 23 January 2020 ML sent the Claimant copies of the relevant paperwork that needed to be completed, including the risk assessment (169). She returned the completed paperwork on 24 January 2020.

18. On 23 January 2020 ML also contacted Human Resources by email, stating he had received a FWR that included homeworking. He asked about provision of equipment for homeworking and also whether it was acceptable for an employee to work 55 hours for week one and 20 hours for week two.

19. On 24 January 2020 there was a meeting of senior managers at which requests for flexible working, including that of the Claimant, were to be discussed. ML initially told the Claimant that she would need to leave the meeting when her request was discussed, but in the event told her she did not need to do so. ML's explanation for his change of mind was that he thought that since her request had already been accepted there was no need for her to leave the meeting. We accept that explanation and note that the minutes of the meeting record "FK-agreed but bits to finalise". The Claimant alleged that when discussing the FWR of another team member she was asked if she thought the colleague would leave if her request was not granted, and replied she thought she would. ML then said that "we shouldn't be held to ransom over staff flexible working requests". At various times in the hearing the Claimant suggested that the comment was a deliberate attempt to persuade others to change their decision about her own FWR and warn her that she was easily replaceable. However, the Claimant later appeared to backtrack from this allegation in her closing submissions and in any event we don't consider it to be a fair or reasonable interpretation of events given that ML had already approved the Claimant's request.

20. On 27 January 2020 ML was informed by Human Resources that although the Claimant's proposed hours raised health and well-being concerns, the hours were acceptable as regards the Working Time Regulations and that the health and well-being concerns were a matter for him to consider as a manager.

However, HR told ML that as regards homeworking he needed to speak to the Internal Governance (IG) Department to check that the proposed work was compatible with issues of patient confidentiality. The same day ML contacted IG but was told the person to whom he needed to speak was not available. As he had previously experienced problems getting a response from that particular manager he emailed the Claimant to update her of the position. The email stated:

"HR have got back to me with a few additional queries about your flexible working/home working proposal. They have a few health and wellbeing issues regarding the 55 hours and also want me to clarify a few things with IG as well.

Bearing this in mind, this is going to take a bit longer to clarify, so the 3rd as a start date is not looking possible to confirm. I don't think this is a show stopper, just a delay, hopefully, by just a week or two at the most."

21. The Claimant was not in work on 27 January 2020. However, when she arrived at work on 28 January 2020 and read the email, she was furious and said in evidence the email raised doubts in her mind that her new working arrangements might not happen at all. She resigned immediately by email, stating:

'I'm sorry I just can't continue. I wish to leave by the end of this week. I'm aware that I have to give 1 month's notice but as I put in my request weeks ago and explained my travel issues, I don't feel that I have any option. If I had known this was going to be so much of an issue I would have handed in my notice in December. I'm stressed and upset now so I'm going home sick..."

22. ML replied immediately, stating:

"Sorry to hear this is causing you to be ill. I am going to talk to IG today, so it may be possible to still sort this out by the end of the week, so we could still be able to start the arrangement next week. If you are in tomorrow I should be able to clarify this with you. If you still want to hand in your notice, we can discuss that as well. I just thought I should make you aware asap that there is the potential for some delay.
I will however have to clarify a few issues with IG. Unfortunately, I haven't had to deal with any homeworking requests before, so I am having to be guided by HR and IG with this.
Unfortunately, due to December workload pressures in the Mortuary and Bereavement, I had to divert a lot of my time there, which meant your request and a few others were delayed."

23. The Claimant did not reply until the following day (29 January) when she confirmed that she wanted to leave "ASAP". In the event, however, she agreed to work a month's "transition period" to assist her colleagues, and in particular PH.

24. For completeness, we note that on 3 February 2020, ML received an email from IG stating that in view of the information ML had given them regarding the work proposed to be done from home, they were happy to approve the proposal.

25. On 13 March 2020 the Claimant lodged a formal grievance in respect of the way her FWR had been handled by ML, to which the Respondent sent a written response (dated 9 April 2020) on 1 May 2020.

Conclusions

Constructive Unfair dismissal

26. To succeed in a claim of constructive unfair dismissal the Claimant must establish that she resigned in response to a fundamental breach of contract by the Respondent.

27. In this respect the Claimant relies on the implied term of mutual trust and confidence which provides than an employer must not act in such a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee without reasonable and proper cause. The Claimant says she resigned because the Respondent, through ML, breached this term by reason of the ineptness and delay in handling her FWR, and the fact she was "left hanging" without any support from ML.

28. We have to say, that we don't consider the Claimant's description of the process, to be a fair or reasonable one and we find that the facts of this case fall considerably short of crossing the threshold of serious failing required to establish a breach of the implied term of mutual trust and confidence.

29. While it is true that the Claimant's meeting with ML about the FWR was not held within 28 days of her formal request as per the Respondent's FWP, in view of the Christmas period and associated annual leave (including that of the Claimant) there were, in fact, only 9 working days between the date of her request and the expiry of that 28-day period on 7 January 2020. In addition, the fact the meeting was not held before 21 January 2020 was at least partially due to the Claimant's further period of leave between 14-18 January 2020. Further, ML informed the Claimant of his decision (that her request was being agreed) at the meeting and put that decision in writing the day after the meeting on 22 January 2020. Accordingly, the Claimant had a written decision in respect of her FWR 6 weeks and one day after she put in a formal request, which is only a slippage of one day from the timetable envisaged in the Respondent's FWP. We would also add that although the Claimant considered her request to be urgent, we do not consider it was unreasonable or "inept" of ML not to have appreciated that fact until he spoke with the Claimant sometime after 9 January given, first, the fact that the Claimant had taken over 3 weeks to put in her formal request after getting the "green light" to do so and, secondly, own very considerable workload during that period.

30. As regards the proposed start date of the Claimant's new working pattern, we also don't consider it unreasonable that ML proposed that, having agreed the Claimant's request, there would be a period of (just under) two weeks until 3 February 2020 before the new pattern would commence in order to complete the necessary paperwork and check compliance with the relevant policies. As regards, the concerns that arose, which threatened that start date, the fact that

ML had queries about the health and well-being implications of a 55 hr working week, is in our view entirely reasonable. In an ideal world he would have sought the views of HR on this issue prior to meeting with the Claimant on 21 January 2020, in which case HR would also have flagged up the IG concerns and directed him to the IG department also prior to that meeting. However, the fact this did not happen, and the IG issue came to light and had to be dealt with after the meeting of 21 January 2020, was not a sufficiently serious failing, either on its own or considered in the light of events since 10 December 2019, to come close to breaching the implied term. While it was undoubtedly frustrating for the Claimant it was just a small hiccup and she had maintained her patience for another week or two the matter would have been resolved.

31. Finally, we also do not consider that there is anything in the terms of ML's email of 27 January 2020 that justified the Claimant in taking the view that the agreement to her FWR was likely to be withdrawn, and had she been in any doubt about this she could have asked him for clarification. In any event, ML's email of 28 January 2020 should have reassured her on that point and made it clear that his previous email was only intended to make her aware that there was the potential for some delay.

32. In short, we reject the allegation that the Respondent's handling of the Claimant's FWR was "inept" and that she was left "hanging" and unsupported by her manager. The FWR represented a very significant change to the Claimant's working pattern, and we consider ML was justified in treating it with caution and being alert to its potential implications as regards the rest of the senior team, the workload of the department, the Respondent's obligations as regards patient confidentiality and data, and the Claimant's own health and wellbeing. While the handling of the matter was clearly not perfect, in our view the failings were not substantial and the delays and glitches in the process not unreasonable in the context of a busy working environment.

33. It follows that the claim for constructive unfair dismissal is therefore dismissed.

Complaint under section 80H ERA

34. As regards the complaint under section 80H ERA. Section 80G provides that an employer to whom an application is made under section 80F for a contract variation is under an obligation to:

    (a) deal with the application in a reasonable manner;
    (b) notify the employee of the decision within the decision period of 3 months beginning with the date on which the application is made; and
    (c) only refuse the application on certain grounds.

35. In this case the Claimant was notified of the decision within 3 months of the date of her application, and the application was allowed. As regards the complaint that the application was not dealt with in a reasonable manner, we reject that complaint for the same reasons given above in relation to the complaint of constructive unfair dismissal.

36. It follows that the complaint under section 80H ERA is also dismissed.

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Employment Judge S Moore

Date: 19th August 2021

Sent to the parties on:

10th September 2021.

For the Tribunal:

THY……..