EMPLOYMENT TRIBUNALS

Claimant: Mrs K Lacey

Respondent: Oxford University Hospitals NHS Foundation Trust

Heard at: Reading Employment Tribunal (Via CVP) **On:** 25 and 26 November 2021

Before: EJ Tuck QC

Ms H Bailey

Ms C Edwards

Representation:

Claimant: In Person

Respondent: Ms M Stanley, counsel.

JUDGMENT

The Claimant's claims of refusal to permit her a contractual variation under the Flexible working provisions of the Employment Rights Act 1996, and of direct sex discrimination under the Equality Act 2010 fail, and are dismissed.

REASONS

1. By an ET1 presented on 20 February 2020, following a period of early conciliation from 9 January 2020 until 9 February 2020, the Claimant has brought claims of a refusal to permit a contractual variation under the Flexible working provisions of the Employment Rights Act 1996, and a claim of direct sex discrimination under the Equality Act 2010.

Issues.

2. Ms Stanley prepared a list of issues which were discussed at the outset of the case, and after amendment were agreed between the parties:

(i) Flexible Working (section 80F, section 80G and section 80H of the ERA)

When did the Claimant make a qualifying flexible working request within the meaning of section 80F:

- The Claimant relies on her email of 12 August 2019.
- The Respondent says the qualifying request was not made until 29 August 2019.

(ii) Did the Respondent fail to deal with the application in a reasonable manner in accordance with section 80G(1)(a) of the ERA?

(iii) Did the Respondent fail to notify the Claimant of the decision on the application within the decision period which is:

a. a period of three months beginning with the date the application was made; or

b. a longer period agreed by the employer and employee.

(iv) Did the Respondent's reasons for refusal fail to include one or more of the reasons at section 80G(1)(b)(i) to (ix) of the ERA?

(v) Was the decision by the Respondent to reject the application based on incorrect facts in that the Respondent was incorrect about the nature or extent of the public facing element of the Claimant's role.

Direct Sex Discrimination

(vi) The Claimant says she was subjected to less favourable treatment in that her application to start at 7am and work flexibly was refused.

(vii) Was this less favourable treatment because of the Claimant's sex?

The Claimant relies on a male comparator (Julian Bond).

Facts

3. The Claimant commenced work for the Respondent at Sobell House Bereavement Service on 20 June 2011 as an Administrative Assistant, and her post was made permanent in October 2015. She worked from 8am until 1pm four days per week (exc Fridays) – and had another job with NHS Blood and Transplant on the John Radcliff Hospital site, some 1.2 miles away starting at 1.30pm.

4. Mrs Srinder Singh joined the Respondent in April 2019 as Bereavement Care and Voluntary Services Lead at Sobell House. At this time she took over line management of the Claimant. In their early interactions, the Claimant mentioned a desire to alter her working hours; due to her health conditions she needed to drive to her second job and half an hour between finish and start times was not long enough to travel, have lunch and park.

5. The tribunal was referred to the Claimant's job description, and the post's person specification. The parties agree that the Claimant's role included answering the telephone and interacting with any service users calling, and face to face interactions with volunteers who would come into the office area, to hand in expense claims, request photocopying, etc. Her role would not involve seeing clients /members of the public face to face. The Claimant in her statement said that there were 80 voice messages left with the service from 27 August to 18 November 2019, averaging 1.5 calls per day. The tribunal understand however this to a count only of messages left when calls were not answered. Mrs Singh said that 169 calls were logged in the period of October 2019 to June 2020, and that her experience of the office was that it was a fairly busy place. (The tribunal was not told what impact, if any, the final three months of this period coinciding with the first covid lockdown may have had on call volumes.)

6. On 12 August 2019 the Claimant emailed Mrs Singh, saying "I would like to request to change my starting time from 8am to 7am, Mondays to Thursdays, initially for a mutually agreed trial period". That was the entirety of the email. Mrs Singh replied the following day, acknowledging that this request had been made verbally in June 2019, but saying that before it could be considered "it would be helpful if you could please put in writing to me the reason for this request". The Claimant replied on 14 August setting out her reasons. She wanted to avoid morning traffic, start her day without interruption doing tasks which needed full concentration, reduce the risk of her leaving time being delayed by having to assist volunteers and having time to find parking on the NHS site which she went to for her second job. She said it would improve her work life balance and decrease her stress levels.

7. On 23 August 2019 Mrs Singh emailed the Claimant telling her that having discussed her request with HR, she had been informed that an email request was not accepted, and the Claimant needed to complete a "flexible Working Request Form". The Claimant did so and submitted it on 29 August 2019.

8. On 18 September 2019 the Claimant and Mrs Singh met to discuss the request. Mrs Singh told us that she made handwritten notes which she typed into a word document she had first created in about July, to record her interactions with the Claimant. The outcome of the meeting was an agreement that the Claimant would trial starting at 0730 three days per week – Mondays, Tuesdays and Thursdays (her colleague did not work on Wednesdays, so on that day her hours would remain 8 til 1). Although Mrs Singh's note was not shared with the Claimant contemporaneously, she accepted in cross examination that the note was broadly

correct save in one respect. The Claimant did not recall, and positive denied, that there was any mention of a proposed review or restructure during their September 2019 meeting – though she accepts this was raised by Mrs Singh in October 2019. The parties do agree that Mrs Singh referred to a concern about the Claimant undertaking lone working and a “safety element”, and that she also referred to the “service being a public facing one” and saying that the proposed hours did not fit with the office working hours of 9am til 4.30pm.

9. The temporary variation to permit three days of 0730-12.30, for a period of four weeks was recorded in a document dated 18 September 2019.

10. Following this four week period Mrs Singh and the Claimant met again, on 21 October 2019. The Claimant said that “the trial had not worked for me”. The Claimant explained in answer to the tribunal the difficulties with parking at the John Radcliff hospital site where her afternoon job was, were such that even an hour between finishing at Sobell House and starting at JR, was insufficient to allow the journey, park and eat lunch. While there was mention of parking difficulty in this meeting, and also some reference to a Respondent shuttle bus which runs between the two sites, (which Mrs Singh says takes approximately 15 minutes), it is not apparent to the tribunal how detailed the discussion was at that time – or indeed at any time before this tribunal hearing. The Claimant told us that as her afternoon job was with a different NHS body, she would not have been eligible for the shuttle bus, but in any event it left at 12.20, and the next one at 1pm, taking 40 minutes to arrive. In any event she would not have wanted to have to return to the Sobell house site at the end of her working day to collect her car. Miss Cullen who considered the appeal against the refusal to grant the request in the terms applied for, said that she would have been surprised if the fact the Claimant worked for another NHS body in the afternoon would have prevented her from accessing the service – but this was not a discussion or real consideration she undertook at the time. Returning then to the meeting of 21 October 2019 - Mrs Singh said that as she had been on leave during some of the trial period she wanted to extend it. Her concern was whether there was sufficient cover in the office at the end of the claimant’s working day, between 1230 and 1300. Whilst it is apparent that the Claimant was unhappy with her request to start at 7am not been acceded to, in fact the parties did agree to extend the trial period. The Claimant told Ms Singh that she had also made a flexible work request from her other employer – which we understood to include a later start time.

11. By email on 22 October 2019 the Claimant asked for a detail of the business reasons for not agreeing her flexible working request in full. On 24 October Mrs Singh sent the updated agreement to include her reasoning. The flexible working agreement Mrs Singh prepared after the 21 October 2019 meeting, stated that there were organisational changes planned to restructure the provision of administrative duties to support the bereavement and voluntary services. The time scale for implementation of structural changes was recorded as being planned to be in place by the end of February 2020. Mrs Singh recorded having taking into consideration that the proposed hours of 0700-1200 did not fit with standard office hours (of 0900

– 1630) when clients and volunteers would generally call / come into the hospice and that the "bereavement service is a public facing service", that there would be a lack of cover during office hours especially when the other administrator was not there, and would potentially create isolation / increase loan working time and cause concern for personal safety.

12. The Claimant and Mrs Singh met again on 18 November 2019. The parties agree that the Claimant opened the meeting saying that she knew that her request for 0700 – 1200 would be refused and that she intended to appeal. Mrs Singh was happy to approve a more permanent variation to an 0730 start time, but the Claimant did not want this. The Claimant therefore reverted to 0800 – 1300 and presented her appeal.

13. The tribunal saw the Claimant's detailed appeal document, on which Mrs Singh had annotated her responses in italics. One of the Claimant's grounds of appeal was sex discrimination. The Claimant wrote:

> "A precedent has already been set within the Bereavement Service as the Bereavement Co-ordinator started working from 0700 ever since he commenced employment with the Bereavement Service back in 2015 (4 years ago) and has done ever since…. I consider that Srinder is actually discriminating against me as a woman when she clearly had no objection whatsoever to a man working from 7am."

14. This is a reference to Julian Bond, who was the Bereavement Service Co-ordinator. Mrs Singh's response in the appeal document, and in her statement to this tribunal was that his start time and pattern of work had been agreed before she took up the post of care lead, and that he told her on her second day that he had intended to retire in August, but agreed to delay his retirement until November 2019 to allow her to settle into her role. She said "I did not feel it a priority to discuss his hours of working with him. In addition the co-ordinator worked flexibly to include evenings because of training and supervising of the bereavement volunteers, which is a responsibility of the role, and on these days he started work later in the day." She denied that "the gender of the employee" was any factor in her decision making.

15. An appeal was heard by Miss Rebecca Cullen on 19 December 2019. We had the notes of that hearing. At the conclusion Miss Cullen upheld the decision to reject a 7am to 12pm working pattern and said she felt 7.30am to 12.30pm was a reasonable compromise "keeping the volunteers and service users at the heart of this decision". The Claimant confirmed that she was told this orally at the end of the meeting, and it would be confirmed in writing. Miss Cullen told us that as a manager she had dealt with 10 flexible work requests, and granted 9, and that her approach was "yes, unless…". An undated letter confirming the appeal dismissal was attached to an email sent to the Claimant on 23 December 2019 – but she was on leave and did not see a letter until 6 January 2020 on her return from leave. A dated version of the letter along with notes from the appeal hearing were later sent to the Claimant.

16. A reorganisation did take place, although not until later than planned. Consultation began in July 2020; during that reorganization the Claimant's post was deleted and she has since moved to another service within the Respondent.

Law

Flexible Working Request.

17. Part VIIIA ERA 1996 sets out provisions concerning flexible working. So far as relevant, Section 80F provides:

"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) …

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

(iii) …

(iv) …

(2) An application under this section must—

(*a*) state that it is such an application,

(*b*) specify the change applied for and the date on which it is proposed the change should become effective, [and]

(*c*) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with,

18. Section 80G sets out the employer's duties in relation to an application made under s80F:

(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.

19. Section 80H makes provision for complaint to the Employment Tribunal;

(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 (a) or (b)] 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.

20. The Flexible Working Regulations 2014 provide at reg 4 that a flexible working application must (a) be in writing, (b) state whether the employee has previously made any such application to the employer, and if so when, and (c) be dated.

21. ACAS issued Code of Practice 5 on “Handling in a reasonable manner request to work flexibly” (2014). This includes guidance that:

"If your employee has the right to make a flexible working request, it's important to:

- ask for the request in writing
- consider the request fairly
- discuss it with your employee
- look at other options if the request is not possible
- make a decision based on facts and not personal opinion
- only turn down the request if there's a valid business reason
- give your employee a decision within 3 months of receiving the request

If you need more time to make a decision, you can extend the time limit if your employee agrees".

22. A decision can be challenged by an employee if it was "based on incorrect facts" (s80H(1)(b)). As to what this scope of enquiry permits – this was considered by the Employment Appeal Tribunal in ***Commotion Ltd v Rutty*** [2006] IRLR 171, in which HHJ Burke QC held at paragraph 37 – 38:

> [an] employee is entitled to present a complaint to an employment tribunal on the basis that the decision to reject his application for flexible working was based on incorrect facts sections see 80H(1)(b). It must follow that the tribunal is entitled to investigate the evidence to see whether the decision was based on incorrect facts. There is, we would suggest, a sliding scale of the considerations which a tribunal may be permitted to enter into in looking at such a refusal. The one end is the possibility that all that the employer has to do is to state his ground and there can be no investigation of the correctness or accuracy or truthfulness of that ground. At the other end is perhaps a full enquiry looking to see whether the employer has acted fairly, reasonably, and sensibly in putting forward that ground. Neither extreme is the position, in our judgment, which applies in the relevant statutory situation. We accept Mr Dunn's [counsel for the employer] submission that the tribunal is not entitled to look and see whether they regard the employer as acting fairly or reasonably when he puts forward his for rejection of the flexible working request. However, we reject Mr Dunn's submission that the tribunal is not entitled to examine the facts objectively at all, for if they were not so entitled, the jurisdiction set out or the right to make an application set out by s.80H(1)(b) would be of no use. The true position, in our judgment, is that the tribunal is entitled to look at the assertion made by the employer ie the ground which he asserts is the reason why he has not granted the application and to see whether it is factually correct. In this case, it does not

> arise; but another case, it may be for instance that the bona fides of the assertion might have to be looked into.
>
> In order for the tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type. We do not propose to go exhaustively through the matters at which a tribunal might wish to look, but if the tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law.

Direct discrimination.

23. Section 13 of the Equality Act 2010 provides that a person is discriminated against if because of their protected characteristic, they are treated less favourably than others are, or would be treated.

24. Section 23 provides for comparison by reference to circumstances, and states that when comparing cases for the purposes of (inter alia section 13) there must be "no material difference between the circumstances relating to each case".

25. Section 136 of the Equality Act provides that if there are facts from which the tribunal could decide, absent any other explanation, that a person contravened the provision concerned, the court must hold that that contravention occurred unless the person shows that they did not contravene the provision.

Submissions:

26. Ms Stanley submitted first that the email of 12 August 2019 from the Claimant did not comply with the mandatory provisions of s80F ERA, nor with the Flexible Working Regulations 2014. This is to be contrasted with the formal application made on the requisite form on 29 August 2019 – which Ms Stanley submitted started the time clock.

27. Under s80H she said there were four heads of claim; firstly a claim that there had been a failure to comply with s80G(1) – to deal with the application in a reasonable manner. Secondly a failure to notify the employee within the decision period. Thirdly

– whether the application was rejected for a permissible reason within s80G(2), and finally– rejecting the application on incorrect facts.

(i) Dealing with the application in a reasonable manner – guidance can be gleaned from ACAS Code of Practice 5; Handling in a reasonable manner requests to work flexibly. She said that the facts show meetings, trial periods and an appeal. This was a reasonable procedure.

(ii) As to dealing with the application within the decision period – that starts with a qualifying application and ends with the appeal decision. 23/8/19 – 19/12/19. This is longer than three months, but the Respondent contends that a longer period was agreed within s80G(1)(B) given the agreement to extend the trial period.

(iii) As to whether a reason within s80G- she submitted that the task of the ET is to consider the genuineness of the employer's belief – not its reasonableness. She relied on both the planned restructure which did occur in 2020, and the detrimental effect on ability to meet customer demand.

(iv) Reliance on incorrect facts is the fourth type of claim- and the Claimant relied on the issue of whether the role was public facing. Ms Stanley submitted that Mrs Singh was fully aware of the scope of the role – as demonstrated by Mrs Singh's answers to the Claimant's appeal.

28. As to the claim of direct sex discrimination, she said that Mr Bond was not a comparator in materially the same circumstances as a more senior employee with a varied diary. As to concerns for a woman doing lone working, seemingly absent for the male employee who was similarly lone working, Ms Stanley submitted that Mrs Singh was concerned about Mr Bond's start time but had no authority to revisit this decision of a previous manager in the few months before his retirement. She said there was no evidence of Mrs Singh's motivation being tainted by sex.

29. The Claimant made submissions. She told us: during my meeting with Mrs Singh in June 2019 we discussed my health issues, and my difficulties in getting to my second job at the JR on time. The outcome was the possibility of flexible working, and Mrs Singh said I needed to put my request in writing. I raised my concerns about the administrator, Ms Bain, not being in the office at my leaving time.
I made a flexible working request, in writing, on 12 August 2019. I believe it was made on that date as it complies with the regulations 2014, being in writing and dated. Mrs Singh acknowledged the application on 13 August and asked for my reasons. The Respondent's procedure does not mandate the use of their form.
On 23 August 2019 Mrs Singh said that after consulting again with HR, I needed to complete a flexible request form

30. The Claimant went on to tell us: "I consider that there were numerous delays caused by Mrs Singh. On 18 September 2019 Mrs Singh refused my application only because of lone working and health and safety concerns, which were not valid reasons. She

did not mention restructuring. Mr Bond has been allowed to commence from 7am regularly since he joined the service in 2015. My request was refused on in permissible lone working grounds. I of course would not have been lone working from 7am as Mr Bond would have been there. Not allowing me, a woman, to work from 7am is direct discrimination."

"In October 2019 Mrs Singh added a further reason of proposed structural changes to be in place by February 2020. In fact, I received no documents on this until the consultation began in July 2020. As to cover for the office, Maddie Bain worked three days so would be there.
Mrs Singh also said it would have been impossible to recruit someone for an hour a day, but this would not be necessary.
In a small office there are often periods when there cannot be cover."

31. The Claimant emphasised that the NHS Flexible working policy encourages flexibility to ensure improved health and wellbeing for employees, allowing better work life balance.

32. The Claimant was critical of Mrs Singh's evidence criticising her in ways irrelevant to the flexible working request; she submitted this showed that Mrs Singh did not approach her application in a reasonable manner. She found the comments made by Mrs Singh to be distressing.

33. She concluded by saying that the period of time allowed to determine her request ought to have been 3 months, and she said she did not agree to this being extended, and as to 'incorrect facts', the Claimant told us that even when the office was not staffed, there was a very good answerphone such that service delivery was not adversely impacted by occasions when there were no staff actually in the office.

CONCLUSIONS ON THE ISSUES

34. We are not able to conclude that the claimant's email of 12 August 2019 amounted to a qualifying request for flexible working as it did not address the issue of what effect, in her opinion, the change would have on her employer as required by s80F(2)(c), nor did it state that no earlier application had been made as required by regulation 4 of the Flexible Working Regulations.

35. These defects were remedied by the application of 29 August 2019, which did constitute a qualifying request.

36. We considered next whether the Respondent failed to deal with the application in a reasonable manner in accordance with section 80G(1)(a) of the ERA? We had particular regard to the ACAS Code of Practice and were satisfied that the respondent had meetings to discuss the Claimant's request on 18 September, 21 October and during the appeal hearing of 19 December 2019. The request was discussed, and in fact a compromise agreed to for the purposes of two trial periods.

37. We considered carefully whether Mrs Singh made her decisions on the basis of relevant facts and not personal opinions. Mrs Singh included in her statement factors which she said were irrelevant to her decision, such as her suspicion that the Claimant had made an anonymous complaint about her use of a parking permit, and had been disruptive in inviting an ex staff member to a party. However, on balance, we accepted Mrs Singh's evidence that even though she had included those matters in her statement (and was unable to explain why she did this), her decision was based on her consideration of the administrative needs of the bereavement service, and the reorganisation she had in mind.

38. The Claimant's third complaint was that the decision on her application had not been made within the applicable period of three months, or such longer period agreed between the parties. The application was 'live' between 29 August 2019 and the refusal of her appeal on 19 December 2019. There had been no explicit agreement to extend the three month period. However, the tribunal accepted that it was clear to both parties that once the extension of the trial period was agreed on 21 October, it was highly likely that the final determination of her application would extend into December 2019.

39. Whilst the tribunal is of the view that it would have been better had the Respondent set out an express invitation to agree to an extension beyond 29 November 2019, we do accept there was, in substance, an agreement to the period the determination took.

40. As to whether the Respondent's reasons for refusal failed to include one or more of the reasons at section 80G(1)(b)(i) to (ix) of the ERA, it is clear that from 21 October 2019 at the latest, and certainly in advance of 19 December 2019, there was reliance on planned structural changes. It was apparent that Mrs Singh wanted to maximise administrative presence in the office between 9am and 4.30pm, and that this was to enhance the quality of the service offered to service users and volunteers.

41. Finally in relation to the flexible working claim, we considered whether the decision by the Respondent to reject the application had been based on incorrect facts in that the Respondent was incorrect about the nature or extent of the public facing element of the Claimant's role. We accept that Mrs Singh was fully aware of the nature of the Claimant's role, which included speaking to service users on the phone when they were making or altering appointments, and seeing volunteers face to face, giving them assistance on tasks such as photocopying, claiming expenses, and "being a welcoming presence" in a service dependent upon volunteers. The decision had not been based on incorrect facts.

42. In relation to the claim of direct sex discrimination, we accepted that the claimant was treated less favourably than Mr Bond, in that he was permitted to start work at 7am and she was not. There was clearly also a difference in sex. We remind ourselves, that this is insufficient to shift the burden of proof, and that we must consider why Mrs Singh treated the claimant in the manner she did. The claimant

essentially says that it was because of stereotypical assumptions that a woman should not 'lone work', whereas a man was permitted to do this (although she would not in fact be lone working as Mr Bond would be present – at least until his retirement).

43. We were not satisfied that Mrs Singh was motivated by sex. She wanted to minimise lone working, but also to maximise the time that staff were present during the services advertised hours of 0900 to 1630. We accept Mrs Singh's evidence that she did not like Mr Bond's working hours, but she was not going to "pick a fight" about this in the few months before his delayed retirement. We were told that his replacement starts after 8am. Further, we were not satisfied that Mr Bond was an appropriate comparator because (i) he was more senior than the claimant, (ii) held a different role, (iii) was in his final few months of employment prior to his retirement, and most crucially, (iv) the decision as to his start time was not decided by Mrs Singh or indeed Miss Cullen.

44. For these reasons, the claims are dismissed.

Employment Judge Tuck QC

Date: 26 November 2021

JUDGMENT SENT TO THE PARTIES ON

13 December 2021

FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and respondent(s) in a case.