EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Cocks	v	Construction Industry Training Board

Heard at: Watford (Remote via CVP) **On**: 17 June 2021
Before: Employment Judge Hanning, Mr R Eyre and Mr B McSweeney

Appearances
For the Claimant: In Person
For the Respondent: Mr P Strelitz (Counsel)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 9 July 2021 and written reasons requested on 22 June 2021 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided

REASONS

Background

1. The claimant had been employed by the respondent as a Legal Officer before his employment terminated by reason of redundancy on 31 December 2019. Prior to that redundancy, he had made requests for flexible working which, he contended, had been improperly handled and unreasonably refused.

2. In July 2019 he lodged an ET1 which made claims relating to the handling and refusal of his request and also claiming discrimination and defamation. At the start of the hearing he confirmed, rightly, that the latter claims were not to be pursued and that his claim was confined to the handling and refusal of the request for flexible working.

The Issues

3. The issues that the Tribunal were required to consider then were:

   a. Did the claimant make an effective request for flexible working?

b. If so, was that request dealt with in a reasonable manner and was it refused for a permissible reason?

c. If not, what compensation should be awarded?

The Law

4. The law as to requests for flexible working is contained in Part 8A of the Employment Rights Act 1996. Section 80F provides that:

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. . .

(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. . .

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

5. Section 80G provides that:

(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.

…

(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.

6. Finally, section 80H provides:

(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)

The Evidence

7. The Tribunal had the benefit of an agreed bundle of documents which ran to 271 pages and heard evidence from the claimant, Stacey Manze, an HR Business Partner of the respondent and Emma Black, an Executive Director of the respondent. There were written statements provided for each of them. The Tribunal considered all the witnesses to be truthful and doing their best to assist the Tribunal.

Findings of Fact

8. The following findings of fact have been reached unanimously by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and our assessment of the witness evidence.

9. Only findings of fact the Tribunal considers to be relevant to the issues to be determined, have been referred to in these reasons. It has not been necessary, and neither would it be proportionate, to determine each and every contentious issue, to record every single event or to refer to every document we read or were taken to. That does not mean it was not considered if it was referenced to in the witness statements/evidence.

10. The claimant joined the respondent in January 2011 starting as a Service Desk Analyst. He transferred to the legal department as a paralegal in December 2016 and by 2019 was a Legal Officer for the in-house legal team. He was clearly hard-working, successful and a valued member of the team. Throughout this period, he worked at the respondent's head office in Bircham Newton which was within walking distance of the claimant's home.

11. In 2017 the respondent announced what it termed Vision 2020 which the result of a fundamental review of its operation. An important part of its intended strategy was a plan to sell the respondent's site at Bircham Newton and transfer its head office operations to a new location in Peterborough.

12. Formal arrangements for the transfer of staff from Bircham Newton to Peterborough began in 2019. Simultaneously, the respondent planned to implement a radical slimming down of its legal and governance team. From a team of 11 lawyers the respondent planned to reduce to 3 lawyers and 1 legal officer so, besides the relocation, the respondent implemented a redundancy exercise.

13. As part of the process of relocating staff from Bircham Newton to Peterborough, the respondent recognised that the different journey might present problems for those relocating. They therefore permitted as a matter of course that staff transferring to Peterborough could opt to work one day a week from home. Those wanting to work from home more than that had to make a request which was to be considered as part of the redundancy process. Those requests would be considered by a panel appointed for that purpose.

14. This approach was significant because there was an obvious overlap between the respondent's desire to give consideration to special requests as part of the redundancy process and the statutory obligation to consider formal requests for flexible working. The respondent had a specific policy to deal with formal requests for flexible working but that was not adopted here; requests were initially at any rate not treated as formal flexible working requests, but requests made as part of the change management and associated redundancy processes.

15. Against that background the claimant asked for additional flexibility. He was in a position that his role at Bircham Newton could be matched with that to be

performed at Peterborough. Therefore, if he wished, he was eligible to carry out the same role from Peterborough and thereby avoid redundancy. However, the move to Peterborough represented a significant change for him compared to being within walking distance from his home. As such it presented difficult personal challenges.

16. As part of the overall process there were meetings with the claimant at which he made his specific requests, but he also adopted the respondent's formal flexible working process and, first, completed a request form on 2 April 2019. This requested that he be able to work from home 2 days per week, on Wednesday and Friday. His accompanying email was clear that this was to start only when the team moved to Peterborough.

17. That request was considered by the appointed panel and refused on the grounds that the additional flexibility requested (essentially an extra day working from home) would have a detrimental impact on the quality and service of the team.

18. The claimant was told of the refusal, but not the reasons for it, on 14 May 2019. Perhaps on account of the earlier discussions, the claimant did not seem surprised by the refusal and instead asked if he might immediately present an alternative request. He rightly recognised that the legislation does not permit a second application to be made within 12 months of the first. He flagged this and asked for dispensation to make another request which was granted.

19. The second application was lodged on 14 May 2019. This proposed a fortnightly schedule with, for Week 1, 2 days working from home (Wednesday and Friday) and, for Weeks 2, 1 day working from home (Wednesday) and a shorter working day on Friday 'earned' by taking shorter lunch breaks during that week. The key upshot being the claimant would spend only 3 days in a fortnight working from home plus a shortened working day every other Friday but with the same overall working hours.

20. That request was discussed in detail at a redundancy consultation meeting on 23 May 2019 with the claimant and his line manager Emma Black. After that meeting Ms Black considered the request and determined that she could approve it in principle but not on the precise terms the claimant was asking. She considered she could accommodate the overall time working from home but did not consider she could commit to the exact days of absence from the office as she needed to preserve flexibility. She took the view that to commit to specific days working from home on a permanent basis would have a detrimental impact on quality and performance of the team by denying her flexibility to accommodate the cover requirements for the team and the impact on business continuity.

21. On 20 June 2019 she met with the claimant and confirmed that she could only accommodate his request if there was flexibility to shift the day of working from home if this was necessary for business reasons. That decision was not confirmed in writing until 16 August 2019. By that time the had already determined that he was unable to agree to the required flexibility as it would not

meet his needs, so he declined the role at Peterborough and accepted redundancy.

The Submissions

22. Against that background, the claimant's case was the respondent had failed to deal properly with his requests. He did not accept that his first request was properly considered and in particular had not been dealt with in accordance with the respondent's specific flexible working policy nor in accordance with ACAS guidance including the failure to allow him an appeal.

23. He also considered that the rationale for the refusal of his second request was unfair and outside the respondent's stated policies.

24. For the respondent, it was submitted that there was no valid claim at all. The claimant's claim was explicitly in respect of a future role rather than his current role and, applying the strict working of the legislation which uses only the present tense, the statutory obligations only apply to a request in respect of the current role and not to a future role.

25. The respondent further argued that the claimant's requests were fatally defective as neither recorded a start date. As this is mandated by the legislation, the failure to give a date strictly speaking alleviated the respondent of any responsibility to deal with the request.

26. Finally, if the requests were valid the respondent argued it had considered both fully and declined them for legitimate reasons. There is no statutory obligation to provide a right of appeal and, while there was a superficial appearance of a failure to meet the 'decision date' as the written notification was sent 3 months and 2 days after the request, in fact the claimant had been notified earlier.

Conclusions

27. We considered there were essentially 4 issues for us to determine:

    a. Was either of the claimant's requests invalid as they related to future terms rather than his current role?

    b. Was either of the claimant's requests invalid as they failed to include an explicit start date?

    c. Were the claimant's requests dealt with reasonably and refused on legitimate grounds?

    d. If not, what compensation should be awarded?

28. On the 'future' issue, we found that the respondent to be applying an unduly strict application of the statutory wording. In our judgment it would not be in keeping with the purpose of the Act to prevent an employee asking for flexibility in arrangements not yet in place. Such a rule would mean an employee would have to adopt a working practice knowing that it was unsuitable for their needs before being able to request flexibility.

29. In any case we were not persuaded this was going to be new role. To the contrary, the evidence indicated that the role could be 'matched' which meant it was an identical role save as the place of work.

30. There was some discussion about the role in Peterborough not being 'suitable alternative employment' for the purposes of redundancy legislation but that is a different test and was not the issue before the Tribunal.

31. Substantively we were satisfied role was identical save as to the place of work and therefore, even if the legislation was limited to current terms, this did not prevent it applying to the same role in a different location.

32. Finally, the request was essentially generic. It was to work from home part of the time and, even though he did not expect or ask that this arrangement would start until he relocated to Peterborough, it nevertheless related to related to his existing terms and conditions.

33. On the question of the start date, the Tribunal acknowledge that 80F is clear and mandates that the employee identify the date on which it is proposed the change start. However unsatisfactory that might be, we considered that we were bound by the wording and not allowed to deviate from it.

34. Therefore, if the request had been confined to the respondent's form, we would reluctantly have had to accept the respondent's submission. But the request was not confined to the form. Leaving aside the meetings, the first request was submitted with an accompanying email which in our judgment formed part of the written application.

35. That email did not give a precise start date but made it clear that the flexible working was not expected to start unless and until the team had relocated to Peterborough. In our judgment that was sufficient to meet the obvious reasons for the statutory requirement.

36. An employer needs to know when new practices are expected to start for planning and decision-making purposes. Here the claimant was clear that he only wanted the arrangements to begin once the team had moved. The precise date was out of his control and so he could reasonably be expected to give that. the date was however in the control of the respondent who clearly understood exactly what was intended and could assess the request accordingly.

37. The second request was submitted without a similar email but in our judgement the context remained clear, and the respondent can have been in no reasonable doubt about what the claimant was asking. We find that the respondent understood the intended start date and that the claimant had, viewing the matter in the round, provided sufficient information to meet the statutory criteria.

38. So, the requests being valid, did the respondent deal with them reasonably and refuse them on legitimate grounds? The short answer in our judgment is yes.

39. We accept that the respondent may not have may not complied with its own internal flexible working policy in the processing of the requests and then in the method by which they were considered. The first request was considered by a separate panel rather than the claimant's line manager and it is true the claimant was not offered an explicit appeal against that decision.

40. However, the legislation does not impose a prescribed procedure far less mandate that an employer have a policy and comply with that. What the legislation requires is that the request be considered and there is no question that the respondent considered both requests carefully.

41. We had regard to ACAS Code of Practice and considered specifically the recommendations that and employer should arrange to speak to applicant to discuss application and afford a right of appeal. Those are obviously very sensible practical recommendations.

42. However, non-compliance with the ACAS Code does not necessarily mean an employer has been unreasonable. Here, both applications had been discussed so we find it was not unreasonable not to have an additional discussion.

43. No immediate appeal was offered but equivalent process was permitted. The claimant was allowed to make a fresh application and that second application was considered by his line manager who was willing to permit the increased time working from home subject only to reserving some flexibility over the days on which that might happen.

44. As it happens, the claimant was belatedly offered an appeal much later. We do not criticise the claimant at all for not taking that when he had every reason to believe it would not change the decision but objectively, we did not consider that the initial failure meant the requests were not reasonably considered.

45. In our judgment, the overarching goal is that an employee is allowed to explain the nature of the request, that an employer give it proper consideration and then the employee to have a further say if needed. In our judgment all of that was achieved.

46. For the avoidance of doubt, we also considered that there was no failure to meet the prescribed decision date. We accepted the point that even if the written notification was delayed, the claimant had been notified of the outcome well within the prescribed 3 months.

47. In terms of the reason for refusal, there was no substantive dispute but that it fell squarely within the permitted reasons which, after all, are broadly framed. We empathise with the claimant in his view that the respondent's concerns may have been over-stated or even unreasonable but ultimately these are operational issues which are for the employer to determine. It is not for the employee nor for the Tribunal to try to go behind the reasoning and reach an alternative conclusion. Provided the employer has applied its mind to the request in an objectively reasonable manner, that is sufficient to comply with the statutory requirements.

48. It of course followed from our findings that the request was reasonably considered and legitimately refused that we did not consider the question of compensation.

Delay

49. I apologise to the parties for the long delay in the production of these written reasons. Although the request was made promptly on 22 June 2021, that was overlooked internally and not referred to me until 13 September 2021. For my part, in the time since then I have had some serious health issues with which to contend, and which regrettably prevented me preparing these as quickly as I should have done.

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Employment Judge Hanning

Date: 5 January 2022

Sent to the parties on:

7 January 2022

For the Tribunal Office

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