Case No: EA-2020-000724-RN (Previously UKEAT/0007/21/RN)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 September 2021

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR J WALSH	**Appellant**
- and -	
NETWORK RAIL INFRASTRUCTURE LIMITED	**Respondent**

- -
- -

Miss R Owusu-Agyei (instructed by Thompsons Solicitors) for the **Appellant**
Miss E Wheeler (instructed by Eversheds Sutherland (International LLP)) for the **Respondent**

Hearing date: 21 September 2021

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JUDGMENT

SUMMARY

FLEXIBLE WORKING

An agreement, made after the expiration of the decision period, to attend and participate in a hearing to consider an appeal against a decision to refuse an application for flexible working did not result in an implied agreement to extend the decision period for the purposes of section **80G(1B)(b) ERA**.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the decision of the Employment Tribunal sitting in Liverpool on 22 November 2019, Employment Judge Buzzard sitting with lay members. The Tribunal held that the claimant had presented a complaint in respect of a request for flexible working that fell outside the jurisdiction of the Tribunal because it had been made during the decision period and therefore was premature.

2. The outline facts are taken from the decision of the Tribunal. The claimant is employed by the respondent as an Ops Technician. The claimant submitted a flexible working application on 11 February 2019. The application was rejected on 6 March 2019; with the rejection being confirmed by a letter dated 7 March 2019. The claimant appealed against the decision rejecting his request for flexible working on 13 March 2019. The claimant applied to ACAS on 4 April 2019. An early conciliation certificate was issued that day. There was extensive correspondence between the parties seeking to fix a date for an appeal hearing. The Tribunal found as a fact that the delay in fixing the appeal was not the result of the fault of either party.

3. The decision period in which a determination was to be made in respect of both the original application for flexible working and the appeal, absent any agreement to extend the period, was due to elapse on 10 May 2019. After that date had passed correspondence continued between the parties. It seems likely that neither party gave any thought to the decision period. The Tribunal found as a fact that an agreement was reached that the claimant would attend an appeal hearing to be held on 1 July 2019. The agreement was set out in a letter sent by the respondent on 24 June 2019. Prior to attending the appeal, the claimant submitted his claim to the Employment Tribunal on 25 June 2019. He asserted that his application for flexible working had not been dealt with reasonably, had been determined on incorrect facts, and that the process had not concluded before the decision period had

expired.

4. The appeal was held on 1 July 2019. The appeal was dismissed. The claimant was told the outcome on the day of the appeal hearing.

5. The Tribunal concluded that the agreement that the appeal be held on 1 July 2019 necessarily involved an agreement to extend the decision period. That had the consequence that the claim had been submitted before the expiry of the decision period and so the employment tribunal had no jurisdiction to hear the claim.

6. The statutory scheme for flexible working requests is set out in **Part 8A** of the **Employment Rights Act 1996** ("**ERA**") and the **Flexible Working Regulations 2014**. Reading this judgment will be considerably more rewarding with a copy of the **ERA** to hand, open at **Part 8A**. ACAS has produced a Code and Guidance that were not relevant to the determination of the specific issue in this appeal.

7. The right to request flexible working is set out at section **80F ERA**. An employee can apply for a change in terms and conditions of employment relating to matters such as hours and time of work. The form of an application for flexible working is provided for in the **2014 Regulations**.

8. The employer has a number of duties in relation to an application for flexible working; principally set out in section **80G ERA** and also, to a limited extent, in section **80H ERA**. Pursuant to section **80G(1)(a) ERA** the employer is required to deal with the request in a reasonable manner. Pursuant to section **80G(1)(b) ERA** an employer may only refuse the application on one of a number of specified grounds. A complaint may be brought under **80H ERA** that a decision to reject an application has been made on incorrect facts (section **80H(1)(b) ERA**).

9. The statute and regulations make no specific provision about the procedure for considering an application for flexible working. There is no requirement for a hearing, or that there must be an opportunity to appeal. Where the employer's procedure provides for a hearing, if the employee fails to attend two hearings in a row that can result in the application being treated as having been withdrawn provided the employer notifies the employee of that fact. Where there is provision for an appeal, the appeal decision must also be notified within the decision period: section **80G(1A) ERA**. The decision period is defined by section **80G(1B) ERA** as being:

> "… (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 employee."

10. Section **80G(1C) ERA** provides that an agreement to extend the decision period may be made before it ends, or with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period came to an end. Section **80H ERA** provides for complaints to the Employment Tribunal. Section **80H(1)(a) ERA** allows a complaint to be made on the basis that there has been a breach of section **80G(1) ERA**, which includes a failure to deal with the application in a reasonable manner and/or to determine the application within the decision period; or under **80H(1)(b) ERA** that a decision was based on incorrect facts. Section **80H(3) ERA** precludes a complaint being made to the Employment Tribunal before the decision period has ended; either because a decision on the application has been made within the decision period or the decision period has concluded without a determination of the application for flexible working having been made. Section **80I ERA** provides for a tribunal to make an order for reconsideration of the application and to make an award of compensation where a complaint is well founded. The amount of an award of compensation shall be of an amount that the tribunal considers just and equitable in all the circumstances, but may not exceed a maximum set out by regulation 6 of the **2014 Regulations** as being eight weeks' pay.

11. The Tribunal concluded that an agreement had been reached that the appeal take place on 1 July 2019. The Tribunal set out the question it considered it had to answer at paragraph 49:

> "It is not in dispute that the claimant agreed that the appeal hearing would be on 1 July 2019. The question is if the claimant could have agreed that the appeal could go ahead on 1 July 2019, without, by implication, agreeing that the time frame for that appeal to be heard was extended to include at least 1 July 2019. Whilst there could have been arguments that any such implied agreement would have to have allowed for a reasonable time for the decision on that appeal to be reached after 1 July 2019, this further issue did not arise in this claim."

12. The Tribunal's reasoning was set out at paragraphs 54 and 55.

> 54. The Tribunal unanimously agreed that it is not credible for the claimant to have agreed to the flexible working application appeal could take place on 1 July 2019 without agreeing that the process, of which the hearing was part, could continue until at least that date. It is implicit in positively agreeing a date for a hearing, without raising any concern or objection to the date, that the process of which the hearing is part can continue until at least that date. Any analysis that suggested a date for the hearing could be agreed without an implied extension of time to permit the hearing on that date would be unworkable in practice.
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> 55. This does not mean that the claimant could not have objected to the delay, but still attended a hearing such that the hearing took place after the expiry of the decision period. Such an approach could have been evident if the claimant had attended his appeal on 1 July 2019 because that was the date he was given, rather than it being a date that had been expressly agreed by him following discussion with the respondent to find a date that met his requirements and the respondent's.

13. The Tribunal concluded that because an agreement had been reached that the appeal should go ahead on a specific date, 1 July 2019, that necessarily involved an agreement that there be an extension of the decision period. That was held to be a necessary inference merely from the fact that there had been an agreement to attend and take part in the appeal on 1 July 2019 without the claimant having reserved his position.

14. The claimant appealed by a notice of appeal sealed by the Employment Appeal Tribunal on 21 January 2020. The outline grounds of appeal were set out at paragraph 2:

> "2. The employment tribunal erred in law in that:

> i. At **§54** of the judgment, the tribunal erred in its interpretation of s.80G(1B)(b) **Employment Rights Act 1996** ('ERA') by concluding that there could be an implied agreement between an employer and employee to hold an appeal hearing against a decision on a flexible working application on a certain date **without more**;
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> ii. At **§33** of the judgment, the tribunal have made a finding that "*There was no suggestion that [the Claimant] had merely acquiesced…*". That finding is contrary to the documentary evidence in front of the tribunal and the Claimant's witness evidence. That finding of fact is perverse;
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> iii. At **§47 to §57** of the judgment, the tribunal fail to consider any evidence pertaining to an implied agreement to extend a decision period other than the purported agreement to have an appeal hearing on a certain date. The decision that there was an implied agreement to extend the decision period was contrary to the evidence."

15. The appeal was originally considered by Bourne J who, by an order with seal date 30 October 2020, required the Employment Tribunal to answer a number of questions concerning the evidence it had relied on to make its determination about the agreement to hold the appeal on 1 July 2019. The Tribunal produced a detailed response setting out the relevant parts of the notes of evidence of the employment judge and one of the lay members, the other member not having retained any notes. Once that information was received, HHJ Shanks determined that the matter should proceed to a full appeal hearing, by an order dated 19 January 2021.

16. I consider that the key issue in this appeal is straightforward; was the Tribunal correct in law to conclude that an agreement that an appeal take place on a specific date after the expiration of the decision period necessarily involved a retrospective agreement that the decision period be extended?

17. I do not consider it is significant whether the agreement that an appeal take place be express or implied. The statute is silent as to the nature of an agreement to extend the decision period. There is no requirement that it be in writing, or that it be express rather than implied. However, the statute is clear that there must be an agreement that the decision period be extended.

18. The respondent's submission is that there would be no point attending an appeal hearing if it

has not been agreed that there be an extension to the decision period; with the consequence that an agreement to attend an appeal must necessarily involve an agreement to extend the decision period. I do not accept that submission. I consider that an agreement to attend an appeal after the expiration of a decision period is a separate matter from whether there has been an agreement to extend the decision period.

19. There are a number of reasons why parties might wish to hold an appeal hearing outside the decision period, even if an agreement cannot be reached that the decision period be extended. An appeal might resolve the differences between the parties and so avoid a hearing in the employment tribunal, or reduce the issues in dispute. An appeal might deal with substantive issues, such as whether the determination has been made on correct facts, been dealt with reasonably, or whether the refusal was for one of the permitted grounds. There is nothing implicit in an employee agreeing to attend an appeal hearing that means that the employee must have agreed to an extension of the decision period. An agreement to attend an appeal after the expiry of the decision period is no more than that, an agreement to attend the appeal, in this case on an agreed date. The appeal might remedy any substantive defect in the manner in which the request for flexible working was dealt with but that does not mean that the decision period has been extended. For the decision period to be extended there must be an agreement for an extension.

20. An agreement to extend the decision period requires that the period of the extension be agreed. A further problem with the suggestion that attending an appeal after the expiry of the decision period results in an implied extension of the decision period is that there would still be, in most cases, an issue as to the length of the decision period, is it just to the day of the appeal hearing or is there some implied agreement as to a period for the appeal to be determined.

21. I consider that the Tribunal erred in law because the only basis upon which it decided that

there had been an extension of the decision period was that the claimant had agreed to participate in an appeal on a specific date after the expiry of the decision period.

22. Part of the statutory purpose of these provisions is to ensure that decisions are made with reasonable dispatch. That is for obvious reasons. Employees often seek flexible working because of urgent personal circumstances. There is nothing surprising in the possibility that an employee could maintain a claim that there has been a failure to make the decision within the decision period, notwithstanding attending an appeal. If the appeal resolves other issues that may reduce any remedy that is awarded.

23. As I consider that the Tribunal was wrong as a matter of law to conclude that a decision to agree to attend and participate in an appeal on a specific date, necessarily involved there being an agreement to extend the decision period, there is only one possible conclusion that could have been reached on the evidence before the Tribunal, that there was no agreement to extend the decision period and accordingly the claim to the Employment Tribunal was not precluded by operation of section **80H(3B) ERA**. Accordingly, I substitute a decision to that effect.

24. The matter must now be remitted to the Employment Tribunal to decide the substantive claim that the decision to refuse the claimant's application for flexible working, and to refuse the appeal, was not dealt with in a reasonable manner and was based on incorrect facts. After that, depending on the outcome, the Tribunal will have to determine remedy in respect of the failure to determine the application within the decision period and, if the Tribunal finds for the claimant, on the substantive issues.

25. I consider it is appropriate that the matter be remitted to the same Employment Tribunal if possible. The Employment Tribunal has made a number of findings of fact that are not in dispute in

this appeal. The Tribunal will be well placed to determine the remaining issues between the parties. I have no reason to doubt the professionalism of the tribunal. I consider that it is proportionate remit the matter to the same Tribunal.