EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101202/2022

Held in Glasgow on 23 and 24 November 2022

Employment Judge L Wiseman
Members P McColl and V P Alexander

Mr Alexander MacFarlane	**Claimant** **Represented by:** **Ms L Neil -** **Solicitor**
The Commissioners for Her Majesty's Revenue and Customs	**Respondent** **Represented by:** **Ms S Monan -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal, by a majority (Employment Judge dissenting) decided the claim under section 80F of the Employment Rights Act was well founded and ordered the respondent to pay to the claimant compensation in the sum of £590.04 (being two weeks' net pay).

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 23 February 2022 alleging he had been discriminated against because of disability and that the respondent had failed to deal with his request for flexible working in a reasonable manner.

2. The respondent entered a response in which it reserved its position regarding disability status pending further information from the claimant, and denied the claims.

3. The respondent subsequently accepted the claimant was a disabled person in terms of section 6 of the Equality Act. The claimant has type 2 diabetes.

4. The claimant's representative, at the commencement of the hearing, confirmed the claims in respect of alleged disability discrimination were being withdrawn. The claims were dependent on the substantial disadvantage of being required to work in the office. The claimant had not, in fact, been required to work in the office and therefore the claimant could not show substantial disadvantage. The claims, for this reason, were withdrawn.

5. The complaint made regarding the flexible working request was insisted upon by the claimant.

6. The Employment Judge offered parties the opportunity to have settlement discussions or to convert the hearing to a judicial mediation. The parties, having had time to consider their positions, confirmed they wished to proceed with the hearing.

7. The tribunal heard evidence from Mr Alistair Graham, Front Line Manager, who was the claimant's line manager; Mr William Gibson, Business Unit Head, who made the decision regarding the request for flexible working and from the claimant.

8. We were also referred to a number of jointly produced documents. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

9. The claimant commenced employment with the respondent on the 6 August 1974.

10. The claimant has always worked within Compliance. In August 2019, he transferred to the role of Enquiry Processing Worker, which was part of the Counter Avoidance team (within Compliance), based at East Kilbride. The claimant's role involved reviewing customer correspondence and gathering details about avoidance scheme activity.

11. The claimant worked part time on a Monday, Tuesday and Wednesday (7.5 hours per day from 07.30 to 15.30).

12. The claimant has been working from home since March 2020 because of the Covid lockdown.

13. The respondent has a number of policies dealing with flexible working and working from home. The respondent introduced a new contract in August 2021 which dealt not only with pay arrangements, but also introduced a new working from home policy which gave an employee (in circumstances where the role was suitable) the opportunity to work from home 2 days per week, or more where the business agreed.

14. The respondent also had a Balancing Home and Working policy which gave employees a choice, where possible about where and how they worked. The policy noted the respondent was an office-based organisation and that its offices provided an opportunity for interaction, collaboration and a sense of community. The policy also noted the need for face to face interactions some of the time in order to share knowledge and expertise and learn from one another.

15. Working from home under the above policy is a non-contractual, informal and flexible arrangement.

16. There is also a Special Working Arrangements Policy which contains guidance for employees who wish to request changes to their contractual working requirements outside the flexibility framework. Employees are encouraged to use the informal flexible arrangements.

17. The respondent, prior to the new flexibility framework policies being introduced in August 2021, had a policy whereby employees could apply to work exclusively at home.

18. The claimant applied, on the 2 June 2021, to be a Designated Homeworker under this policy (page 79). The claimant, in the accompanying email to Mr Graham, his line manager, confirmed he wished to stay at home with immediate effect. The claimant referred to having worked at home for the past 14 months (during lockdown) and that his manager had been happy with his work. The claimant felt his work could be done equally at home or in the office,

and that he had been collaborating as required with colleagues during this time (via Teams).

19. The claimant confirmed the main reason for his request was health. The claimant has type 2 diabetes and was in the "vulnerable" category regarding Covid. The claimant was concerned at the prospect of returning to the office with the pandemic still extant. He referred to having health worries about working with others, some of whom may not be fully vaccinated. The claimant was also concerned for his wife, who had osteoarthritis in both knees and was also in the vulnerable covid category.

20. The claimant referred to caring responsibilities because his wife has osteoarthritis in her knees and a severe herniated disc. His wife could only walk a few yards without stopping and had recently been diagnosed with ruptured bicep tendons, strained shoulder tendons and an injury to her shoulder rotary cuff. The claimant assisted his wife with washing and dressing.

21. The claimant's wife also worked for the respondent, and she had been granted permanent home working. The working arrangements were that the claimant's wife worked upstairs and the claimant downstairs.

22. The claimant did not consider his request would be of any detriment to the business.

23. Mr Graham arranged to meet with the claimant to discuss the request. The meeting took place on the 16th June. The notes of the meeting were produced at page 83. Mr Graham prepared for the meeting by noting the questions he required to cover with the claimant, and noting the claimant's responses to those questions, during the meeting. Mr Graham's role at the meeting was to gather information from the claimant.

24. Mr Graham accepted the claimant had not been offered the opportunity to be accompanied at the meeting.

25. Mr Graham and the claimant discussed the eligibility criteria to be satisfied for a designated homeworker arrangement. The first criterion was that it fitted

with the business model. Mr Graham noted the respondent remained an office-based organisation. He also referred to the informal working arrangements whereby employees could be offered the option of working from home for about two days per week. Contractual (that is, permanent) homeworking was only an option where it was required by the job role, or was a workplace adjustment or a measure to mitigate redundancy.

26. The second criterion was that the arrangement would not deliver a detriment to the business area, or would provide a workplace adjustment that enabled a disabled employee to do their job. The claimant was of the opinion the arrangement would not deliver any detriment to the business, and in fact would produce a benefit by freeing up a desk for use by others. The claimant also referred to having worked collaboratively with colleagues and the manager and that as he had been working from home successfully over the past 15 months the permanent change would not have any impact.

27. The third criterion was that the employee must have suitable accommodation at home. The claimant described his homeworking arrangements and the equipment he had at home.

28. Mr Graham was required to consider if the employee was suitable for the proposed arrangement. The claimant considered he was well suited to working alone for long periods of time. He had many years' experience and was easily contactable. He had participated in the weekly meeting via Teams and had been constantly updated whilst working at home.

29. Mr Graham questioned the claimant regarding his health. The claimant had type 2 diabetes and had been in the vulnerable covid category, but not told to shield. The claimant went out to the shops when not busy and sat outside at the pub. He had been on holiday to Aviemore in May 2021. The claimant acknowledged the safety measures the respondent had in place but was concerned about reports of people with covid. The claimant told Mr Graham that if his request was not granted he may need to consider retiring earlier than planned (February 2023).

30. Mr Graham also questioned the claimant about his caring responsibilities. The claimant confirmed his wife's health issues with osteoarthritis in both knees, a herniated disc in her back and injury to her shoulder. The claimant assisted his wife with dressing and did most of the jobs around the house. The claimant felt that with working at home he was present to help when needed.

31. Mr Graham referred the claimant to the informal flexible working arrangements available to all employees, which would mean the claimant could work from home one day a week. Mr Graham considered that, being practical, the claimant would work one day a week at home for three weeks, and two days a week at home in the fourth week. The claimant wanted only to come into the office as necessary, which he interpreted as meaning not at all.

32. Mr Graham completed the Remote and Mobile Working document on the 17 June (page 89) The document set out the eligibility criteria and noted the document was designed to help managers think about the issues involved when considering whether remote working was appropriate. The document noted various issues such as, issues for the business, possible implications for customers, issues to consider for the individual and jobholder suitability. The document listed the questions to be considered under each heading and left space for the manager's comments. The comments made by Mr Graham were a mixture of his views and those of the claimant.

33. Mr Graham indicated on the document that there was no business need to make the post a remote arrangement. The benefits to the business were those advanced by the claimant, that is, it would free up a desk and enable the claimant to keep working. The cost/savings were unknown except for there being a cost if the claimant retired and a recruitment exercise had to take place. Mr Graham did not consider the proposed arrangement had an impact on the claimant's ability to get the job done, or an impact on other team members. The claimant did not deal with front facing customers. Mr Graham considered that with the claimant's length of experience he had demonstrated being able to adapt and keep performing at home.

34. The claimant was based at East Kilbride. A new Regional Centre opened in Glasgow and some members of the claimant's team moved to Glasgow. The claimant believed he was the only member of his team to remain in East Kilbride, but this was incorrect. Four members of the team moved to Glasgow: the claimant and the remaining five members of the team stayed in East Kilbride.

35. Mr Graham could not take the decision regarding claimant's request: it had to be referred to a Business Lead (grade 7). Mr Graham referred the application to Ms Karen Higgins, who in turn referred it to Mr William Gibson, when he took up the post of Business Lead in August 2021. The decision from Mr Gibson was delayed due to the pay negotiations and the new contracts, and not issued to the claimant until the end of September 2021. The claimant continued to work from home during this period.

36. Mr William Gibson is the Business Unit Head at Counter Avoidance. Mr Gibson took up this role in August 2021. He had previously been a Tax Professional within the respondent's organisation. The flexible working request was the first one he had had to deal with.

37. Mr Gibson received all of the relevant information from Mr Graham (the claimant's application form; the meeting notes and the Remote and Mobile working form completed by Mr Graham). Mr Gibson also had regard to the Homeworking and mobile working guidance (page 48). Mr Gibson understood from Mr Graham that nothing had changed since the information had been gathered, and on that basis, he considered it would only be necessary to meet with the claimant if he needed any further information.

38. Mr Gibson took 4/5 days to consider all of the information. His decision was set out in a letter dated 29 September 2021 (page 98). Mr Gibson noted the claimant had cited two main factors in support of his application – health (impact of covid) and caring responsibilities. Mr Gibson confirmed he had reviewed all of the points for consideration and had decided to reject the application.

39. Mr Gibson noted the claimant's health concerns and concluded they could be managed safely through discussions. Mr Gibson also referred to the actions being taken by the respondent to ensure the number of employees in work was limited; social distancing was in place; enhanced cleaning was being carried out and face coverings were being worn indoors. The respondent had only recently started with a gradual return to the office and discussions with managers were taking place to address concerns.

40. Mr Gibson concluded the claimant's caring responsibilities could be managed through the respondent's flexible working guidelines (which allowed for flexible start and finish times, compressed hours and hybrid working). The claimant lived 5 minutes away from work and could return home at lunch time if required.

41. Mr Gibson relied on planned structural changes as the reason for his refusal of the application. He noted firstly that the respondent was an office-based organisation which sought to balance work between home and office. The respondent was committed to creating a workplace which encouraged collaboration and a sense of community. Employees had a role in creating a supportive, collaborative, inclusive team and to do that everyone needed to interact with each other face to face some of the time, sharing knowledge and expertise and learning from each other. Mr Gibson considered this would be impacted by the claimant working at home all of the time. Mr Gibson noted the counter avoidance structure involved working as a team, and the structures were subject to change. The work undertaken could also change to meet changing business priorities.

42. Mr Gibson next had regard to the fact there were 28 new trainees joining the department at the start of the year. He considered face to face collaboration and learning to be important in the circumstances. He noted the claimant (and others) had used Teams to collaborate during the pandemic, but he considered there was "a bigger picture" in circumstances where the composition of teams and the work they do is subject to change. Collaboration was across all eight teams which Mr Gibson managed, and although the

claimant and Mr Love had worked closely together, that work was coming to an end and new work would be allocated, which would require collaboration.

43. Mr Gibson referred to the work involving desk-based and face to face customer interventions. The claimant had many years' experience and the work he currently undertook was vital in building the capability of new and existing staff, and some of that was best done face to face. Mr Gibson considered the claimant's learning capability would be adversely impacted if he was at home all of the time. The business would also lose the flexibility in utilising the claimant's experience to train new staff.

44. Mr Gibson provided Mr Graham with notes about his decision (page 94). In this document Mr Gibson referred to the respondent being an office-based organisation and to the culture the respondent endeavoured to create. He also referred to it being important that each person understood their role in sharing skills, expertise and knowledge with others to build supportive, collaborative and inclusive teams. The respondent had invested heavily in the design of the Regional Centres to support collaborative working, and the benefits this brings to employees and customers.

45. There were 28 new trainees and new work coming into the counter avoidance department and it would be important to have face to face support for the new trainees. Employees could also be asked to change on to different work streams at very short notice.

46. Mr Gibson also referred to the flexibilities already offered and to the fact that in the gradual return to office working, employees were currently being asked to return only one day a week, and this was not mandatory. The respondent was working towards a blended approach with home and office working.

47. Mr Gibson noted the claimant's health and the precautions he took regarding Covid. He also noted the claimant was going on holiday to Spain on the 27 September 2021. Mr Gibson concluded the claimant was starting to integrate again, including travelling abroad in a plane. Mr Gibson further concluded permanent homeworking was not justified in the circumstances, particularly

with the measures the respondent had in place and the flexibility arrangements which could be used by the claimant.

48. Mr Gibson noted the caring responsibilities the claimant undertook for his wife but considered this could be managed by making use of the flexibilities on offer. The claimant could work one or two days a week at home. He lived very close to the office and could come in late/early or leave late/early if he needed to care for his wife.

49. Mr Gibson concluded permanent homeworking would impact on the respondent's strategy and the workplace they were endeavouring to create. The respondent needed a flexible workforce able to respond to changes at short notice. The permanence of the arrangement sought by the claimant would mean face to face interaction with him would be lost.

50. The claimant presented an appeal against Mr Gibson's decision to refuse the application on the 13 October 2021 (page 102). The main point of appeal was that Mr Gibson appeared to have rejected the application on the basis of planned structural changes, but had not provided any evidence of this. The explanations put forward were merely a justification of the respondent being an office based organisation. The claimant also complained the process had not been concluded within the timescale set out in the ACAS Code of Practice. The claimant took each of the points relied on by Mr Gibson and provided his explanation for why they were incorrect.

51. Mr Barker and the claimant met (virtually) to discuss the appeal, following which Mr Barker issued his decision to reject the appeal in a letter dated 8 November 2021 (page 110). Mr Barker regretted the time taken to resolve the application had taken longer than three months, and he apologised for this. Mr Barker was satisfied the claimant's health and caring responsibilities could be supported through the flexibility arrangements available to all employees. He noted in particular that the "return to office one to one meeting" with the manager had not yet taken place and that this would include the Covid 19 Vulnerability Screening Questionnaire. Mr Barker considered this discussion

should take place and also consider whether a referral should be made to occupational health to support the claimant on a temporary basis.

52. Mr Barker considered the factors taken into account by Mr Gibson were reasonable and that it was reasonable for him to take into account the impact of business structural changes and the value of face to face collaboration through attending the office for some of the time.

53. The claimant has not been required to work from the office to date. He commenced a period of annual leave on the 26 October 2022 which will run until 1st February 2023 when he will retire.

Credibility and notes on the evidence

54. There were no issues of credibility or reliability in this case: the witnesses simply saw things from a different perspective. The claimant accepted, in cross examination, that it would be possible for him to carry out his caring responsibilities using the flexible arrangements available to all employees, but he felt *"it just makes life harder".* The claimant also accepted there had been no mandatory requirement for employees to return to work at the time his application had been made. In fact it was not until March 2022 that the respondent asked employees to return to work and to utilise hybrid working and the flexible arrangements available. The claimant met with Mr Graham at this time and a request for an occupational health report was made. The report (page 138) confirmed the claimant was fit to return to hybrid working. The claimant did not in fact ever return to working in the office.

55. The claimant told the tribunal that he and Mr Keith Love had been given largely similar avoidance schemes and so they had decided to work jointly on both schemes. This meant that after an initial period of collaboration with other team members, the collaboration was mainly with Mr Love. Other teams were interested in the work being carried out, for example, VAT teams, but these meetings were done on Teams.

56. The joint project came to an end in March/April 2022 and no new scheme was started until October 2022.

57. The claimant accepted Mr Graham's notes of the meeting on the 16 June were a fair summary of the discussion. The claimant was no longer in the clinically extremely vulnerable category regarding Covid, but he was very worried about catching covid in the workplace. He acknowledged the measures the respondent had in place but daily bulletins about who had covid and where they were based at work undermined any faith he had in those measures. The claimant's key point was that collaboration and meetings had been done by Teams during the pandemic and could continue to be done in this way, with no detriment to the claimant or the business. The claimant did not want to return to the office to work for any part of his working hours.

58. The claimant, having reviewed Mr Gibson's notes for his decision, considered Mr Gibson had merely sought to put forward an explanation which supported the respondent's policy of being an office-based organisation. The claimant, with regards to collaboration, noted contact had largely been limited to Mr Love, the Team Lead, the Team Supervisor and other teams, for example, VAT. The claimant did not believe he would ever be required to pass on knowledge to someone, or to mentor, given he only had one year's experience in counter avoidance. The claimant did not believe any structural changes were planned and considered the reference to this was an attempt to hide the real reason for rejecting the application.

59. The claimant was unhappy at the delay in dealing with his application and the fact no referral was made to occupational health. The claimant acknowledged the existing flexibility arrangements available to employees, but considered that although these were helpful they would require him to be in the office at some point, and he was not willing to do this.

60. The claimant, in cross examination, accepted Mr Graham had given serious consideration to the request. He accepted Mr Gibson, in his role, would have been aware of planned structural changes to which the claimant was not privy. He also accepted that at the start of new work there is inevitably greater collaboration, and although he had not ever been involved in training or mentoring trainees, he could not discount the possibility Mr Gibson may have considered the claimant would be involved in this.

Claimant's submissions

61. Ms Neil referred to section 80F of the Employment Rights Act and to the Flexible Working Regulations 2014 and submitted the only issue before the tribunal was the manner in which the respondent had dealt with the application. The onus was on the respondent to consider the application in a reasonable manner, and this included the timescale for the decision-making process and whether the permitted ground for the refusal of the application actually applied.

62. Ms Neil referred to section 207 of the Trade Union and Labour Relations Consolidation Act, and the duty of the tribunal to take into account the ACAS Code of Practice.

63. Ms Neil submitted the employer should arrange to talk to the employee as soon as possible after receiving the flexible working request. The application was made by the claimant on the 2 June, and Mr Graham met with the claimant to discuss it on the 16 June. The claimant accepted it was dealt with quickly at this stage. However, the decision-maker, Mr Gibson did not meet with the claimant to discuss the application and this was an error because it appeared Mr Gibson did not understand the claimant's needs. Mr Gibson failed to take into account the claimant's team, and his proximity to retirement. The details of the claimant's health and caring responsibilities were dismissed as being manageable under the flexibility arrangements, but there was no focus on the benefits to the respondent of the proposed arrangement.

64. Mr Gibson appeared to proceed on the basis that the respondent being an office-based organisation was paramount. He failed to consider the request carefully. The benefits to the claimant and the respondent were not considered. No occupational health report was sought and so the balancing of health and needs could not be done. The situation regarding covid was not static. Mr Gibson appeared to use the fact the claimant had been abroad on holiday as justification for his concerns not being valid. Mr Gibson asked no questions about the claimant's wife's condition.

65. Ms Neil submitted the document at page 89 completed by Mr Graham appeared not to have been considered by Mr Gibson. It was submitted that if he had considered the information regarding collaboration and the fact the claimant did not see customers face to face, he might have understood the benefits of home working.

66. The employer should allow the employee to be accompanied at the meeting and at an appeal. Mr Graham accepted there was no discussion of this.

67. Ms Neil submitted there had been significant delay in informing the claimant of the decision. The application had been presented on the 2 June and the claimant was informed of Mr Gibson's decision on the 29 September. The appeal was not concluded until the 8 November.

68. The planned structural changes were not supported by the evidence. This was particularly so if the claimant was the only member of his team to continue to be based at East Kilbride.

69. Ms Neil invited the tribunal to find for the claimant and to award his 8 weeks' pay. Ms Neil acknowledged the claimant had not been required to return to work in the office but submitted compensation would be just and equitable because of the uncertainty and the stress to the claimant of not knowing the outcome for such a protracted period.

Respondent's submissions

70. Ms Monan invited the tribunal to find both Mr Graham and Mr Gibson to be credible and reliable witnesses. She submitted the claimant's evidence had, in some respects, lacked credibility: it could not, for example, be credible for him to suggest that he was happy to fly to Spain (to take that risk because his son needed a holiday) but be unwilling to return to work in the office.

71. Ms Monan noted the respondent accepted there had been delay in dealing with the application, but this had been due to the transition to the new policies and the fact the application had to be treated under the old policies.

72. Ms Monan noted the respondent was required to deal with the request in a reasonable manner. Mr Graham had met with the claimant on the 16 June to discuss the application. There was no requirement for the decision-maker to meet with the claimant. The request was discussed with the claimant at the meeting on the 16 June and Mr Gibson had considered the request carefully, noting the basis of the request was health and caring responsibilities. The claimant was not shielding and there was nothing to say he could not work in the office, particularly when he appeared to be getting on with life and holidays. Mr Gibson had all the information he required regarding the claimant's wife, her condition and the claimant's caring responsibilities. His conclusion the claimant could make use of the flexible working arrangements to address his caring responsibilities was reasonable. The issue of freeing up a desk was not a benefit to the respondent. Ms Monan submitted all of these points were balanced against the adverse business impacts.

73. The reason for refusing the application was planned structural changes. Mr Gibson made reference to 20 new trainees coming into the team who would benefit from face to face collaboration.

74. The appeal was dealt with promptly by the respondent.

75. Ms Monan referred to the case of ***Webster v Princes Soft Drinks 1803942/2004*** where it was held that it was not for the tribunal to impose their view regarding the business evaluations.

76. Ms Monan submitted the respondent had dealt with the request seriously and thoroughly. There were planned structural changes which were wider than just the new trainees. The refusal of the request had no impact on the claimant's circumstances: he has continued to work at home and continued with his caring responsibilities. Ms Monan invited the tribunal to dismiss the claim, but if it did not, then the fact the claimant had continued to work at home went to the issue of compensation not being just and equitable.

Discussion and Decision

77. We referred firstly to the statutory provisions at section 80F Employment Rights Act which are entitled "Statutory right to request contract variation" and which provide that a qualifying employee may apply to his employer for a change in his terms and conditions of employment if the change relates to "(iii) where, as between his home and a place of business of his employer, he is required to work."

78. Section 80G Employment Rights Act sets out the employer's duties in relation to an application made under section 80F. The duty is to deal with the application in a reasonable manner, to notify the employee of the decision on the application (including appeal outcome) within the decision period and to only refuse the application because one or more of the stated grounds apply. Ground (viii) is planned structural changes. The decision period is three months beginning with the date on which the application is made.

79. The Flexible Working Regulations 2014 do not add to the above.

80. We also had regard to the ACAS Code of Practice regarding Handling in a reasonable manner requests to work flexibly (2014). The basic requirements of a reasonable procedure are:

- discuss the request with the employee;
- consider the request carefully and
- deal with the request promptly.

81. The ACAS Code recommends that upon receiving a request, the employer must consider it and should arrange to talk with the employee as soon as possible. The employer should allow the employee to be accompanied to the discussions (and any appeal). The discussion with the employee will help the employer get a better idea of what changes the employee is looking for and how they might benefit the business and the employee. The employer must consider the request carefully, looking at the benefits of the requested changes for the employee and the business and weighing these against any

adverse business impact of implementing changes. In considering the request the employer must not discriminate against the employee. Once the employer has made its decision, it must inform the employee of the decision (in writing) as soon as possible. If the request is refused, it must be for one of the eight permitted business reasons, which includes a planned structural change to the business. If the request is rejected the employee should have the opportunity to appeal against that decision. The law requires that all requests (including appeals) must be considered and decided on within a period of three months from first receipt of the request.

82. We considered each of the above points. The first point is that the employer, upon receiving a request must consider it and arrange to meet with the employee as soon as possible. The claimant accepted this had happened in this case in circumstances where the application was made on the 2 June and he met with Mr Graham to discuss it on the 16 June.

83. There was no dispute regarding the fact Mr Graham and the claimant had a lengthy meeting on the 16 June, or that the notes produced by Mr Graham were a fair and accurate summary of the discussion. We noted the claimant did not, during the course of the hearing, seek to add any additional information to the notes or suggest that anything had been omitted. The claimant did suggest that coming into the office "when necessary" should have read "when strictly necessary", but we preferred Mr Graham's evidence that the discussion had been about coming into the office when necessary. In any event, we did not consider this made any difference to the claimant's position because his interpretation of both phrases was that it realistically meant not coming to the office at all.

84. The change the claimant wished was to be a designated homeworker. This meant a permanent change to his terms and conditions of employment whereby he would work entirely from home. Mr Graham obtained information from the claimant regarding his health and concerns about covid, his caring responsibilities, whether the arrangement fitted with the respondent's business model and whether the arrangement delivered a detriment to the business. The notes of the discussion were comprehensive and covered

almost 6 pages. Mr Graham then completed the Remote and Mobile Working document (page 89). Mr Graham's role was to gather all of the relevant information and there was no suggestion he had failed to do so. Mr Graham could not make the decision regarding the claimant's request because it had to be referred to a more senior person, effectively Mr Graham's line manager.

85. The onus on Mr Gibson was to consider the request carefully and look at the benefits of the requested change for the employee, and weigh these against any adverse business impact of implementing the changes. In considering the request Mr Gibson must not discriminate against the claimant.

86. The members of the tribunal (Employment Judge dissenting) acknowledged Mr Gibson had before him all of the information gathered by Mr Graham. The members (Employment Judge dissenting) were of the opinion that whilst they accepted there was no requirement for Mr Gibson to meet with the claimant, they considered it would have been of assistance to him to do so in circumstances where he was new to the department and lacked a full understanding of the claimant's role.

87. The members (Employment Judge dissenting) were of the opinion the request made by the claimant was not considered carefully by Mr Graham: it was not dealt with in a reasonable manner. The members reached that conclusion because they believed Mr Gibson (who was inexperienced in dealing with such requests) focussed on the business needs (that is, getting people back to work after lockdown) and failed to balance this against the claimant's concerns regarding health and caring responsibilities. The members considered Mr Gibson displayed a lack of empathy for the difficulties surrounding the claimant's caring responsibilities.

88. The members accepted Mr Gibson's evidence regarding the planned structural changes involving 28 new trainees coming into the department, but noted no explanation of this had been given to the claimant. Further, they concluded Mr Gibson appeared to have taken into account incorrect facts regarding the involvement of the claimant in face to face communications with

customers, mentoring and training. Mr Gibson had failed to take sufficient care in understanding all of the information gathered by Mr Graham.

89. The members accepted the claimant's opinion that the planned structural changes advanced by Mr Gibson masked the real reason for refusing the request, which was the focus on the respondent being a work-based organisation and getting employees back to work.

90. The members also concluded there had been unreasonable delay in dealing with the request, which he had not been explained or agreed with the claimant.

91. The Employment Judge disagreed with the members' above conclusions. The Employment Judge noted Mr Gibson had before him all of the information gathered by Mr Graham. The Employment Judge accepted Mr Gibson's evidence that he had read and considered all of that information. Mr Gibson, in considering the request, had regard to the fact the claimant's role did not require home working; there was no business need to make the post a remote working arrangement and Mr Gibson did not consider there were any business benefits to the claimant being a designated homeworker. Mr Gibson did not accept that freeing up a desk was a benefit to the respondent in circumstances where not everyone would be present in the office at the same time and therefore not all desks would be utilised in any event. There were no actual cost savings to the business, although it was acknowledged that if the claimant retired early there may be recruitment costs in filling his post.

92. Mr Gibson also had regard to the strategy of the respondent in being an office-based organisation, committed to creating workplaces that encourage collaboration and a sense of community. All employees have a role in creating supportive, collaborative, inclusive teams and the ethos of the respondent was that to achieve this, employees had to interact with each other face to face some of the time, sharing knowledge, experience and learning with other.

93. Mr Gibson took into account the claimant's health condition and his concerns regarding Covid. Mr Gibson noted the claimant was not in a shielding category and that he went out shopping (albeit at times when the shops were quieter),

he visited the pub but sat outside and was going on holiday to Spain with his son (a trip which involved being in the airport and flying). Mr Gibson considered the situation with Covid was changing, as were people's attitudes. It appeared the claimant, based on the information provided, was starting to integrate again and was prepared to take the risks associated with flying because his son needed a holiday. Mr Gibson balanced this with the fact the respondent was just starting to request employees to return to the office, but this was not being made mandatory. The respondent was moving towards a blended approach with office and home working.

94. The respondent also had various measures in place (less employees in the office, social distancing, enhanced cleaning and earing face coverings) to protect employees, and whilst there were reports/updates of employees with covid, there was nothing to suggest those employees were catching covid at work. The covid situation was changing and so were attitudes to it. Mr Gibson concluded the health issues did not justify permanent home working. He further concluded that with people being given a long time to return to the office, with covid risks being kept under review and with the flexible arrangements available to all employees, the claimant could be supported to manage his concerns.

95. Mr Gibson rejected the claimant's suggestion that an occupational health report should have been obtained before any decision was made. The Employment Judge noted that although the suggestion was put to Mr Gibson in cross examination, there was nothing to suggest what further information could be provided by an occupational health report. In any event an occupational health report was obtained following the discussion between Mr Graham and the claimant in March 2022 regarding a return to work in the office. The report (page 138) in April 2022 recommended the claimant was fit to continue to work in his contracted role either from home or hybrid working. There was nothing to suggest the same recommendation would not have been made had the occupational health report been sought earlier.

96. Mr Gibson also considered all of the information regarding the claimant's caring responsibilities in terms of his wife's condition and the daily tasks he

undertook to assist her. Mr Gibson noted that although the claimant's wife tended to stay upstairs whilst working, she was able to come down stairs to get herself a drink or lunch. The other tasks undertaken by the claimant did not impact on his ability to perform his duties. Mr Gibson also took into account the fact the claimant lived 5 minutes by car away from work. Mr Gibson concluded that with the flexible arrangements available to employees, the claimant would be able to work from home 1 or 2 days a week and could adjust his start/finish time to suit.

97. Mr Gibson next considered and acknowledged there was no evidence of additional costs, or of impact on customer demand and no evidence there would be an impact in reorganising work, or in quality or quantity of work. Mr Gibson next had regard to the fact there was a planned structural change involving 28 trainees due to arrive in the department, and he considered that face to face support, collaboration and learning for the new trainees was important. New streams of work were coming into the department and employees could be moved to new streams of work at very short notice. Collaboration, and face to face collaboration, were important.

98. The claimant challenged Mr Gibson's conclusions. The claimant accepted collaboration was important and that he collaborated not only with members of his team, but also with other teams and managers. The claimant however argued that all collaboration during the pandemic had been via Teams and he considered this would continue in the future because (i) the members of his team were moving to the Regional Centre in Glasgow in early 2022 and (ii) until then, with social distancing and not everyone present in the office at the same time, it would not be possible to meet face to face.

99. The Employment Judge acknowledged the claimant had used Teams for collaboration during the pandemic. It was not, however, correct to say the members of the claimant's team moved to be based in Glasgow. In fact only four members of the team moved to Glasgow, with six members of the team (including the claimant) remaining at East Kilbride. The Employment Judge accepted that with the team geographically split, and with social distancing, there would continue to be some use of Teams: the situation regarding Covid

was not static and the move was towards a greater use of face to face interactions.

100. The claimant also challenged Mr Gibson's conclusion regarding the sharing of knowledge and expertise. The claimant argued that although he had over 40 years' experience in compliance, he only had a year's experience in counter avoidance. He did not consider he had a great deal of knowledge or experience to pass on, and had not mentored anyone. The claimant thought that if he was required to mentor someone, he could do that from home.

101. The Employment Judge preferred Mr Gibson's evidence regarding this issue. Mr Gibson acknowledged the claimant's limited experience in counter avoidance, but he described the fact the claimant had over 40 years' experience in compliance as being "invaluable".

102. The Employment Judge accepted the claimant's evidence that he had not been required to mentor anyone, but that did not detract from the fact a new manager (Mr Gibson) may have considered it entirely appropriate to utilise the claimant in this way in the period leading up to retirement.

103. The claimant argued he did not have face to face interaction with customers and that all of his training had been online. The Employment Judge accepted the claimant did not have face to face interaction with external customers, but Mr Graham's evidence, which the Employment Judge accepted, was to the effect "Compliance used face to face" and whilst there was a lot of online training, certain areas were face to face.

104. The claimant, whilst acknowledging employees could be changed on to new work streams at short notice, questioned what new work streams were due to happen. The claimant argued Mr Gibson had taken into account incorrect facts in reaching his conclusion. These matters are dealt with below.

105. The Employment Judge, in considering whether Mr Gibson had reached his conclusion based on incorrect facts had regard to the case of ***Singh v Pennine Care NHS Foundation Trust EAT 0027/16*** where the EAT held that it is not for an employment tribunal to judge the reasonableness or fairness of

an employer's refusal to provide flexible working: it simply needs to investigate the facts on which the decision was based.

106. The Employment Judge had regard to the fact that prior to the pandemic the claimant was an office based employee. There was no evidence to inform the tribunal whether collaboration had been face to face at that time: equally there was nothing to suggest it would not have been so. The respondent's employees were working from home because of the pandemic. New ways of working had to be introduced because of the circumstances. The Employment Judge accepted as factually correct Mr Gibson's explanation that the respondent was at the stage in October 2021 of trying to slowly, safely and carefully move employees back to working some of the time in the office. These efforts were ceased after approximately 4/5 weeks because the country went back into lockdown again in November. There was no mandatory return to working in the office until March 2022.

107. The Employment Judge also accepted as correct the evidence that the respondent was moving towards hybrid working where employees would have a mix of home and office working. The respondent also had very generous flexible working arrangements available to all employees. The respondent's strategy was of being an office-based organisation, working towards balancing work between home and office, and committed to creating workplaces that encourage collaboration and a sense of community.

108. The Employment Judge also accepted as factually correct that the respondent wished employees to be in the office for part of their working week. The importance of face of face interaction cannot be under-estimated in terms of collaboration, team building, sharing of knowledge and expertise and learning from each other. The informal discussions which take place when employees get together can be of enormous benefit to all.

109. There was no dispute regarding the fact new work streams come into the department and no dispute employees may be transferred to new work streams depending on priorities. The fact Mr Gibson did not, in his outcome letter, explain what changes required to be driven forward, and did not explain

what the changing business priorities may be, did not mean these were incorrect facts.

110. Mr Gibson did, in his letter, refer to "face to face customer interventions". Mr Gibson when asked about this queried whether he was being asked about internal or external customers. There was no dispute regarding the fact the claimant did not meet external customers face to face, but he had met internal customers (for example, other teams) face to face.

111. Mr Gibson also referred in his letter to training new staff and face to face learning. Mr Gibson did not accept the position that because the claimant only had one year's experience in counter avoidance, he would not have the skills and knowledge to pass on. Mr Gibson described the claimant's overall experience as being "invaluable" to new starts. He also described that new work employees could be directed to both virtual and face to face learning. The Employment Judge accepted both of these points were not incorrect facts: Mr Gibson was not stating the claimant trained new staff or did face to face training. The issue was that the situation was not static: with the 28 new trainees arriving, the claimant could be involved in passing on skills and knowledge. Equally, if the claimant was moved to a new stream of work, he could be involved in face to face training. The key issue for Mr Gibson was having flexibility within the workforce to best meet this situation.

112. The Employment Judge concluded, for these reasons, that Mr Gibson did not make his decision based on incorrect facts. The planned structural changes related to the intake of 28 new trainees in May 2022 and how that might be best managed and developed, and the new streams of work coming into the department. The Employment Judge noted the claimant's evidence when he told the tribunal that the joint projects he had been working on with Mr Love came to an end in March/April 2022 and thereafter work had been slow in coming through. It was the start of October 2022 before he got a new scheme. The claimant had previously told the tribunal that at the start of new schemes/projects, collaboration was at its highest because of the new work. This supported Mr Gibson's evidence regarding new streams of work coming into the department.

113. The Employment Judge concluded the respondent had met with the claimant as soon as possible after having received the request, and had discussed the request with him. The request had been carefully considered and the benefits of the changes for the employee had been balanced with the adverse business impact. The request had been rejected for one of the permitted reasons, and the claimant had an opportunity to appeal that decision.

114. The duty on the employer is "to deal with the application in a reasonable manner". The Employment Judge had regard to the case of ***Whiteman v CPS Interiors Ltd ET 2602203/2015*** where an employment tribunal considered that "dealing with an application in a reasonable manner" referred to the decision-making process rather than the substance of the decision. The onus on the employer is to "deal with" and "to handle" the application in a reasonable manner, rather than to make a reasonable decision.

115. The Employment Judge was satisfied the respondent had dealt with the application in a reasonable manner given they gathered all relevant information, discussed it with the employee, dealt with the matter in good faith and carefully considered the application before reaching a conclusion.

116. The Employment Judge acknowledged the respondent did not deal with application within the decision period of three months. The respondent took from the 2 June until the 8 November to conclude the process. The Employment Judge considered there were however, good reasons for this. Mr Graham acted quickly to meet with the claimant, but thereafter there was some delay in the matter getting to Mr Gibson (who did not take up post until late August). This appeared to be because there was some confusion about the correct procedures to apply in circumstances where the claimant was making an application under the "old" procedure and therefore that was the applicable procedure to apply. This was compounded by the fact of ongoing negotiations regarding pay and flexible working conditions. The Employment Judge noted that each manager dealt with the matter quickly once it was placed before him.

117. The Employment Judge considered whether the breach of the decision period meant the respondent had not dealt with the application in a reasonable manner. The Employment Judge noted this was not a situation where the claimant was at work awaiting a decision regarding his request. The claimant was at home and aware he would remain working at home until such time as a decision was made regarding his request. The claimant also knew that at the time he made his request there was no move by the employer to ask employees to return to work: this did not happen until March 2022. The Employment Judge concluded the respondent had dealt with the application in a reasonable manner and the breach of the decision period did not undermine that conclusion in circumstances where there were reasonable and honest reasons for the delay. The Employment Judge acknowledged that if there is a finding for the claimant the issue of delay may impact on the issue of what compensation it is just and equitable to award.

118. The Employment Judge acknowledged the claimant was not offered the opportunity to have a representative present at the meeting with Mr Graham or at the appeal. The ACAS Code provides that an employer "should" allow the employee to be accompanied. The use of the term "should" indicates it is a matter of good practice, rather than a legal requirement. The Employment Judge did not consider the failure to offer the claimant the opportunity to be accompanied undermined the fact the respondent dealt with the application in a reasonable manner.

119. The Employment Judge, having had regard to all of the points set out above, concluded the respondent had fulfilled its duty to deal with the application in a reasonable manner. The Employment Judge therefore decided to dismiss the claim.

120. The tribunal, by a majority (the Employment Judge dissenting) decided the claim was well founded. The tribunal, by a majority (the Employment Judge dissenting) ordered the respondent to pay compensation to the claimant in the sum of £590.04 (being two weeks x net pay of £295.02). The sum of two weeks net pay was considered just and equitable because (i) the claimant has continued to work at home throughout, and has not been required to return to

work in the office and (ii) the claimant, although prepared to talk about an informal arrangement, was not prepared to agree to anything other than an arrangement whereby he worked entirely at home.

Employment Judge: **L Wiseman**
Date of Judgment: **28 December 2022**
Entered in register: **30 December 2022**
and copied to parties