EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105897/2022 & 4105898/2022

Held in Glasgow in Chambers on 24 April 2023

Employment Judge S MacLean

Mrs D Campbell **First Claimant**

Miss E Kerr **Second Claimant**

HM Revenue and Customs **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claims are struck out under rule 37 of the Rules contained in schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the claims have no reasonable prospect of success in terms of rule 37(1)(a).

REASONS

Introduction

1. These claims are brought under Part VIIIA of the Employment Rights Act 1996 (the ERA). The claimants allege that the respondent failed to comply with its obligations under section 80G(1) of the ERA and the Flexible Working Regulations 2014 (the FWR) in relation to contract variations by the claimants.

2. The respondent resists the claims. The respondent argues that the Tribunal does not have jurisdiction to deal with the complaints because:

    a. The claimants did not comply with sections 80F(a) of the ERA and regulation 4(b) of the FWR.

    b. The claimants are not entitled to make a statutory flexible working request under section 80F of the ERA because they had made earlier flexible working requests within a 12 month period and did not have the right to make a statutory flexible working request at the time they made the applications that they rely upon in their claims.

3. These cases were combined at a case management preliminary hearing on 31 January 2023 at which an Employment Judge also ordered that the respondent's application for strike out of the claims under rule 37(1)(a) of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules) be considered on the basis of the parties' written submissions.

4. The respondent sent its draft written submission on the application for strike out to the claimants on 21 February 2023. The parties sent their final written submission to the Tribunal on 7 March 2023. The respondent also provided copies of the claimants' applications relied upon in respect of their claims.

The relevant law

5. Under Part VIIIA of the ERA (sections 80F to 80I) employees have the right to request flexible working for applying for a change in their terms and conditions of employment.

6. Section 80F(2)(a) provides that that the application must state that it is an application under section 80F of the of the ERA.

7. The FWR provides the procedural requirements governing flexible working requests. Regulation 4 provides that a statutory 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.

8. The Acas Code of Practice on "Handling in a reasonable manner requests to work flexibly" (the Acas Code) supplements the basic statutory duty on employers to consider requests reasonably. The Acas Code is not compulsory. The Acas Code states that throughout, the word "should" is used to indicate what Acas considers is good employment practice, rather than a legal requirement. The word, "must" is used to indicate something is a legal requirement."

9. Paragraph 3 of the Acas Code provides:

"A request from an employee under the Employment Rights Act 1996 and regulations made under it must be in writing and must include the following information:

- The date of their application, the change to working conditions they are seeking and when they would like the change to come into effect.
- What effect, if any they think the requested change would have on you as the employer and how in their opinion any such effect might be dealt with.
- A statement that this is a statutory request and if and when they made a previously application for flexible working.

You should made clear to your employees what information they need to include in a written request to work flexibly"

10. Rule 2 of schedule 1 of the ET Rules sets out the following:

"The overriding objective of these rules is to enable employment tribunals to deal with the case as fairly and justly. Dealing with the case fairly and justly includes, so far as practicable –

a. ensuring the parties are on an equal footing;

b. dealing with cases in ways which are proportionate to the complexity and importance of the issues;

c. avoiding unnecessarily formality and seeking flexibility in the proceedings;

d. avoiding delays so far as compatible with proper consideration of the issues; and;

e. saving expense.

A Tribunal shall seek to give effect to the overriding objective interpreting or exercising any power given to it by these rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal."

11. Rule 37(1) (a) of schedule 1 of the ET Rules provides:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds (a) that it is scandalous, or vexatious or has no reasonable prospects of success."

Findings in fact

12. From the productions provided by the respondent: the claimants' applications relied upon in their claims, I made the following findings.

13. The respondent has a special working arrangements policy (the Policy) to allow all "colleagues" to request changes to working patterns. A request is made on an application form which is to be submitted as a formal request for "Special Working Arrangements".

14. The information accompanying the application form refers to some "colleagues" having a statutory right to apply for flexible working with a hyperlink: "Statutory Right to Request flexible working, for further information. Applicants are advised that when applying for a Special Working

Arrangements they will be asked to indicate on the application form whether they fulfil the eligibility criteria to make a statutory request:

a. They are an HMRC employee.

b. They have worked continuously for the civil service for 26 weeks.

c. They have not made another statutory request for flexible working within the previous 12 months; and the date (if any) of that application.

15. On 7 September 2021 the second claimant submitted a Special Working Arrangement application. She did not complete the part of the application form headed "Eligibility (applications under a Statutory Right to Request flexible working)" which asked her to confirm her eligibility to apply for Special Working Arrangements under the FWR/section 80F of the ERA. She did not indicate that she was an employee of the respondent; she had worked continuously for the respondent for the last 26 weeks; and that she had not made a request for flexible working with the last 12 months and the date of the most recent request.

16. On 31 March 2022 the first claimant submitted a Special Working Arrangement application. She did not complete the part of the application form headed "Eligibility (applications under a Statutory Right to Request flexible working)" which asked her to confirm her eligibility to apply for Special Working Arrangements under the FWR/section 80F of the ERA. She did not indicate that she was an employee of the respondent; she had worked continuously for the respondent for the last 26 weeks; and that she had not made a request for flexible working with the last 12 months and the date of the most recent request.

Deliberations

17. I started my deliberations by reading the ET1 claim forms. They were broadly similar. The first claimant referred to submitting her "statutory flexible working application". The second claimant referred to submitting her "statutory request in the form of a Special Working Arrangement". The claimants asserted that they had made statutory requests for flexible working.

18. The right to bring a statutory flexible working request operates independently from existing employment rights. The only complaints before the Tribunal were under section 80H of the ERA.

19. I then referred to the relevant law which I have summarised above before considering the parties' written submissions.

20. The respondent's clarified that it was no longer relying upon ground in paragraph 2(b) above. The respondent's position was that nowhere in their Special Working Arrangement applications do the claimants state that they are making an application under section 80F of the ERA. Further their Special Working Arrangement applications do not state whether they had made a previous flexible working application, and if so, when. The respondent submitted that the FWR and the Acas Code mean that even if the claimants had not made any previous statutory flexible application their requests for statutory flexible working should have stated this. Accordingly the Special Working Arrangement applications do not meet the requirements under the section 80F(a) of the ERA and regulation 4(b) of the FWR; they are not valid statutory flexible working requests; and the claimants do not have the right to complain about the respondent's failure to comply with its duties under the ERA and the FWR and seek compensation.

21. The claimants' position was that they made statutory flexible working requests from the outset. They say that the respondent treated the applications as such and have only retrospectively challenged that they are not statutory flexible working requests. The claimants refute that "they have 'no prospect of success'". The claimants say that they followed "the policy and guidance dictated by the respondent" in the belief that they were making flexible working applications.

22. The claimants' submissions also address the respondent's handling of the requests and the grounds upon which they were refused. In my view these points were in relation to the substantive issues which was not the purpose of this preliminary hearing where no oral evidence was led.

23. I appreciated that the Policy encouraged those employees who were eligible for and wished to make a statutory flexible working request to do so in the Special Working Arrangement application form which was used by all "colleagues". This seemed pragmatic. I did not understand the Policy to state that this was the only way a statutory application for flexible working could be made.

24. The information accompanying the application forms specifically directs colleagues to the eligibility requirements of the statutory flexible working request which are expressly included in the Special Working Arrangement application form and which neither claimant completed. There was no explanation why they had not done so.

25. The claimants submitted that they believed that "they were continuing to make statutory flexible working requests". They also consider that the respondent "accepted their applications as statutory requests" and at every stage of the process handled them as such.

26. While the claimants already had alternative working patterns in place the circumstances under which these had been made and granted was not before me. The Policy allows the respondent to consider Special Working Arrangement applications. The respondent submitted that the claimants' earlier applications also did not meet the requirements for a statutory flexible working requests.

27. The right to bring a complaint under section 80H of the ERA is in respect of a request under section 80H of the ERA and the FWR. The request must state that the application is under section 80F of the ERA; and if and when they have made a previous request for flexible working. The Special Working Arrangement applications relied upon by the claimants do not do so. Indeed the part where that information could readily be provided is incomplete.

28. While there are disputed facts about the handling of the Special Working Arrangement applications, from my findings above I considered that as the mandatory requirements for the statutory flexible working requests were not

complied with. Accordingly the claimants' rights to make a complaint under section 80H and to seek a remedy under section 80I of the ERA did not arise.

29. Having reached that conclusion I considered that the claimants' complaints had no reasonable prospects of success and should be struck out.

30. Given that the claimants have in my view not submitted a statutory flexible working request they would not be precluded from immediately submitting new statutory flexible working requests as section 80F(4) does not operate where the request was not made in accordance with the statutory procedure.

Employment Judge: **S Maclean**
Date of Judgment: **25 April 2023**
Entered in register: **28 April 2023**
and copied to parties