EMPLOYMENT TRIBUNALS

Claimant: Mrs C Hutton

Respondent: Commissioners for HM Revenue & Customs

Heard at: Newcastle Employment Tribunal
On: 7 and 8 August 2023 (evidence, submissions) 29 August 2023 (deliberations)
Before: Employment Judge Jeram, Ms C Hunter and Ms D Newey

Representation:
Claimant: Mr Hutton, husband
Respondent: Mr A Crammond of Counsel

RESERVED JUDGMENT

The claimant's complaints made pursuant to s.80H Employment Rights Act 1996 are not well founded and are dismissed.

REASONS

1. By a claim presented on 27 October 2022, the claimant made a number of complaints against a number of respondents. All complaints were dismissed upon withdrawal by the claimant, leaving only her complaints in relation her flexible working application.

2. The claim has been case managed on 9 February 2023 by EJ Johnson and 8 March 2023 by EJ Arullendran. At the latter case management hearing, the claimant was directed to make any application to amend her claim by 22 March 2023 and provided for consequential case management directions thereafter. That claimant made no

application to amend within the time scales provided for, or at all, until the outset of the hearing.

3. The claimant's applications to amend her claim were discussed and determined; they were allowed in part only, for reasons given orally at the hearing. The final list of issues were as follows.

Issue 1
Did the claimant's application of 6 April 2022 to become a contractual home worker meet the qualifying criteria which required the respondent to comply with the time limits in section 80G Employment Rights Act 1996? In particular,

a. did the claimant's application state that it was made under the statutory scheme, and
b. did the claimant's application specify the date the claimant wished the change to come into effect?

Issue 2
Did the claimant's application of 28 June 2022 form a new application or an amendment to the application dated 6 April 2022?

Issue 3
Did the respondent notify the claimant of the decision within 3 months of the claimant's April or June applications, or any longer period as agreed?

Issue 4
Did the respondent fail to deal with the claimant's application in a reasonable manner in one or more of the following ways -

a. did the respondent provide an untruthful statement in the rejection letter stating that there was no need to isolate
b. did the respondent fail to appoint an independent appeal manager
c. did the respondent fail to follow ACAS guidelines by not considering the claimant's partner's condition

Issue 5
Did the respondent fail to refuse the claimant's application on one of the prescribed grounds set out in section 80G ERA? The respondent relies upon 80G(b)(v) (detrimental impact on quality), section 80G(b)(ii) (detrimental effect on ability to meet customer demand) and/or section 80G(b)(vi) (detrimental impact on performance)

Time
ACAS was notified of the claim on 22 August 2022; an EC certificate was issued on 15 September 2022. The claim was presented on 27 October 2022. The application to amend in respect of Issue 3 above was made on 22 March 2023.

The respondent accepts that all claims were presented in time save for the claim at Issue 3.

For any claim not brought in time, was it *reasonably practicable* for the Claimant to have brought the claims in time? If the Tribunal is satisfied that it was not reasonably practicable to have presented the claim within the statutory time limit, was it brought within such further period as the Tribunal considers reasonable?

Remedy

Should the Tribunal make an order for reconsideration of the flexible working application? The claimant does not seek compensation.

Evidence

4. The claimant gave evidence in support of her own case; for the respondent Angus Robson (at the relevant time, Senior Business Support Officer) gave evidence. As well as reading their witness statements the Tribunal had regard to those documents it was taken to in an agreed bundle of documents comprising of 453 pages.

5. The claimant's request that her husband give evidence on her behalf was rejected, since no witness statement containing his evidence had been prepared or exchanged. Although we found the claimant's oral evidence to be broadly reliable, such was the disparity between the simplicity of her oral evidence when compared with the lengthy and relatively complex matters contained in her written evidence, we were not satisfied that her written evidence, or correspondence said to be written by her, were in fact an accurate reflection of her own position. Whilst we recognise that witnesses can receive significant assistance in the preparation of the case, it was not always clear to the Tribunal that the issues being raised were in fact those of the claimant. In our judgment, we address all aspects of the claimant's case, however they were raised or advanced, even though on occasion they were, or may be, inconsistent.

Findings of Fact

6. The claimant remains in employment as an Assistant Officer in the National Insurance department of the respondent. Her husband is also employed as an assistant officer in the tax department of the respondent.

7. After a period of homeworking as a result of the Covid pandemic, on or around 31 January 2022 employees of the respondent, including the claimant and her husband, were given notice of the respondent's move to a 'New Way of Working', as set out in their 'Balancing Home and Office Working' policy. Employees were informed of their ability to seek hybrid working and provided with extensive guidance and support, together with signposts for sources of further information.

8. The claimant was required to return to office-based working for at least part of the working week, but she did not. The claimant was receiving advice and support from her trade union.

9. The claimant's husband, Mr Hutton, has Chronic Obstructive Pulmonary Disease ('COPD'). We understand that he made an application for contractual i.e. permanent home working and that that was granted as a reasonable adjustment on account of his COPD. He is a union representative, but was not, in these proceedings, representing his wife in his union capacity.

10. On 4 April 2022, an application was made for the claimant to be granted contractual homeworking. The supporting guidance explains that respondent is an office-based organisation and that it expects most employees to be able to balance home and work commitments in line with the '*Balancing Home and Office Working'* policy, which permits flexibility of around 2 days per week. It identifies, however, four instances where contractual homeworking is permitted: as requirement to make a reasonable adjustment under the Equality Act 2010; where the job requires homeworking; as part of a statutory right to request flexible home working; as an alternative to making redundancies. The only ground that was potentially applicable to the claimant was that relating to flexible home working.

11. The guidance reminds the applicant to assess their own situation and to consider other methods of flexible working before making an application for contractual homeworking, providing a list of links to applicable policies. It directs the applicant to speak to their line manager about the intention to apply for contractual homeworking. Thereafter, the guidance provides a single link to the application form. The guidance directs the applicant *'to set out:… When you would like the proposed changes to take effect… If this is a statutory request for flexible as explained above and whether you have made any previous flexible working requests.…'*. The guidance states the circumstances in which an employee is eligible to make a statutory request for flexible home working.

12. The application form reminds the prospective applicant that other methods of flexible working ought to be exhausted before applying for contractual homeworking and it informs the applicant that they may apply for contractual homeworking even if they do not qualify for the statutory right to request flexible working.

13. The application form was completed by, or as we consider more likely on behalf of, the claimant. She stated she was eligible for flexible working but did not respond to the question asking whether she had, in last 12 months, made an application for flexible working. Her stated reason for changing her working pattern was that the *'flexibilities on offer do not provide sufficient certainty for me to manage my work and personal commitments'.* In response to a question asking whether the desired change was connected to a protected characteristic under the Equalities Act 2010, the response was expressed in the affirmative, adding that reliance was placed upon

s.44 Employment Rights Act 1996, suggesting that there was a serious and imminent risk if the claimant were to return to work in the office.

14. The form did not contain any indication that the application was made pursuant to a statutory right to request flexible working and it did not state the date on which the claimant sought to effect the change.

15. The application was sent to the claimant's then new manager Lindsay Goldie-Maughan ('LGM'). The covering email stated *'hello Lindsay, I have attached my application for homeworking under special working arrangements.. '.*

16. The special working arrangements ('SWA') procedure is a different procedure to that adopted for contractual homeworking applications. LGM consulted her line manager, Angus Robson ('AR'). It was his first week at work. There was no suggestion before this Tribunal that AR had any previous relationship with either the claimant or her husband. AR construed the application as being one made, as a covering email suggested, pursuant to the special working arrangements procedure. He recommended to LGM that she submit the application for recommendation / determination by the relevant panel.

17. The SWA panel returned the application to LGM to deal with as contractual home working application. LGM had a meeting with the claimant to discuss the application. She prepared a draft outcome letter. The contents of the draft letter suggested that LGM not only considered and rejected the application as if it were a contractual home working application, but in addition, that she considered and rejected it as if the application contained a statutory request for flexible working. As to the latter aspect, LGM rejected it on a number of potentially permissible grounds, including her view that to grant it would lead to a detrimental impact on quality of work. That draft outcome letter was reviewed by member of Human Resources, who advised removal of the references to a request for flexible working, since no such application had been made and the explanation for a rejection of the contractual homeworking application had already been set out.

18. LGM wrote to the claimant on 31 May 2022, informing her that her contractual homeworking request been rejected and explaining the reasons why. The claimant was reassured that the health, safety and well-being of colleagues was a matter of priority to the respondent and that none of the four grounds on which permanent homeworking, as set out in the guidance, was made out.

19. Identifying that the claimant was not herself a disabled employee, LGM commented that the *'the Government and NHS are advising - that people at high risk from coronavirus (Covid-19) are advised to follow the same guidance as everyone else. This means you will no longer advised to stay at home (shield)'* she added that the threat of *'serious and imminent danger'* was removed and that the expectation was that most colleagues would be able to balance their work between home and office as outlined in the respondent's procedures.

20. The claimant was informed of her right to appeal the decision, in accordance with the contractual homeworking policy.

21. On 13 June 2022, a 6-page letter of appeal was submitted to AR, relying on all three permissible grounds of appeal in the contractual home working policy, namely that a procedural error had occurred, the decision was not supported by information or evidence and that new evidence had become available.

22. AR acknowledged the letter on 26 June 2023 and invited the claimant to a meeting on 29 June 2023.

23. On 28 June, an email was sent from the claimant's email address to AR bearing the subject line *'Arranging an appeal meeting following a contractual homeworking decision'*. The contents of the email stated, somewhat cryptically, that the claimant *'need[ed] to postpone the meeting scheduled for tomorrow due to an issue that has been raised. I will inform you all when the issue has been resolved'.*

24. AR acknowledged receipt of the letter on the same day and agreed to reschedule the meeting, whilst asking for a timeframe when he might expect the claimant to be available.

25. Approximately 15 minutes later, a further email from the claimant's email address was sent to LGM. The subject line was *'REVISED contractual homeworking application' and it contained an attachment with the name 'REVISED contractual homeworking application form2.doc'.*

26. The body of the email stated *'hello Lindsay, it has come to my attention that the form for contractual homeworking application I submitted did not fit the legal definition of a statutory request. I am therefore entitled to make a correct statutory request. I have attached the application'.* The claimant was unable to explain what she meant by what she claimed were her own words; we are not satisfied that she drafted this email.

27. The attached application was headed *'REVISED contractual homeworking application form'.* The contents were identical to those contained in the previous application form save for the following additional features.

28. The form contains a further, and new, heading *'This is a Statutory Application for contractual home working under the Flexible Working Regulations 2014/section 80 F Employment Rights Act 1996'.* Two new queries and their responses appeared in the form: in response to the query *'I would like this working pattern to commence from:*' the response inserted was *'1 September 2022'*; in response to the query *'Describe the working pattern you would like to work in future (days/hours/times worked):*' the inserted reply stated *'I would like to keep my current hours i.e. full-time, 12 PM to 8 PM Monday to Friday and six Saturdays per year'.*

29. The claimant confirmed in her oral evidence that this second application form was obtained using the same intranet link as a first application form, although when asked how, if that were the case, the additional queries in the second application had appeared, she later stated that she may have been given the second application form by somebody, possibly her husband.

30. On 30 June 2022, AR email the claimant stating that a revised meeting would take place on 20 July 2022. He added that because the original meeting had to be rescheduled, the normal timeframe for dealing with the appeal was likely to require an extension. He added *'we will still look to deal with your appeal as soon as possible but please confirm in response to this email to me whether or not you agree to extend the time period for us to meet to discuss your appeal by 25 days'.* He received no such confirmation.

31. The claimant attended the meeting on 20 July 2022, accompanied by her trade union representative (who was not her husband).

32. The hearing was conducted as both an appeal against the decision of LGM and a hearing of the claimant's application for flexible working. AR's principal concern was to ensure that the claimant benefited from a second hearing at which as many documents as possible containing as much information as possible, were available to him to consider. AR was concerned that if he were to treat the applications separately, the claimant would be excluded from relying on the contents of the second application form on the grounds that it was submitted within 12 months of the first. The Tribunal were satisfied that AR was motivated to ensure that he had as full an understanding of the claimant's arguments as he could.

33. We were taken to no evidence to suggest that the claimant's trade union representative, or indeed the claimant herself, objected to the proposal that the matter proceed as an appeal. No issue was taken, by either the claimant or her trade union representative, with the suggestion that the deadline for responding to the appeal was extended; nor, however, did they explicitly agree to it. At the conclusion of the hearing, the claimant confirmed that her grounds for appeal had been fully considered and her trade union representative confirmed that it had been a helpful meeting.

34. On 3 August 2022, AR sent to the claimant his decision to reject her appeal.

35. AR recorded in his outcome letter that the claimant had confirmed at the appeal hearing that it was her intention to submit the first application as a request for contractual home working based on workplace adjustments but that she now wished to be considered under the statutory right to flexible working.

36. He noted that the claimant had, since her first application, become a registered carer for her husband. He stated that the respondent could offer support in the form of a carers passport.

37. He said he understood the claimant's husband's condition came with an increased vulnerability to Covid-19. He stated he was not a medical expert but had reviewed the advice on the HMRC and gov.uk websites. He reproduced the current guidance to the effect that that people who are clinically extremely vulnerable were *'no longer substantially greater risk than the general population'* and that they were *'advised to follow the same guidelines as everyone else on staying safe and preventing the spread of coronavirus'*. AR added however that he appreciated that the claimant would still have concerns about the possible impact of a return to the office and set out a number of working practices that could be explored as possible additional supportive measures.

38. AR's letter continued that he had assessed the merits of the application but could not accommodate the request due to the detrimental impact on quality of work. He stated that the claimant had been unable to maximise the benefits of hybrid working by remaining away from the office; there had been no face to face interaction with her colleagues, which reduced opportunities for collaboration and drives in improving quality; she could not support activities such as floor walking and sharing her knowledge and experience with colleagues in live situations and with more than one person at a time. He cited in his letter an example of this, being the recent difficulty in resourcing high quality floor walkers to upskill two new teams, meaning that the level of knowledge and experience passed on was adversely impacted upon.

39. In his letter AR stated that quality was measured as a team, so the impact on the claimant's personal work was difficult to identify. In cross examination, he confirmed that the claimant's work had been of high quality but that, because the claimant had not in fact returned to work since his appointment, he could not measure the actual impact of her absence from work. His letter continued that the *'show me'* method of coaching was less effective because it could not be delivered in real time with more than one colleague; he stated that the claimant's absence adversely impacted on her ability to contribute to the sense of culture and community in the team.

40. During the Tribunal hearing, the claimant encountered numerous difficulties participating in a remote hearing, from difficulties receiving emails, requiring a adjournments so that Mr Hutton could check other devices for receipt, difficulties navigating an electronic bundle requiring assistance from her husband, and numerous occasions when her Internet connection was lost. AR confirmed that these difficulties illustrated his concerns about the practical problems associated with the claimant's request for 100% remote working.

41. In cross examination, the claimant agreed that it was legitimate of the respondent to value working in a face-to-face setting, because that assisted collaboration and the

generation of ideas and solutions to achieve the best outcome for customers. She agreed that working in this way could help build effective working relationships, help colleagues help each other and support the creation of stronger teams. She agreed that face to face interactions, including the social aspect of connecting could support well-being. She agreed that it was important for employees, individuals and sharing their skills, expertise and knowledge with others to build supportive, collaborative and inclusive teams. She agreed that the respondent had invested heavily in the design of Regional Centres to support collaborative working and the benefits that brings to employees and customers.

42. A grievance was submitted, in which it was alleged that LGM and AR behaved dishonestly and unlawfully. In her fact-finding meeting, LGM stated that when she first received the application, she sent it to AR, because she believed it was not for her to make a decision. She stated AR returned to her otherwise and pointing her to his own manager, Joanne Gordon ('JG'), for guidance. She confirmed that once that happened, 'it was all my investigation and my decision'. She confirmed that she had in her outcome letter quoted directly from the NHS and HMRC websites was unaware of what may, or may not be, contained on the Oldham Council website.

43. In her interview, JG confirmed her understanding that AR worked closely with a dedicated caseworker, raised questions about preparation and procedures but that he was very capable of making decision for himself with expert support. In his interview, confirmed that LGM made the original decision and the appeal stage he followed advice about policy and guidance, making his own decision on the facts.

44. In her oral evidence, the claimant stated that the respondent has failed to follow the ACAS Guidance in that it had failed to *'consider if the person can work from home'*.

45. The claimant confirmed in her evidence that it was no part of her case that the respondent had failed to offer an appeal stage from the decision made by AR.

The Law

46. The relevant statutory scheme is set out in Part 8A of the Employment Rights Act 1996 ("ERA") and the Flexible Working Regulations 2014.

47. There is no issue before us about the claimant's right to request flexible working as set out at section 80F ERA. An applicant employee can apply for a change in terms and conditions of employment relating to matters such as hours of work and place of work. The form of an application for flexible working is provided for in the 2014 Regulations.

48. Pursuant to section 80G(1)(a) ERA the employer is required to deal with the request in a reasonable manner.

49. Section 80G(1)(b) ERA provides that *'an employer . . .shall only refuse the application because he considers that one or more of the following grounds applies - . . . (v) detrimental impact on quality'.*

50. Sections 80G(1A) and (1B) ERA 1996 require a decision to be notified within the decision period, defined as 3 months beginning with the date on which the application was made. In this regard, Mr Hutton directed the Tribunal's attention to the decision of Walsh v Network Rail Infrastructure Ltd Case No: EA-2020-000724-RN (Previously UKEAT/0007/21/RN).

51. The provisions do not create a requirement for a hearing, or for the provision of an opportunity to appeal.

52. ACAS has produced a Code of Practice, Handling in a Reasonable Manner Requests to Work Flexibly and Guidance that the Tribunal must take into account.

53. The claimant sought to rely upon ACAS Guidance entitled 'Working Safely with Covid'. The respondent takes no issue as to whether this was the applicable guidance at the relevant time. In relation to employees who live with someone who is at high risk, the Guidance states:
'if someone lives with a person who is at high risk, they may be worried about being in the workplace. They should talk to their employer. The employer should consider what support they can offer, for example:
    - *Agreeing extra safety measures for the workplace*
    - *considering if the person can work from home'*

Discussion and Conclusions

Issue 1 - The April Application

54. The application submitted on or around 6 April 2022 did not meet the mandatory requirements of s.80F(2)(a) or (b) in that if did not state that it was made under the statutory scheme and it did not specify the date on which the claimant wished the change to become effective. This matter was conceded by both Mr Hutton and the claimant.

Issue 2 - The June Application

55. The claimant accepted, frankly, in her oral evidence that she knew that this second application could not, in some undiscernible way retrospectively 'amend' or render compliant her April application with the provisions of Part 8A of the 1996 Act.

56. Nevertheless, it was a matter that Mr Hutton sought to pursue with some vigour in closing submissions and so we address the point.

57. The first application was submitted as a contractual homeworking application, based on an assertion that the claimant required reasonable adjustments pursuant to the Equality Act 2010, despite the futility of the attempt, intentionally so. That much is evident not only from the clear guidance provided in the application process, but also from what was said by the claimant, or on her behalf by her trade union representative, at the appeal hearing before AR.

58. The second, June, application, was explicitly framed as an application under the statutory scheme for flexible working, but the claimant, with the benefit of her own union representation, agreed to treat that June application as part of an appeal against the outcome of the April application.

59. We add two observations. First, at the time of the appeal, the claimant's position was that the June application was to be treated as an appeal of the earlier contractual home working application rather than, as it was sought to be argued on her behalf before the Tribunal, an application which would have the effect of converting the status of the contractual home working application. Second, before EJ Arullendran, Mr Hutton contended that it was Mr Robson who said the new application was to be considered as an amendment to the original; that is simply not borne out by the evidence before us.

60. For the avoidance of doubt, we reject the suggestion made by Mr Hutton that the reason the first application was presented as an application for reasonable adjustments due to a fault in the respondent's application process. There was no detailed or reliable evidence from the claimant about this and, furthermore, the April application was submitted explicitly on the basis *'other flexibilities'* – of which the guidance specifically cited the statutory right to request flexible working as being one such option - were insufficient to meet the claimant's needs.

61. The point that Mr Hutton therefore sought to argue, that any appeal decision was not notified to the claimant within the decision period, applying Walsh therefore did not arise, but we note in any event that the facts of that case are distinguishable to those with which we are concerned.

62. We conclude that the second application in June did not have the effect of, in some undefined manner, amend the application in June.

Issue 3 – Decision Period

63. The statutory request for flexible working was made on 28 June 2022 was responded to on 3 August 2022; it was provided within the statutory decision period.

Issue 4 – Reasonable Manner

Untruthful Statement of Fact

64. The Tribunal is satisfied that LGM accurately stated the position relating to the lack of a need to isolate – the extracts provided by her accord with the comments made by AR as well as this Tribunal's own experience of the advice being provided around this time.

65. Furthermore, we add the following to our reasoning. Given the claimant's hesitation when being cross examined on the point, we are far from satisfied that she conducted any, or any thorough, search of the internet at the relevant time. The suggestion that the extract belonged exclusively to Oldham Council does not appear to be hers, and is we find, in any event, unlikely. Finally, even if the statement were untrue, it is either irrelevant to the claimant's case, or sufficiently irrelevant to it to lead to a finding that the application had been dealt with an unreasonable manner; even on her own case, there was no suggestion that there was any need for her, that is to say the claimant, to isolate. The way the case was advanced appeared, again, to conflate Mr Hutton's own position with that of his wife.

Independent Appeal Manager

66. The Tribunal accepts the oral evidence of AR, who we found to be an impressive witness of fact as well as someone who was keen to ensure that he carried out his task to the best of his ability.

67. His oral evidence to the Tribunal was supported by that given by LGM and JG at their grievance meeting. His involvement in the application before the appeal stage was restricted to giving his opinion and advice to LGM as to the appropriate procedure. Both he and LGM were new to their roles and we note that the claimant does not suggest that AR or LGM had any dealings with either the claimant or one another before the advice was given. Nothing before us suggests that AR was anything other than a manager who conducted the appeal stage with independence of mind.

ACAS Guidelines

68. In considering the claimant's applications for contractual home working made in April and flexible working made in June, the respondent was, in fact, *'considering whether the person could work from home'* as the ACAS Guidelines suggest. That addresses with the claimant's oral evidence.

69. Dealing with the points made in the claimant's witness statement; the respondent understood that the premise of the applications was that the claimant was worried about being in the workplace because she lived with her husband who was at high risk. The respondent was talking to the claimant. AR did consider what extra safety

measures might be put in place at the workplace; he could not agree them with the claimant because she would not countenance a return to work.

70. The applicable ACAS Guidelines were not breached.

Issue 5 – Refusal on a Prescribed Ground

71. Section 80G(1)(a) does not require that the ground/s for refusal are objectively justified; it is essentially a requirement that the employer act in good faith in refusing the application on grounds that fall within the scope of the section.

72. We have already stated elsewhere that we were both impressed by AR and found that he was genuine in his attempts to ensure that he gathered as much information as possible, in order to provide the claimant with a full and thorough response. We accept that AR genuinely believed that the claimant's physical attendance at work would assist in the maintenance and improvement of quality of working in respect of her own work as well as that of her colleagues; she was a good performer and he believed that to be experience which would help assist, directly through training and indirectly through team cohesiveness, the overall quality of work and relationships.

73. We accept AR's response to questioning by Mr Hutton that AR's outcome letter, and his witness statement necessarily concentrated on the claimant and only indirectly considered Mr Hutton, because it was her application that he was required to consider.

74. We accept that the refusal was because he considered, principally, that to grant the application would have a detrimental impact on quality.

75. For the avoidance of doubt, the absence of a formal appeal stage did not arise as an issue between the parties in this case and nor did its absence cause concern to the Tribunal; the parties agreed to approach the June application as an appeal against LGM's decision and sensibly so; the two applications were based on the same subject matter i.e. the claimant's concern to protect her husband's health.

76. The claimant's claims are not well founded.

_____

Employment Judge Jeram

_____

Date: 2 October 2023