EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104605/2024, 4104236/2024 and 4104237/2024

Held in Glasgow via Cloud Video Platform (CVP) on 30 August 2024

Employment Judge R Bradley

Mr D Doyle	**First Claimant** **Represented by:** **Ms S Christie - Solicitor**
Mr G Lawson	**Second Claimant** **Represented by:** **Ms S Christie - Solicitor**
Mr G Booth	**Third Claimant** **Represented by:** **Ms S Christie - Solicitor**
Lloyds Bank plc	**Respondent** **Represented by:** **Mr L Cunningham - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claims of failure to comply with section 80G(1) of the Employment Rights Act 1996 (duties in relation to a statutory right to request contract variation) are struck out on the basis that they do not have reasonable prospects of success.

REASONS

Introduction

1. On 3 June 2024 at a case management preliminary hearing EJ Hoey fixed the date and purpose of this hearing. It was to determine the respondent's strike out application (which failing a deposit order).

2. His Note (by agreement) combined the three claims and recorded that they should be determined together.

3. All three claimants remain employed by the respondent. The claims complain of failures relative to requests for flexible working under Part VIIIA (sections 80F to 80I) of the Employment Rights Act 1996.

4. EJ Hoey's Note contained various orders which were made with the parties' consent. In summary for this hearing he ordered virtual and hard copies of:

    a. A joint bundle to be sent to the tribunal no later than 7 days before the hearing, so by 23 August

    b. A statement of agreed facts to be sent to the tribunal no later than 7 days before the hearing, so by 23 August.

5. On 29 August the hard copy of the joint bundle was received at the tribunal. It included the statement. After the end of this hearing, Ms Christie kindly emailed to me the joint bundle.

6. It is regrettable that with such a short number of uncontroversial and agreed orders parties' solicitors were not able to comply with them.

The issues for this hearing

7. At paragraph 11 EJ Hoey's Note sets out two issues for me:-

    1. Should the claims be struck out because:

        a. The claims raise the same or substantially similar complaints to previous claims that the Employment Tribunal has already issued rule 52 Judgments in respect of; and/or arise out of or in connection with

facts, matters and events that are settled by a COT3 agreement; and/or are an abuse of process and the principles of res judicata; and/or

b. The claims do not demonstrate a cause of action in relation to the respondent's agreement to reconsider the Claimants' flexible working requests (as each claimant had already made a relevant request, and is limited to one per year); and/or

c. The claims are for "*failure to allow flexible working*", which is not a statutory claim that the Tribunal has jurisdiction to hear

2. In event the claims are not struck out, should the claimants be required to pay a deposit of up to £1,000 as a condition of continuing with the proceedings.

Evidence

8. As per the June Note, no oral evidence was led.

Findings in Fact

9. From the statement of agreed facts I made the following findings.

10. Mr Doyle commenced employment with the Respondent on 10 December 2001.

11. On 18 July 2023, he submitted a flexible working request.

12. On 25 July 2023, the Respondent confirmed to Mr Doyle that his flexible working request had been rejected.

13. The Respondent rejected the flexible working request for the following reason: Your circumstances/request does not meet the criteria for an homeworking contract.

14. On 2 August 2023, he appealed the outcome of his flexible working request.

15. On 29 August 2023, the Respondent informed him that his appeal against his flexible working request had not been upheld.

16. On 13 November 2023, Mr Doyle issued a claim against the Respondent in the Glasgow Employment Tribunal under case number 4106954/2023. This claim related to the Respondent's decision not to grant his flexible working request.

17. On 18 December 2023, Mr Doyle's claim was settled under a COT3 agreement. One term of the COT3 agreement was that the Respondent warranted to reconsider Mr Doyle's flexible working request.

18. On 14 February 2024, the Respondent confirmed that Mr Doyle's flexible working request had been reconsidered and had not been accepted.

19. The Respondent provided the following reasoning for not accepting Mr Doyle's flexible working request: Detrimental impact on performance.

20. On 11 April 2024, Mr Doyle issued a new ET1 regarding the outcome and reconsideration of the flexible working request he made on 18 July 2023.

21. Mr Lawson commenced employment with the Respondent in 2014.

22. On 4 May 2023, he submitted a flexible working request.

23. On 6 June 2023, the Respondent confirmed to him that his flexible working request had been rejected.

24. The Respondent provided the following reason for rejecting Mr Lawson's homeworking request: Any contractual changed to make a colleague a homeworker must be by absolute exception where there is a fundamental colleague adjustment needed. It doesn't appear this situation is in line with precedence for change and therefore we wouldn't be able to support this.

25. On 12 July 2023, Mr Lawson appealed the outcome of his flexible working request.

26. On 8 September 2023, the Respondent informed him that his appeal against his flexible working request had not been upheld.

27. On 11 December 2023, Mr Lawson issued a claim against the Respondent in the Glasgow Employment Tribunal under case number 4107278/2023. This

claim related to the Respondent's decision not to grant his flexible working request.

28. On 21 December 2023, Mr Lawson's claim was settled under a COT3 agreement. One term of the COT3 agreement was that the Respondent warranted to reconsider Mr Lawson's flexible working request.

29. On 15 February 2024, the Respondent confirmed that Mr Lawson's flexible working request had not been upheld following a reconsideration.

30. The Respondent provided the following reason for not upholding Mr Lawson's flexible working request: Detrimental impact on performance.

31. On 20 March 2024, he issued a new ET1 regarding the outcome and reconsideration of the flexible working request he made on 4 May.

32. Mr Booth commenced employment with the Respondent on 30 December 1998.

33. On 30 March 2023, he submitted a formal flexible working request.

34. On 31 March 2023, the Respondent confirmed to him that his flexible working request had been rejected.

35. The Respondent provided the following reasoning for rejecting his flexible working request: Colleagues benefit from coaching and collaboration in the office.

36. Mr Booth appealed the outcome of his flexible working request and, on 13 June 2023, he was informed that his appeal against his flexible working request had not been upheld.

37. On 22 August 2023, Mr Booth issued a claim against the Respondent in the Glasgow Employment Tribunal under case number 4104450/2023. This claim related to the Respondent's decision not to grant his flexible working request.

38. On 14 December 2023, Mr Booth's claim was settled under a COT3 agreement. Within that COT3 agreement, the Respondent warranted to reconsider Mr Booth's flexible working request.

39. On 15 December 2023, Mr Booth's claim under case number 4104450/2023 was formally dismissed.

40. On 26 February 2024, the Respondent confirmed that, Mr Booth's flexible working request had not been upheld following a reconsideration.

41. The Respondent provided the following reasons as to why Mr Booth's flexible working request was not accepted: Detrimental impact on performance and detrimental impact on quality.

42. On 20 March 2024, Mr Booth issued a new ET1 regarding the outcome and reconsideration of the flexible working request he made in March 2023.

Submissions

43. Both parties lodged written submissions to which they spoke. I mean no disservice by neither repeating nor summarising them. To the extent necessary I refer to them below.

44. Mr Cunningham lodged a list of authorities with copies, albeit not all of the caselaw referred to in his written submission was listed and copied.

Law

45. Rule 37(1) of the Employment Tribunal Rules of Procedure 2013 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 prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;(c) for non-compliance with any of these Rules or with an order of the Tribunal;(d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."*

46. Rule 39 (1) and (2) of the 2013 Rules provide *"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or*

argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

47. Rule 52 provides *"Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."*

48. Section 80H(1)(a) and (b) of the 1996 Act provide *"(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—(a) that his employer has failed in relation to the application to comply with section 80G(1) - (b) that a decision by his employer to reject the application was based on incorrect facts".*

49. Section 80I(1) and (4) of the Act provide: *"(1) Where an employment tribunal finds a complaint under section 80H well-founded it shall make a declaration to that effect and may—(a) make an order for reconsideration of the application, and (b) make an award of compensation to be paid by the employer to the employee. (4) Where an employment tribunal makes an order under subsection (1)(a), section 80G shall apply as if the application had been made on the date of the order."* Section 80G sets out an employer's duties in relation to a statutory flexible working request.

Discussion and decision

50. All parties are agreed that the claimants presented their ET1s in the present claims about the outcome and reconsideration of their flexible working requests made variously in March, May and July 2023 (as per the findings at

paragraphs 20, 31, and 42 above). I pause to emphasise that it is agreed that the respondent would ***re***consider (my emphasis) the original 2023 requests.

51. Ms Christie argues (paragraphs 6 to 8 of her written submission) that the reconsiderations which took place at the beginning of 2024 amount to fresh applications for each of the claimants. Under Section 80F(4) of the Act, at the time the applications were submitted, an employee could submit one request a year. However, she says, parties could, by agreement, permit an employee to submit a further request. Under the terms of each COT3, the respondent agreed to a reconsideration of each request. She argues that this amounts to the respondent agreeing to a fresh request for each claimant.

52. I do not agree with that analysis.

53. The respondent's position is that the current claims raise the same or substantially the same complaint as did the 2023 claims. Mr Cunningham's written submission summarised the position in relation to each claimant, but the thrust of his argument which spanned all three claims is that the five cumulative conditions necessary for the success of a plea of *res judicata* ((i) a prior decree of a competent court/tribunal; (ii) pronounced in contested proceedings; (iii) between the same parties; (iv) relative to the same subject matter; (v) on the same grounds) are met.

54. In my view the parties have, correctly, agreed that what took place at the time of the reconsiderations, was a reconsideration of their flexible working requests from 2023. It is difficult to see how that is not a reconsideration of the same subject matter between the same parties. It is therefore difficult to see how the substance of dispute in the present claims would not be on the same grounds and between the same parties. The litigation of those requests was disposed of by Rule 52 dismissals. Neither of the Rule 52 caveats ((a) or (b)) applied. That being so, Rule 52 expressly operates so as to prevent any of the claimants from commencing a further claim against the respondent raising the same, or substantially the same, complaint. The claims are res judicata.

55. Section 80I(1) make express provision for the remedy of a reconsideration by an employer if a complaint is well-founded. Subsection (4) provides that in such a case the employer must treat it as if it were a new or (to use Ms Christie's word) a *"fresh"* request. But in these cases the COT3 forms did not require such a reconsideration. Had the claimants wanted a "*Section 80I reconsideration*" that could have been set out in the COT3 forms. But they did not.

56. In my view and as per the COT3 forms the respondent agreed to reconsider the 2023 requests. They have done so in implement of that agreement.

57. In these proceedings the claimants allege that *"the Respondent failed to deal with the Claimant's request in a reasonable manner as required under Section 80G(1)(a) of the 1996 Act".* On my analysis the requirement to deal with the reconsideration requests conform to section 80G(1)(a) does not arise because the respondent did not agree to do so in that way. There can thus be no failure.

58. In her written submission Ms Christie says "*These claims are in relation to the reconsiderations that took place at the beginning of this year only. These claims do not relate to the facts or matters applicable to the previous claims which were settled by way of COT3s. The Rule 52 judgements issued by the Employment Tribunal relate to the claimant's previous claims only."* As per what I have said at paragraph 54, I do not agree with her submission. The facts and matters of both sets of claims are substantially the same.

59. On that basis, my view is that the claims have no reasonable prospect of success. My judgment therefore is to strike them out under Rule 37. To the extent that Issue 1a focusses on rule 52, the COT3 form and *res judicata*, I answer it *"yes".* I do not accept that the claims are an abuse of process.

60. No deposit order is appropriate. On that question, however, Ms Christie's position was the the claimants' trade union would pay any deposit and was able to pay it, up to the sum sought by the respondent (up to £1000).

61. I note in passing that the claimants are now at liberty to make a further application for flexible working should they wish to do so.

Employment Judge: **R Bradley**
Date of Judgment: **03 September 2024**
Entered in register: **04 September 2024**
and copied to parties