EMPLOYMENT TRIBUNALS

Claimant: Mrs C Ekwunife
Respondent: Sage Housing Group Limited

Heard at: London Central (by CVP)

On: 6/2/25
Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent: Ms M Murphy (Counsel)

JUDGMENT

1. The Claimant's application for the AGOR to be struck out is refused
2. The Respondent's application for the section 80H(1)(b) ERA 1996 claim to be struck out is refused.
3. All and any extant claims in this matter other than the section 80H(1)(b) ERA 1996 claim is dismissed on withdrawal by the Claimant

REASONS

1. The Claimant issued two claims, the first 2218518/2024 in relation to various matters including a refusal dated 29/11/23 of a flexible working request (FWR) dated 17/11/23 and 6011185/2024 in relation to a refusal dated 21/5/24 of a FWR dated 23/4/24. All the claims in 2218518/2024 and all but the section 80G/H ERA claim in 6011185/2024 have already been struck out

2. The hearing today relates to the section 80G/H ERA claim in 6011185/2024

3. I considered a bundle of 179 pages, a written skeleton argument from Ms Murphy, and oral submissions.

Reasons for paragraph 1 of the Judgment above

4. On 3/2/25 the Claimant submitted a request that the Respondent's AGOR dated 20/12/24 should be struck out. This request is based on the Claimant's misunderstanding of the tribunal procedures and is groundless. The Respondent was ordered (para 11 of a CMO dated 23/10/24) to file its AGOR and there is nothing wrong with it.

For paragraph 2 and 3 of the Judgment above

5. In the ET1, C stated that "none of the [statutory] reasons were given and yet my employer refused my flexible working request without giving a valid reason."

6. The Tribunal ordered C to clarify her remaining flexible working claim under section 80G

7. In C's subsequent 'Further Information' (dated 4/12/24), C asserted that R "*had no genuine business reason...*" that satisfied the eight statutory reasons, asserting that instead the reason was race discrimination (comparing her treatment to that of a 'Caucasian Manager'). She also stated "*When the claimant worked 2 days in the office before a 3 day office working arrangement was imposed on her, there were no detrimental impacts on either quality or performance as the claimant met her targets and excelled*."

8. R relies upon two statutory reasons; namely detrimental impact on quality and, or detrimental impact on performance.

9. The relevant part of section 80G reads as follows:

80GEmployer's duties in relation to application under section 80F

(1)An employer to whom an application under section 80F is made—

(a)shall deal with the application in a reasonable manner,

(aza)shall not refuse the application unless the employee has been consulted about the application,

(aa)shall notify the employee of the decision on the application within the decision period, and

(b)shall only refuse the application because he considers that one or more of the following grounds applies—

(i)the burden of additional costs,

(ii)detrimental effect on ability to meet customer demand,

(iii)inability to re-organise work among existing staff,

(iv)inability to recruit additional staff,

(v)detrimental impact on quality,

(vi)detrimental impact on performance,

(vii)insufficiency of work during the periods the employee proposes to work,

(viii)planned structural changes, and

(ix)such other grounds as the Secretary of State may specify by regulations.

10. The refusal letter dated 21/5/24 had to consider a FWR in two parts: (i) a request to reduce hours at work which would include reducing C's lunch breaks from 1 hour to 30 minutes and (ii) a request to reduce the days per week during which C was obliged to attend the office from 3 days to two.

11. The refusal letter reads in relevant part as follows:

- Dealing with the requested reduction in the length of the lunch break: *"As discussed during the flexible working meeting, to ensure the wellbeing of our colleagues*

where anyone works full time hours, we will not look to reduce their lunch break from one hour to 30 minutes. We believe that it is important, particularly when our colleagues are in customer facing roles, that they have adequate time to take a sufficient break during the day."

- Dealing with the request to reduce the days per week during which C was obliged to attend the office from 3 days to two: "*Whilst the business continues to informally support hybrid working in some cases, teams across the business are being encouraged to be present in the office on a more regular basis, and the business will continue to encourage this, some teams are already back to the office on a full-time basis, therefore we are unable to agree to reduce the days you attend the office. Office attendance aids performance and collaboration amongst the team, it also enables us to more easily help with any issues on calls and develop the team accordingly.* "

12. Both these reasons for refusal fall within the meaning of the descriptors "quality" and "performance" which are permitted reasons for refusal in section 80G.

13. The Claimant has confirmed today that

- She now accepts that any race discrimination claim brought in relation to her FWR has been struck out and cannot be pursued and she does not seek to pursue it

- That she is not claiming that the refusal of her request to reduce hours per day at work (which would include reducing the Cs lunch breaks from 1 hour to 30 minutes) was contrary to statute or otherwise unlawful

- That she does not make any section 80H(1)(a) claim (ie she accepts that the procedural requirements in section 80G(1) were satisfied

- That her sole claim is under section 80H(1)(b) - and relates to the refusal of her request to reduce the days per week during which C was obliged to attend the office from 3 days to two - ie she claims that the refusal of that request on quality and performance grounds was based on incorrect facts. The "incorrect facts": relied on are stated by her as follows; "*When the claimant worked 2 days in the office before a 3 day office working arrangement was imposed on her, there were no detrimental impacts on either quality or performance as the claimant met her targets and excelled.*" She added today that the refusal was wrong because she was incurring excessive and unaffordable commuting costs having to travel into the office

14. Commotion Ltd v Rutty [2006] IRLR 171 (EAT) established that although a tribunal was not entitled to decide whether the employer had acted fairly or reasonably under the Flexible Working Regulations, it was entitled to examine the evidence surrounding the employer's decision. If there was no evidence that working part time was not feasible, the

employment tribunal was entitled to conclude that the decision had been based on incorrect facts and was therefore in breach of the Flexible Working Regulations.

15. Singh v Pennine Care NHS 2016 established that In order for the tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal is entitled to inquire into what would have been the effect of granting the application:

16. The claim in this case cannot be struck out without an examination into the facts relied on by the Respondent in concluding that if it granted the Claimant's request (to reduce the days per week during which C was obliged to attend the office from 3 days to two) it would have a detrimental effect on quality or performance.

Employment Judge J S Burns
6/02/2025
For Secretary of the Tribunals

Date sent to parties
13 February 2025