Case Number: 2301268/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS J FORECAST**
MS S EVANS

BETWEEN:

Mr L King

Claimant

AND

Respondent

ON: **28 and 29 September 2017**
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr R Ryan, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim succeeds.
2. The respondent shall pay to the claimant the sum of **£2,664.**
3. The respondent shall reconsider the claimant's application for flexible working.

REASONS

1. This decision was delivered orally on 29 September 2017. The claimant requested written reasons.

2. By a claim form presented on 4 May 2017 the claimant Mr Lewis King claims a breach of the Flexible Working Regulations.

3. The claimant has been working for the respondent supermarket since 10 November 2015 as a Customer Delivery Driver and his employment is continuing. He is based at the respondent's New Malden Extra store. The claimant is responsible for delivering on-line orders.

4. The parties agree that the correct name of the respondent is Tesco Stores Ltd and the record is amended accordingly.

The issues

5. The issues were identified with the parties at the outset of this hearing as follows:

6. Did the respondent fail to deal with the claimant's request for flexible working in a reasonable manner?

7. Did the respondent notify the claimant of the decision on his application within the decision period? Was there an agreement to extend the decision period under section 80G(1B)(b) Employment Rights Act 1996 and was it made retrospectively under section 80G(1C)(b).

8. If the claimant succeeds, should the respondent be ordered to reconsider his application and/or pay an award of compensation to the claimant? What amount of compensation should be paid to the claimant, subject to the permitted maximum under section 80I(2) of the Employment Rights Act 1996, as is considered just and equitable in all the circumstances?

9. It was not disputed that the claimant was a qualifying employee and it was not suggested that his flexible working request was in any way defective.

Witnesses and documents

10. We heard from the claimant and from his colleague Mr Ivan Monev, a customer delivery assistant.

11. For the respondent we heard from Ms Kamlesh Bhachu, People Manager for the Lead Dotcom department and Mr Kevin Bungee, Team Manager for the Lead Dotcom department.

12. There was a bundle of documents of 63 pages. There was a chronology from the respondent, it was not agreed by the claimant.

Findings of fact

<u>The flexible working request</u>

13. The claimant works as a delivery driver in the Lead Dotcom department. His employment is continuing. On Monday 12 December 2016 he submitted a flexible working request to People Manager Ms Kamlesh Bhachu (page 49 with a form of acknowledgement at page 50). He told Ms Bhachu that he wanted to hand in a flexible working request. Ms Bhachu said she could not recall the claimant giving her the request, she says she "found it on her desk" and she put it in a drawer for managers to deal with (statement paragraph 6). She read the request and was aware of the change the claimant was seeking. It was not denied that the claimant handed in the request on 12 December and we find that he did.

14. At the time of the events in question the claimant was studying HR and has since completed his CIPD Level 3. The respondent accepts that it was a very well drafted request and we agree. The claimant told the tribunal that he took a template from some research on Google. It set out that it was a request under section 80F of the Employment Rights Act 1996. It is headed "REQUEST FOR FLEXIBLE WORKING". The claimant set out his reasons and what he thought would be the effect on the business. He said he would like the new pattern to commence from 30 January 2017. We find that it could not have been clearer that this was a request for flexible working under the legislation to which he referred.

15. The claimant's evidence was that when he tried to give the request to Ms Bhachu she told him to give it to a Team Manager. The claimant said she told him that she had never seen such a request. Ms Bhachu told the tribunal that despite having 18 years of service in HR at the respondent she has never previously dealt with a flexible working request and she has never been asked by managers to provide HR input in connection with such a request. Ms Bhachu is the senior HR professional at the New Malden store which has about 650 employees.

16. Ms Bhachu's oral evidence was that she would be the person to deal with appeals on flexible working requests but she has never dealt with one. She had no familiarity with the respondent's Flexible Working Policy. She said that the claimant's request was treated as a "contractual change" which she considered to be different from a flexible working request. When asked by the tribunal whether flexible working requests would often involve contractual changes she said: "*We've missed the flexible working request and concentrated on the change of hours".*

Ms McLeish and Mr Wilson's involvement

17. The claimant's Team Manager was Mr Kevin Bungee who in December 2016 was temporarily overseeing the Dairy Department as the manager of that department was off sick. The claimant tried to give his request to the Picking Manager, Ms Sarah McLeish, who was then overseeing Mr Bungee's department.

18. Ms McLeish did not accept the request so the claimant handed it to Mr Ron Wilson, an Assistant Manager. The respondent accepts that Mr Wilson signed the acknowledgement of the request on 12 December 2016 (page 50). There was some equivocation by the respondent as to whether the document in the bundle at page 49 was the document the claimant submitted on 12 December. We find based on the signed acknowledgement which accompanied it, the document at page 49 was the request submitted on 12 December 2016.

19. The acknowledgement states: "*I shall notify you of my decision on this*

application within three months of this date, unless we agree a longer deadline for this decision". The claimant had researched and understood the statutory decision period of three months.

20. The claimant has a five year old son and was finding it difficult to juggle child care arrangements with his partner on Saturdays, as he and his partner both work. The claimant's existing work pattern gave him Wednesdays and Sundays off. He requested a new working pattern to give him Saturday and Sunday off.

21. When the claimant returned to restock during his shift on 12 December he asked Mr Wilson if Ms McLeish had accepted the request and Mr Wilson told the claimant that Ms McLeish was dealing with it.

Mr Bungee's involvement

22. In January 2017 the claimant asked Mr Bungee what was happening with his flexible working request (Mr Bungee's statement paragraph 6). This was the first that Mr Bungee knew about the matter so he explained to the claimant that he had not seen it. The claimant's colleague Mr Monev overheard the claimant asking Mr Bungee about it and Mr Bungee saying he would look in to it.

23. Mr Bungee told the claimant that he had not seen his written request and asked for a copy. Mr Bungee said in his statement at paragraph 6 that he referred the claimant to the Flexible Working Policy (which we saw in the bundle at page 34). We were also told by the respondent that the policy is on the respondent's intranet and accessible to all staff. The claimant told Mr Bungee that he wanted to move his Saturday shift. Mr Bungee said he would need a copy of the request to be able to deal with it.

24. Mr Bungee's evidence in his witness statement was that he has dealt with a number of flexible working requests in the past and that he had "*a lot of experience with such requests*". He said in his statement that he had both approved and rejected flexible working requests for various different reasons and that he has to balance what the individual is asking for with what is right for the business. He said in his statement that about 5 years ago he was involved in a company-wide project which involved assessing flexibility in the business across a number of stores. He said he had received management training including training on how to deal with flexible working requests and that he understood the process.

25. It was a matter of concern to this tribunal that this evidence (at paragraph 3 of his statement and repeated and confirmed in paragraph 11) was completely contradicted by his oral evidence. Mr Bungee's oral evidence was that he had never dealt with a flexible working request before. We found this to be the more convincing evidence as he had little if any knowledge of flexible working requests when he was questioned about it.

Both he and Ms Bhachu sought to draw some arbitrary distinction between a contract change and a flexible working request. Despite the sworn evidence in his statement about management training, he admitted to the tribunal that he had never seen the Flexible Working Manager Guide at page 37 of the bundle. Neither was he familiar with the policy.

The request to resubmit the application

26. Mr Bungee asked the claimant to resubmit his request. He posed the question in his witness statement "*How could I deal with his request if he just would not give it to me in writing?"* The respondent's manager's guidance clearly envisages that requests need not be in writing. The guidance says (page 39) "*A colleague doesn't need to complete a formal flexible working request form in order to ask you to change their working pattern; they can simply just ask you".* It then sets out what the manager must do in terms of considering the impact on the business, meeting with the employee and informing them of their decision. We find that he could easily have dealt with the request without the claimant giving him a further copy.

27. It is not in dispute that the claimant did not provide a further copy of his original request of 12 December 2016. He repeated his request in a new letter dated 26 April 2017 referred to below.

28. Mr Bungee clearly knew what the claimant wanted. He said at paragraph 6 of his statement that the claimant mentioned that he wanted to move his Saturday shift. We also find based on the claimant's unchallenged evidence on the point, that Ms McLeish also knew what the claimant was seeking as she told the claimant "*We all want Saturdays off, people have been here for years and haven't been able to get Saturdays off".*

29. The claimant had made a formal written request, which was not required under the terms of the respondent's own guidance. We find that it was unnecessary for the respondent to insist upon the claimant submitting it again (when they had on their own admission lost it) when it was clear as to the change he was seeking. If it was not completely clear, a couple of questions in a meeting would have clarified the position.

30. The respondent sought to place responsibility on the claimant for their lack of activity on his request, by him not giving them a further copy. We find that although it might have been helpful, it was not the claimant's responsibility to give them another copy. They had the request, they knew it was a flexible working request (Mr Bungee's statement paragraph 6) and they knew he wanted to change his Saturday shift. If they needed any more detail they could have asked him about it in a meeting.

The decision period

31. The statutory decision period under the legislative framework (set out below) expired on 12 March 2017. The claimant began Early Conciliation on 13 March 2017.

32. The claimant raised a grievance on 10 April 2017 in connection with a deduction from his pay. The respondent made the point that the grievance did not refer to the flexible working request, although there was no reason why the claimant should have made mention of this when he was raising a grievance on a separate matter. The claimant's grievance was upheld by Ms Bhachu. We saw the outcome letter dated 20 April 2016 at page 55. This underlined to us that the respondent was able to deal with matters within a very reasonable time frame.

33. On 26 April 2017 the claimant prepared a letter to Mr Bungee chasing up his flexible working request. The 26 April 2017 was the claimant's day off and he delivered the letter to Mr Bungee the following day, 27 April. Mr Bungee's evidence was that the parties met on 26 April but he accepted he was unclear about this date. We find that there was no meeting on 26 April because the claimant was not at work that day.

34. On 27 April the claimant handed Mr Bungee the letter of 26 April. The letter started with the words: "*Further to a statutory request to change my working hours, I am yet to receive a response*". In this letter the claimant referred to the request of 12 December 2016 and he set out the change he was seeking, namely a request to swap his Saturday shift for a Wednesday. He said "*I would gratefully request that you consider my proposal and provide me with a response by Thursday 4 May 2017 – Failing that, I will accept that as your refusal to change my working pattern".* The 26 April letter refers to a statutory request but it did not quote the legislation in the same way as in the 12 December request.

The 2 May 2017 meeting

35. A meeting took place between the claimant and Mr Bungee on 2 May 2017. It was recorded in a document headed "*Let's Talk (an informal conversation)*" on the respondent's notepaper (page 57). Again the short time between the claimant handing Mr Bungee a letter on 27 April and the meeting on 2 May leads us to find that the respondent is and was quite capable of dealing with the flexible working request within a short timescale.

36. There was no formal invitation to the 2 May meeting. Mr Bungee said orally that he wanted the meeting to "deliver his outcome" to the claimant. We find that this was not a meeting at which there was room for discussion or exploration of the claimant's request. Mr Bungee had made a decision before the meeting and the purpose of the meeting was to tell the claimant the outcome. Mr Bungee did not seek any input from the claimant or take time to consider any representations from the claimant.

37. The outcome was handwritten in the Let's Talk document as follows: "*Unfortunately there is no available shift for Wednesday. Kevin [Bungee] also showed Lewis [the claimant] the Rotas and contracted drivers on Wednesday. The only way we can support you is if you are willing to drop your Saturday and pick up overtime to make up for the hours, however overtime is not always a guarantee".* The last section of the one page document said "*Lewis said he would be losing too much by dropping Saturday. Lewis wants to leave the shifts pattern as it is for the time being".*

No right of appeal

38. It is not in dispute that Mr Bungee did not offer the claimant a right of appeal. This is despite the respondent's policy and guidance giving a right of appeal (pages 34 and 41). Mr Bungee said that he did not do so because the claimant gave no indication that he was unhappy with the outcome and he thought the claimant was satisfied with the decision.

39. Given that Mr Bungee had refused the claimant's request and that the only solution he offered was one on which the claimant could not afford to take a financial risk, we find it unreasonable for him to have formed the view that the claimant was content with the outcome.

40. Mr Bungee also told the tribunal that vacancies on Wednesdays have since arisen within the last four of five weeks.

41. The claimant presented his ET1 on 4 May 2017.

The law

42. The statutory right to request flexible working is set out in section 80F of the Employment Rights Act 1996. It applies to employees who have at least 26 consecutive weeks service. The right to request flexible working is a right to apply for a change in terms and conditions of employment relating to: the hours of work, the times the employee is required to work, where as between his home and a place of business of the employer, the employee is required to work or such other aspect as may be specified by regulations.

43. It does not create a right to work flexibly. The employer must deal with the flexible working request in a reasonable manner – section 80G(1)(a) and must notify the employee of the decision on the application within the decision period (section 80G(1)(aa)). The decision period is set out in section 80G(1B) as the period of three months beginning with the date on which the application is made or such longer period as may be agreed by the employer and employee.

44. The remedy for a breach of section 80G is set out in section 80I. The tribunal may make an order requiring the employer to reconsider the

application and may make an award of compensation. The amount of compensation is such amount as the tribunal considers just and equitable in all the circumstances. Under Regulation 6 of the Flexible Working Regulations 2014 it may not exceed eight weeks pay. A week's pay is subject to the maximum limit as set out in section 227 of the Employment Rights Act 1996. The maximum amount of a week's pay for the relevant period is £479.

45. The relevant legislative provisions are set out below:

Section 80F Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—

(a) the change relates to—

(i) the hours he is required to work,

(ii) the times when he is required to work,

(iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations. . .

Section 80G Employer'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,

(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.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to—

(a) the decision on the appeal, or

(b) if more than one appeal is allowed, the decision on the final appeal.

(1B) For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is—

(a) the period of three months beginning with the date on which the application is made, or

(b) such longer period as may be agreed by the employer and the employee.

(1C) An agreement to extend the decision period in a particular case may be made—

(a) before it ends, or

(b) with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period that is being extended came to an end.

Section 80I Remedies

[(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.

(2) The amount of compensation shall be such amount, not exceeding the permitted maximum, as the tribunal considers just and equitable in all the circumstances.

46. Under section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 we are obliged to take account of any provision of any Code of Practice issued by ACAS which appears to us to be relevant to any question arising in the proceedings in determining that question. We have taken into account the ACAS Code of Practice No. 5 "Handling in a reasonable manner requests to work flexibly" dated June 2014.

Conclusions

47. A flexible working request is a request for a contract variation. This is made clear in section 80F. We were unconvinced and do not accept the respondent's suggestion that there was a distinction between a flexible working request and a contract variation and this is why they did not follow their Flexible Working policy. An employee who makes a flexible working request normally seeks a variation of his working pattern which is very likely to involve a change to their contractual position. The

respondent did not disclose within these proceedings any alternative policy which they suggested might have applied.

48. The claimant made a valid request for flexible working. He made the application to his employer for a change to the times when he was required to work. He wanted to change from Saturdays to Wednesdays. The respondent accepts that it was a very well drafted application. We find that it complied with section 80F.

49. The respondent lost the application and sought to place the responsibility upon the claimant for their lack of activity on it. Although it might have been helpful, there is no obligation on the claimant to provide a further copy. As we have found above, it was clear what he was seeking, their own guidance makes clear that a written request is not necessary and a short meeting would have clarified anything further that they needed to know.

50. The respondent submitted that this was a problem of "interpretation" as to what the claimant was seeking. We find this a most unattractive argument. Employers should not be in a position where they can argue that they "misinterpreted" what was a clear flexible working request as a means of avoiding the effect of the legislation. This is particularly so with an organisation the size of this respondent.

51. We find that the managers at the New Malden store were unfamiliar with their Flexible Working Policy which was clear and comprehensive and readily available to them on the intranet. Mr Bungee's statement said that he referred the claimant to the policy but he had not read it himself. Ms Bhachu and Mr Bungee had never dealt with one before, despite the completely incorrect evidence given by Mr Bungee in his witness statement suggesting great experience in such matters. They were unfamiliar with the policy and the guidance. They did not seek to check it or find out about it or seek guidance from a more senior manager, possibly at Head Office.

52. The respondent is in a position to deal with such matters promptly as was shown by the speedy resolution of the claimant's 10 April grievance and the speed with which an outcome was given from the delivery of a letter on 27 April to the outcome on 2 May. Mr Bungee came to the 2 May meeting not to discuss the matter with the claimant but to deliver the outcome which he had already reached. We find that this did not comply with the ACAS Code of Practice No. 5 "Handling in a reasonable manner requests to work flexibly" dated June 2014 (paragraph 6 which states: "You should discuss the request with your employee".

53. Paragraph 12 of the Code states that if the employer rejects the request they should allow an appeal. It is not in dispute that the respondent did not comply with this.

54. We find that the respondent did not deal with the claimant's request in a

reasonable manner and therefore they did not comply with section 80G(1)(a). The respondent failed to deal with the request when it was submitted in December 2016. They sought to attribute responsibility to the claimant for their failure to deal with it. They did not deal with it promptly when we have found that they were quite capable of doing so. They insisted on a further copy before they would deal with it when their own guidance provides that it need not be in writing. There was no meeting to discuss the request with the claimant, simply an outcome meeting on 2 May 2016. It was the initiation of Early Conciliation that prompted the respondent to do something about the request. It took the respondent 4.5 months to deal with the claimant's request. They did not give a right of appeal as per the ACAS Code paragraph 12. For these combined reasons we find that they did not deal with the request in a reasonable manner.

55. We have also considered whether the respondent dealt with the request within the decision period. It is not in dispute that the respondent did not deal with the request within the three month period in section 80G(1B)(a). The respondent submitted that the claimant's letter of 26 April was a retrospective agreement to extend the period under section 80G(1C).

56. The claimant submitted that if we found this he would accept it, but his submission was that he would not say it had been extended by agreement. He said that the respondent knew about the potential tribunal claim as they were in Early Conciliation and he felt he had to put a date in the letter. The claimant commenced his proceedings on the date stated in the letter, namely 4 May.

57. The respondent did not seek agreement from the claimant to extend the period which they could have done. We find that they are seeking to take advantage of the fact that the claimant stipulated a date in his 26 April letter by which he wanted a reply. We find that if the respondent wished to rely on an agreement then this needed to dealt with explicitly. The respondent has the benefit of a professional HR function. It could have asked for the claimant's agreement to extend the decision period but they did not do so.

58. We have also considered the ACAS Guide on the Right to Request Flexible Working (June 2014) which says on page 5 *"If for some reason the request cannot be dealt within three months then an employer can extend this time limit, provided the employee agrees to the extension".* Our interpretation of this is that if the employer cannot deal with the request in 3 months (including any appeal) then it is for the employer to seek the extension to which the employee can then agree or disagree. We find that it would reduce the effect of the legislation if by stating a date for a reply to a chase up letter, the employee could be construed as agreeing an extension under the terms of the legislation and thus relinquishing any rights he may have. The claimant did not knowingly choose to do this in these circumstances.

59. We find that the respondent was in breach of section 80G(1)(aa). Even if we are wrong about this, the claimant succeeds in any event on the respondent's failure to deal with the request in a reasonable manner.

60. We repeat that Mr Bungee's witness statement was a matter of concern to the tribunal. It was prepared by professional representatives with a statement of truth and Mr Bungee swore to the truth of that statement, saying that he was experienced in dealing with flexible working requests, when this was not the case. He had never dealt with such a request before and he had no familiarity with the respondent's policy or guidance. His witness statement was incorrect and misleading.

Remedy

61. In his Schedule of Loss sent to the tribunal on 23 July 2017 the claimant sought the maximum award of 8 weeks pay plus an order for reconsideration of his request under section 80I(1)(a) and (b).

62. The parties agree that the amount of a weeks' pay for the claimant is £333.

63. The respondent submitted that our findings of fact could not be avoided so that eight weeks pay would be the starting point. It was submitted that although the tribunal rejected the distinction made by the respondent's witnesses it was not in bad faith. The individuals were inexperienced and we should take account of the claimant's failure to provide a further copy of his request. The respondent submitted that this was not a case of ignoring the request or doing nothing about it. There was a meeting on 2 May 2017. The respondent submitted that the award should be up to four weeks. It was not the most serious case, neither was it the best.

64. The respondent did not object to an order that the claimant's flexible working request be reconsidered.

65. The claimant submitted that he should be awarded the maximum. It was an important application for him and he said the respondent only dealt with it quickly the second time around because of ACAS involvement. Without that he believes his request would be outstanding to this day.

66. We accept the claimant's submissions. We rely on our findings on liability and do not accept the mitigation put forward by the respondent. The respondent is a large organisation with an HR function and policies in place which were not consulted. We have found that the claimant was not required to provide a further copy of his request. The respondent knew what he was seeking and a short meeting under the terms of the policy was all that was required.

67. We award the claimant the maximum of 8 weeks pay in the sum of £2,664 and we order for reconsideration of the application in the light of the recent vacancies that have arisen on Wednesdays.

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Employment Judge Elliott
Date: 29 September 2017