Case Number: 3313183/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Thomas Berulis	**v**	GXO Logistics UK Ltd

Heard at: Watford
On: 23 and 24 September 2024,
25 October 2024 (in chambers)

Before: Employment Judge Bedeau
Members: Mr A Kapur
Mr J Sharma

Appearances
For the Claimant: Mr G Oancea, Union representative
Ms Jolita Spillman, Lithuanian and English Interpreter
For the Respondent: Ms S Bowen, Counsel

RESERVED JUDGMENT

1. The claim of direct sex discrimination under section 13 Equality Act 2010, is not well-founded and is dismissed.

2. The claim of delay in deciding a flexible working request under section 80F Employment Rights Act 1996, is not well-founded and is dismissed.

3. The provisional remedy hearing listed on Friday 20 December 2024, is hereby vacated. The parties must not attend.

REASONS

1. In a claim form presented to the tribunal on 14 November 2023, the claimant made claims of direct sex discrimination, and that the respondent delayed in determining his flexible working request beyond three months under s.80F Employment Rights Act 1996.

2. In the response presented to the Tribunal on 24 January 2024, the claims are denied. The respondent averred that the flexible working request did not meet the statutory requirements, and, in any event, the request was considered but rejected due to business needs. The same decision was taken on appeal.

The issues

3. At the case management preliminary hearing held on 4 June 2024 before Employment Judge Hanning, the issues under the two claims were clarified. They are as follows:-

Direct sex discrimination (Equality Act 2010, s.13)

4. Did the respondent, on or around 30 August 2023, refused the claimant's request to change his working days from Tuesday to Saturday to Monday to Friday?

5. Was that less favourable treatment?

6. The Tribunal will decide whether the claimant was treated worse than someone else was treated There must be no material difference between their circumstances and the claimants.

7. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

8. The claimant has not named anyone in particular who they say was treated better than they were.

9. If so, was it because of sex?

Request for flexible working (Employment Rights Act 1996, s.80F)

10. Did the claimant, on or about 11 May 2023, make a complaint request for a change in his terms and conditions of employment?

11. If so, did the respondent notify the claimant of the final outcome of the request within three months of the request or any agreed extension of time?

The evidence

12. The Tribunal heard evidence from the claimant, who called Mr Gheorghe Oancea, Union Representative, as a witness.

13. On behalf of the respondent, evidence was given by Ms Jacqueline Farrow, Transport-First Line Manager; and Ms Catherine Power, Human Resources Manager. It applied for the witness statement by Mr Scott Gill, Assistant Transport Operations Manager, to be considered and be given such weight, if any, the Tribunal considered appropriate.

14. In addition to the oral evidence the parties produced a joint bundle of documents comprising of 134 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

15. The respondent is a transport and logistics company with a depot in Enfield.

16. The claimant commenced employment with the respondent on 24 October 2022, as a Heavy Goods Vehicle Driver, driving a 44-tonne articulated lorry. He was contracted to work 48 hours a week and worked Tuesday to Saturday. He would start at 7am in the mornings working a 9.5-hour shift, sometimes longer . He is from Lithuania and lawfully resides the United Kingdom with his wife and two school-aged children. (pages 66-73 of the bundle)

Flexible working request policy

17. The respondent has a Flexible Working Request Policy applicable to those requesting flexible working. The eligibility criteria, section 3.1 of the policy, at the time stated that the applicant had to be working for 26 weeks at the date of the request and not made a formal request within the previous 12 months.

18. It defines flexible working and states that an applicant must submit a written application if they would like their flexible working request to be considered under the formal procedure. The written application must include the following:-

> "
> - Confirmation that they are making a flexible working request under this procedure;
> - The date of the application;
> - The changes the colleague is seeking to make to his/her terms and conditions and proposed effective date of the change. The colleague should provide as much information as they can about their current and desired working pattern including working days, hours and start and finish times;
> - How the colleague meets the eligibility criteria set out in the eligibility section at 3.1 above;
> - The reasons for their request;
> - What impact the colleague thinks the requested change would have on the Organisation and identify the effect the change would have on the work you do, that of your colleagues and on service delivery;
> - How, in his/her opinion, any such effects might be dealt with;
> - If the colleague has made a previous formal flexible working request the date the colleague made that application."

19. The policy provides that upon receipt of the written application the applicant should be invited to attend a meeting to discuss their request. The request:

> "Should be carefully considered, weighing up the benefits to the colleague and the company against any adverse impact and wherever practicable it should be accepted."

20. Upon reading paragraph 5.1 of the Flexible Working Request Policy, it is not stated that it is a requirement that the person applying for flexible working should complete the form provided. The provision states that the

application should be in writing covering the points already referred to above.

21. The applicant has the right to be accompanied at the meeting either by a work colleague or a trade union representative. Within 14 calendar days after the meeting the respondent is required to write to the applicant to either agree a new work pattern and start date; propose an alternative arrangement to that requested; or where due to business or operational requirements, the company is unable to agree to the request, provide clear business grounds as to why the application cannot be accepted and the reasons why the grounds apply in the circumstances, together with the details of the appeal process.

22. The application can be refused because the respondent considers that one or more of the following grounds apply:

> "• The burden of additional cost.
>
> • The detrimental effect on ability to meet customer demand.
>
> • Inability to reorganise work along existing staff.
>
> • Inability to recruit additional staff.
>
> • Detrimental impact on quality.
>
> • Detrimental impact on performance.
>
> • Insufficiency of work during the periods the employee proposes to work.
>
> • Planned structural changes."

23. Where a written request has been rejected, the applicant is given the right to appeal that decision.

24. After a request to work flexibly has been submitted, regardless of the outcome, the applicant must wait 12 months before they become eligible to submit another flexible working request. (60-64)

25. The requirement that the applicant must have been working for the employer for 26 weeks was repealed by the Flexible Working (Amendment) Regulations 2023. From 6 April 2024, the right to flexible working applies from day one. Th provision does not apply to the claimant as his request pre-dated the 6 April 2024.

<u>The claimant's flexible working request</u>

26. As a result of Britain's withdrawal from the European Union, the claimant's extended family members, who were looking after his two school-aged children, returned to Lithuania. The claimant's wife is an Events Organiser working weekends. He wanted a working arrangement whereby he could pick his children up from nursery and school in the afternoon. His son at the time was three years of age and his daughter was older, about seven or eight years of age.

27. On 11 May 2023, he made a written request for flexible working. It was not on the respondent's Flexible Working Request form. In it he wrote to Mr Cliff Chegwidden, Transport manager, the following:-

> "Dear Cliff,
>
> I am writing to make a statutory flexible working request.
>
> I have not made any previous flexible working request.
>
> My current working pattern is five days shift Tuesday to Saturday.
>
> I would like to change my working pattern as follows: Five days shift Monday to Friday.
>
> The reason I want this change is because my wife is working weekends and I need to look after my children.
>
> I would like this change to start from 5 June 2023.
>
> I look forward to your reply."
>
> (78)

28. In his request he did not fully comply with the requirements in the respondent's policy. He did not specify what shift pattern he was proposing on the days requested, and the potential consequences of the proposed changes on the respondent's undertakings. Upon receipt of his request, he was provided with a copy of the respondent's Flexible Working Request Form and invited to complete all of the sections. He completed the form and sent it to the respondent on 19 May 2023. In the form he was invited to set out details of the change to the pattern of working he was requesting but that section was not completed. He gave the date when he would like the changes to take effect, namely 5 June 2023. He was required to give suggestions on how any adverse effects of the request may be overcome but that section was left blank. He then signed and dated it. There were no details of the specific hours he wanted to work or how those proposed changes would affect the wider team. (70)

29. On 6 June 2023, he was written to by Ms Jacqueline Farrow, Transport First Line Manager, who invited him to a meeting on 8 June 2023, in accordance with the policy. He was informed of his right to be accompanied either by a work colleague or a trade union representative. The letter further stated:

> "At the meeting, you should be prepared to discuss with us the details of your request, the date from which you wish the new working arrangements to commence and the effect these might have on the business, your department and your colleagues.
>
> Following the meeting, a decision will be made regarding your request and this decision will be communicated to you in writing no later than (14 days) after the meeting, or as soon as reasonably possible."
>
> (80)

Flexible Request Meeting on 8 June 2023

30. The claimant attended the meeting on 8 June unaccompanied and said that he wanted to work Monday to Friday as he was struggling with childcare. His wife was looking to change her shift pattern and was unable to get help from his extended family. He could only work six days. Ms Farrow explained to him that there were no available day shifts on Monday to Friday under the existing Monday to Friday shift patterns as the respondent already had sufficient drivers working on those shifts. She also explained that the respondent would need to have his continued support with weekend work as it was usually short-staffed. However, it could accommodate a reduced commitment and proposed a change to his core hours of 48 on Monday to Friday with an afternoon start time and additional requirements to work every other Sunday, which would be paid as overtime. He could choose his start time for his core hours provided it was from 1pm onwards, that being, from either 1pm, 3pm, or 4pm. The claimant said that 1pm would be better but he would need to discuss it with his wife. The meeting then concluded on the basis that, according to Ms Farrow's notes of the meeting, the claimant would speak to his wife and revert to her with his response. (81-82)

31. Ms Farrow expected the claimant to communicate with her about whether the proposed changes were acceptable or not, but a month went by without hearing from him.

32. Mr Oancea emailed Ms Sarah Macriedes, Human Resources Advisor, on 23 June 2023, stating:

> "Hello Sarah,
>
> I hope you are well.
>
> I am contacting you to ask about the status of Mr Berulis flexible working request and whether you had a chance to review it yet?
>
> The letter reached the transport Office on 11 May 2023, this is the time the clock started ticking. I cannot emphasise enough how much this impacts Mr Berulis' life, he struggles to look after his children over the weekends.
>
> If you cannot find my previous email, I have included everything again with his email to clarify, please can you review the request and let us know if you are interested to adjust Mr Berulis' shift pattern accordingly.
>
> If you are not going to be able to review the request, nor to adjust Mr Berulis' shift pattern at least temporarily by 1 July 2023, we will be left with no options other than starting the early conciliation process."
>
> (83)

33. At the time this email was sent Ms Farrow was on leave and was made aware of Mr Oancea's email upon her return. She had not heard from the claimant regarding her suggestion made at the meeting and emailed him on 7 July 2023. She stated that he had not responded to the alternative flexible working option she had offered and wanted to know his decision. (129)

34. The claimant responded the following day in a text message. He wrote:

> "Hello Jacky, Further to your text from yesterday, my position is as follows: the alternative option should not change my shift pattern from am to pm, which would create more difficulties for me and my family. I would also like to hear why this was necessary, whilst my shift remains the same Tuesday to Friday. The only change was Monday, and you always need drivers on Monday. I was asked to work my Mondays as RDW. Thanks"
>
> (130).

Refusal of the flexible working request

35. He was again inviting Ms Farrow to allow him to work Monday to Friday but did not specify the hours. Ms Farrow attempted to accommodate him by suggesting Monday to Friday with a start time in the afternoon as early as 1pm, in addition to working alternate Sundays. In a letter dated 18 July 2023, she informed him that his flexible working request application was declined. She stated the following:-

> "The reason for this is set out below.
>
> You requested to change to a Monday to Friday driving position as your partner was working weekends. At the time you were advised that this shift request was unlikely and an alternative was offered to you.
>
> You requested a change to the pattern of your working hours unfortunately, we believe that agreeing to this change would:
>
> - Impose an unreasonable burden of additional costs to the organisation.
> - Be inappropriate due to planned structural changes.
>
> The reason why this is relevant to your application for flexible working is that we do not have a shift pattern available to accommodate your request.
>
> Please be aware that you may only submit a flexible working request once in any 12 month period."

36. The claimant was then advised of his right of appeal within 14 days of receipt of the letter to Mr Scott Gill, Assistant Transport Operations Manager. (87)

37. Ms Farrow, in her evidence before us, said that reference to planned structural changes was put in error in her letter, and clarified that there were no planned structural changes at the time She stated that although not set out in her outcome letter, the flexible working request was refused on the basis that it would have a detrimental effect on the respondent's ability to meet customer demand on weekends, therefore, would force it to incur additional costs. The flexible working request would, if granted, pose an unreasonable burden on additional costs on the organisation. The respondent did not have a shift pattern available to accommodate the claimant's request. As such, it would have caused the business to incur additional costs to ensure that it had suitable cover on weekends. She stated that Saturday deliveries are condensed due to no deliveries being made on Saturday afternoons The respondent could have accommodated the claimant with a later start time which was offered to him. This was in line with delivery profiling, store opening and closing times, store delivery

times, availability of Iceland store staff to accept deliveries, or store frequency delivery. Morning drivers need to work at least one day over the weekend, preferably Saturday morning.

Appeal against the refusal of flexible working

38. The claimant appealed on 20 July 2023 stating:

> "You have refused my request for flexible working because:
>
> 1. Impose an unreasonable burden of additional costs on the organisation;
>
> 2. Be inappropriate due to planned structural changes.
>
> I believe none of the eight statutory grounds for you to refuse my flexible working request apply to my proposal, as set out in the legislation (s80G Employment Rights Act 1996).
>
> Regarding your first reason to reject by request "Burden of additional cost", I believe that the way I am proposing to work under the Flexible Working Arrangements (such as swapping shifts Saturday with Monday, rather than going part-time) would be no additional cost to you.
>
> The second reason to reject my request "Inappropriate due to planned structural changes", this is because the way I am proposing (my shift pattern remain unchanged Tuesday to Friday, the same start time, moreover, you requested me to work Mondays) Would not cause planning structural changes,
>
> I would like to add that the reason I was asking for flexible working is to care for my children, and my need to work this way may not be forever as, (children do grow up!).
>
> Since 11 May, the date of my original request, I brought my family from abroad to care for my children, but this was the only alternative option I have had, and soon, for me working Saturdays will force me to seek for parental leave under the company Personal and Domestic Leave Policy and section 57A of the Employment Rights Act 1996 because of the disruptions for the care of the dependents.
>
> I would like to hear from you in due course, the matter needs to be dealt with in less than three months including the appeal."
>
> (89)

39. On 20 July 2023, Mr Gill invited the claimant to an appeal meeting on 1 August 2023 at 11 o clock. He wrote that Ms Catherine Power, Human Resources Manager, would also be in attendance. (90)

40. The meeting on 1 August 2023 was cancelled and rescheduled for 8 August. A letter was sent to the claimant by Mr Gill, dated 3 August 2023, inviting him to the meeting on 8 August. The claimant told the Tribunal that he did not receive that letter and that, during the course of these proceedings, it was the first time he saw it. (85)

41. He said that he received a further invitation letter dated 3 August 2023 inviting him to a meeting on 15 August 2023 at 10.30am. That meeting did not take place as he was on holiday. (96)

42. A further invitation was sent to him dated 8 August for a meeting scheduled to take place on 25 August 2023, which he attended. (97)

43. The appeal meeting was attended by Mr Gill, Ms Power, the claimant and his trade union representative, Mr Oancea. The claimant was asked to explain why he made a flexible working request. He said that he worked Tuesday to Saturday and his shift started at 3am. He asked to work Monday to Friday but was refused. Working Saturdays was not viable because of childcare, and he had no extended family members who would have been able to help. He said that his wife had started a new role in party planning, with no set working pattern. He was asked by Mr Gill whether he had any other alternatives. He replied that he was proposing Monday to Friday or to go to work four days Monday, Tuesday, Thursday and Friday, 12-hour shifts. He was asked whether he could consider a later start time, to which he replied 7am was the latest start time for him. He was asked what the respondent would gain from his proposed pattern of work. His response was when he knew of his wife's work pattern, he may be able to come in either on Saturday or Sunday. He was asked whether he would consider working Sunday to which he responded in the negative. He said that it was not possible to work afternoon shifts.

44. He was asked to explain why he said in his letter that none of the reasons met the statutory reasons for refusal but was unable to do so. He referred to emergency leave and was invited to set out the relevant details in the Employment Act, but he was, again, unable to do so. Mr Gill said that one of the reasons for the refusal was cost and that weekend work had a cost. If the respondent was able to offer Monday to Friday to everyone it would not be able to offer weekend deliveries and that it tried to incorporate weekend working to cover the schedules. The claimant said that he could offer at least one day per month working weekends. At this point Mr Oancea intervened to say Mondays were very busy.

45. Mr Gill then adjourned the meeting for nine minutes. Upon reconvening, he said that he had looked through the letter the claimant sent referring to three months having passed. The claimant responded by saying three months was the deadline by which there should be a final outcome. Mr Gill pointed out that the respondent sent the outcome letter dated 18 July 2023. The flexible working request was made on 11 May with the meeting on 8 June. Prior to the outcome letter options were proposed verbally, and that the scheduled appeal meetings, apart from 25 August, were all cancelled due to the claimant's representative being unavailable. The claimant was invited to discuss other options and responded by saying that he could move his start time and could work extra if he was available. Mr Gill said that he would consider what they discussed and would give his decision in writing.

46. The claimant was given a copy of the notes of the meeting. (102-106)

47. On the same day as the appeal meeting, the claimant wrote to Mr Gill stating that his original flexible working request was on 11 May 2023 and that the three months' time limit had passed. He further stated that there was no expressed agreement to extend the time past the three months and that none of the options helped or solved his difficult family situation. He

invited Mr Gill to consider his original request and that he could start at 7am in the morning. (107)

Appeal outcome

48. Mr Gill's outcome letter is dated 30 August 203. In it he wrote:-

> "Dear Thomas,
>
> **Outcome of appeal meeting – flexible working request**
>
> I write further to the appeal meeting that you attended on 25 August 2023. The meeting was conducted by myself, and I was accompanied at that meeting by Cathy Power. You attended this meeting, and you were accompanied by Mr Gheorghe Oancea.
>
> The purpose of the meeting was to discuss your grounds of appeal. You appealed on the basis that at weekends you would like to be home to take care of your children as your partner works on Sundays.
>
> Having given the matter thorough consideration, I regret to inform you that your flexible working request has been declined. The reason for this is set out below.
>
> - You stated in your appeal letter that we should consider the Employment Rights Act 1996. During our meeting you could not explain what the legislation states.
> - You stated in your appeal letter that we should consider the Personal and Domestic Leave Policy section 57A. During our meeting you could not explain what the legislation states.
> - You also wrote in your letter that you provided on 25 August 2023 that the three month time limit had passed. This was proved to be incorrect as you had received an outcome letter on 18 July 2023.
> - You could not provide any further suitable shift patterns for me to consider.
>
> You requested to work Monday to Friday. Unfortunately, we think that agreeing to this change would:
>
> - Have a detrimental effect on the organisation's ability to meet its customer demands.
> - The reason why this is relevant to your application for flexible working is that weekend working is required to meet the needs of the business.
>
> Please be aware that you may only submit a flexible working request once in any 12-month period.
>
> My decision is final, and I can confirm that the appeal process has now been exhausted."

(108-109)

49. In Ms Power's evidence she told the Tribunal that during the appeal meeting Mr Gill advised the claimant that if the respondent agreed to his request to work only the Monday to Friday shifts without any weekend work, it would

have a detrimental impact on the company's ability to offer weekend deliveries.

50. Neither in the notes of the appeal meeting nor in the outcome letter does Mr Gill refer to his decision having been influenced by the claimant's sex or by sex. Further, in the claimant's correspondence and during the initial meeting with Ms Farrow, and in the appeal meeting, does he assert the decision to refuse his flexible working request was significantly influenced by his gender.

Advertisement for Class1Driver

51. The claimant produced in the bundle a screen shot taken on 28 March 2024, reportedly showing that the respondent was advertising a Class 1 Driver position working Monday to Friday. (112)

52. Although in the screen shot it does have Monday to Friday, in the final paragraph it states that the driver would be working a minimum 48 hours a week on any five from seven shift patterns and that the site operates 24/7. "Therefore we have a variety of start times available, to be discussed at the time of your application."

53. The claimant produced this to demonstrate that the respondent was seeking someone to work Monday to Friday and that it was possible to work starting in the morning.

54. This matter was addressed by Ms Power in her evidence before us. She said that she was not familiar with this advertisement, and it is not dated so it was not clear to her when the job role was advertised. On reading the job description it was not necessarily a Monday to Friday role because the Class 1 driver was required to work any five out of seven shift patterns, which is common at Enfield, The respondent did not publish the advertisement. It was published by Indeed and they may very well have misquoted the Monday to Friday shift pattern.

55. Although the claimant sought to rely on this advertisement to support his case that the respondent was willing to allow a Class 1 Driver to work Monday to Friday, starting in the morning, the same as his flexible working request, we accepted Ms Power's evidence. There is no date to this advertisement, and it was not produced by the respondent. The claimant claimed that the screen shot was taken on 28 March 2024, but there is no evidence that such a vacancy was available at the time of the claimant's flexible working request was being considered by the respondent.

Driver composition in the workplace

56. The respondent operates in a male dominated industry. The overwhelming majority of drivers are male. It had taken on recently one female driver. Ms Power told us that, in reality, very few women apply for driver roles. If the respondent was to receive applications from women in respect of driver positions, they would be taken equally seriously as male applicants. At the Enfield site it employs one female driver out of approximately 200 drivers.

Two Drivers' flexible working requests

57. We were told about the flexible working requests made by two male drivers: Julian and Darius. The flexible working request procedure was followed in both their cases and their requests were approved. They both wanted to spend more time with their children.

58. In Julian's case, his requested hours of work were 48 hours a week working Sunday to Wednesday with a 2pm start. He was also required to work such additional hours maybe necessary for the satisfactory completion of his duties. (113-120)

59. In Darius' case, he is a single parent of two school-aged children. He too was required to work 48 hours a week, working Week 1: Monday to Friday, Week 2: Tuesday to Saturday, and was required to work such additional hours necessary for the satisfactory completion of his duties. He would start at 6am in the morning, working 9.6 hours per shift. (121-128)

60. We were satisfied, and do find as fact, that in both Julian's and Darius' cases their requests for flexible working due to childcare were approved and they both were prepared to do work either on Sunday or Saturday.

Submissions

61. We have taken into account the oral and written submissions by Ms Bowen, counsel for the respondent, and by Mr Oancea, on behalf of the claimant. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. We have also taken into account the cases that they have made reference to.

The law

62. Under section 13, EqA direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

63. Sex is a protected characteristic, sections 4 and 11 EqA.

64. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

65. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."

> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

66. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the Tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a Tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the Tribunal is in a position to make positive findings on the evidence one way or the other.

67. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

68. "Could decide" must mean what any reasonable Tribunal could properly conclude from all the evidence before it. This will include in that case, evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The Tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

69. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the Tribunal, at the first stage, from hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the Tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

70. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, such as, race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment but for a non-discriminatory reason.

71. This approach to the burden of proof test was approved by the Supreme Court in the case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, Lord Leggatt.

72. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory, B-v-A [2007] IRLR 576, a judgment of the Employment Appeal Tribunal.

73. The Tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex, Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

74. The protected characteristic must have a significant influence on the decision to act in the manner complained of. This is subjective, Gould v St John's Downshire Hill [2021] ICR 1, a judgment of the EAT.

75. As we have already made reference to, in relation to flexible working, prior to 6 April 2024, an employee who had been working continuously for 26 weeks with their employer, had the right to request flexible working. The position has since changed, and the right applies from day one. The governing statutory provisions are the Employment Rights Act 1996, "ERA 1996" and the Flexible Working Regulations 2014, as amended.

76. Section 80F(1) ERA 1996, states that an employee has the statutory right to request a contract variation. He or she may apply for a change in their terms and conditions of employment if the change relates to the hours of work; the times when they are required to work; where they are required to work; and "such other aspects of his terms and conditions of employment as the Secretary of State may specify by regulations."

77. Of importance is section 80F(2). This provides that:

> "(2) An application under this section must—
>
> (a) State that it is such an application,
>
> (b) Specify the change applied for and the date on which it is proposed the change should become effective, and

> (c) Explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with…"

78. Prior to the 6 April 2024, an employee could only make one request in 12 months, s.80F(4).

79. Once an application has been made under s.80F, the employer must deal with it in a reasonable manner and shall not refuse it unless the employee has been consulted, s.80G(1)(a) and (aa).

80. Section 80G(1)(b) provides that an employer shall only refuse the application if they consider that one or more of the following grounds apply:-

> "(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."

81. The employer must notify the employee of its decision within three months from the date on which the application is made, or within any longer period agreed between the employee and the employer, s.80G(1B)(a) and (b).

82. A complaint may be presented to an Employment Tribunal under s.80H, on grounds that the employer has failed to comply with s.80G(1), or the decision to reject the application was based on incorrect facts, or that the employer's notification under s.80G(1D) did not satisfy the requirements under s.80G(1D)(a) and (b) which are the provisions for treating an application or an appeal as having been withdrawn.

83. Where a complaint under s.80H is held to be well-founded, the Tribunal shall make a declaration to that effect and may award compensation in such an amount if it is just and equitable in all the circumstances, up to the maximum of 8 weeks' pay, regulation 6, Flexible Working Regulations 2014 and s.80I.

84. We were referred to the two Employment Tribunal cases in which it was held that the provisions in s.80F(1) and (2) are mandatory. In that the applicant must comply with the statutory requirements. Hussain v Consumer Credit Counselling 1804305/2004 and Mrs S Maher v Taylor Engineering & Plastics Ltd 2401590/2020. These cases are only of persuasive authority on the Tribunal.

85. In the Hussain case, the claimant wanted to spend more time with his three children who were between 2 and 10 years. He requested that his work pattern should change to enable him to work from 8am to 4pm. He failed to specify the date on which he wanted the change to take effect, and failed to explain the effect the proposed changes would have on his employer. It was refused on the ground that it would have a detrimental effect on the respondent's ability to meet customer demand. He presented a complaint under s.80H. The Tribunal held that the failure to comply resulted in there being no valid claim before it to adjudicate on.

86. A similar conclusion was reached in the Maher case. Although the application was made for childcare reasons, the claimant did not comply with the statutory requirement of s.80F(2).

87. The ACAS Code of Practice 5 – Handling in a Reasonable Manner Requests to Work Flexibly (2014), sets out the steps an employer should consider taking once a flexible working request is received, such as: discussing it with the employee; consider the request, that is, how it is likely to benefit the employee and the employer, and if it should be rejected the provisions in s.80G(1)(b) must apply; and dealing with the request, including the appeal, promptly. The Code has been replaced by the ACAS Code of Practice 5 – Code of Practice on Requests for Flexible Working (2024) which came into effect on 6 April 2024.

Conclusion

Direct sex discrimination

88. Following the case of Efobi in the Supreme Court, the burden is on the claimant to establish a prima facie case of less favourable treatment. From the evidence given to the Tribunal and having regard to our findings of fact, it is clear that the respondent had granted, at least in two cases, flexible working requests to male drivers. The claimant's argument that had he been female he would have been treated more favourably, is not borne out from the evidence and is more conjecture. There is only one female driver working at the Enfield Depot and there was no evidence that she had put in a flexible working request. There was no evidence adduced that either Ms Farrow or Mr Gill, or both, were significantly influenced, or motivated in their decisions to decline the claimant's flexible working request, based on his sex, or sex.

89. The claimant, in his witness statement, stated that another person called Martin was given shorter shifts. We did not hear evidence in relation to Martin's circumstances. We agree with Ms Bowen's submissions that reliance on Martin did not assist the claimant's direct sex discrimination claim as it shows that the respondent's decisions were not motivated by sex. Ms Farrow told us that had it been a flexible working request by a female driver whose circumstances were similar to those of the claimant, that request would be taken seriously and that the requirement to work weekends would still apply.

90. We have come to the conclusion that the claimant has not satisfied the first limb of the burden of proof test and that this claim is not well-founded and is dismissed.

91. Even if a prima facie case of less favourable treatment had been established, we would conclude that the reason for the treatment were those set out in the decisions by Mr Farrow and Mr Gill, namely genuine business reasons. Accordingly, the claim would still not be well-founded and would be dismissed

Request for flexible working

92. The respondent's position is that the claimant's flexible working request either on 11 May or 19 May 2023 was invalid as they did not comply with the relevant provisions in s.80F Employment Rights Act 1996. We agree. The claimant did not follow what was required of him as set out in the respondent's Flexible Working Request Policy, but more importantly, to requirements in s.80F(2). Ms Bowen invited the Tribunal to take into account the two Employment Tribunal cases of Hussain and Maher.

93. The provisions in section 80F(2) states that an application under this section must:

> "(a) State it is such an application
>
> (b) Specify the change applied for and the date on which it is proposed the change should become effective, and
>
> (c) Explain what effect, if any, the employee thinks making the change applied for would have on his and how his employer and how, in his opinion, any such effect might be dealt with."

94. Before us the claimant failed to set out what effect, if any, on the respondent of the proposed changes. Notwithstanding he had Mr Oancea, trade union representative, to assist him. We do follow the judgments in Hussain and Maher. Neither the application on 11 May, nor on 19 May was a valid request and we do not have jurisdiction to hear and determine either one. On this basis the claim under s.80H is not well-founded and is dismissed.

95. Alternatively, even if we are in error and there was only one request made on 11 May 2023 as there is no requirement in law that it should be on the respondent's form, only that it be in writing, it was nevertheless defective. The claimant was sent a flexible working request form to complete. That too did not comply with the policy and with provisions in sections 80F(2). With these defects the respondent was prepared to proceed on the basis that a request had been made for flexible working by the claimant. A meeting was held on 8 June 2023.

96. During the meeting the claimant was in a position to clarify precisely what it was that he was requesting. This led to Ms Farrow expressing a view that what he was proposing the respondent could not accommodate but could accommodate an alternative arrangement. The claimant left the meeting to speak to his wife regarding working Monday to Friday from either 1pm, 3pm or 4pm and working an alternate weekend. It could be argued that the

request complied with section 80F(2) once the information was given to Ms Farrow, and she understood what the claimant's case was on 8 June 2023. This enabled her to form a view as to whether or not the respondent could accommodate the request as, by then, the claimant at the meeting, had complied with the statutory provisions. The effective date being 8 June 2023.

97. Ms Farrow gave her decision on 18 July 2023, a month after the 8 June meeting. The appeal outcome by Mr Gill was on 30 August 2023. This was within the three months' time limit and the respondent was not in breach, and on this basis the claim would fail.

98. Further, even if there was a valid request on 11 May 2023, and there was a breach, in that the outcome of the appeal was outside of the three months' time limit, we agree with Ms Bowen's submissions that this was a technical breach. The respondent had to meet with the claimant to discuss in more detail his flexible working request. Ms Farrow was expecting him to give his response to what she had proposed at the meeting on 8 June 2023, but the claimant had delayed in responding. Following his response, the decision was taken on 18 July to decline his flexible working request. He appealed and the respondent, quite properly, arranged an appeal on 1 August 2023. This was, however, postponed at the claimant's request. There were further scheduled meetings on 8 and 15 August but they did not take place. On 15 August the claimant was on leave. By mutual agreement, the appeal hearing took place on 25 August 2023. This was the earliest date the claimant's representative, and Mr Gill could accommodate. We find that the delay was primarily due to the claimant and his representative. The Tribunal has a discretion whether to award compensation and having regard to all of the circumstances referred to, we would award nil compensation. We do, however, repeat that there was no valid request before this Tribunal.

99. What the respondent did in entertaining the claimant's request was to follow its own policy, though the request did not comply with the statutory requirements. Ms Farrow met with him to understand his proposal and the effect of it on the respondent's business. She refused and he appealed. Another meeting was held after arranging a mutually convenient date. The claimant again clarified his proposal, but his appeal was rejected with reasons. The respondent acted reasonably and in accordance with the ACAS Code of Practice 5 - Handling in a Reasonable Manner Requests to Work Flexibly (2014).

100. The provisional remedy hearing listed on 20 December 2024, is hereby vacated. The parties must not attend.

_____
Employment Judge Bedeau
24 November 2024

Sent to the parties on: 27/11/2024

For the Tribunal Office – N Gotecha

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/