EMPLOYMENT TRIBUNALS

Claimant: **Ms J Payne**

Respondent: **Lifeways Community Care Services**

On: **17 November 2021**

Before: **Employment Judge McAvoy Newns**

Appearances:

For the Claimant: **Ms C Dzikira, Litigation Assistant**

For the Respondent: **Ms L Amartey, Counsel**

JUDGMENT FOLLOWING A PUBLIC PRELIMINARY HEARING

The Claimant's claim pursuant to section 80G(1) of the Employment Rights Act 1996 (**ERA**) has been presented outside of the time limits prescribed by section 80H(5)(a) of the ERA. As it was reasonably practicable for the Claimant to present her claim within these time limits, the claim is dismissed.

REASONS

Evidence

1. Neither party called witness evidence to the hearing. I raised with the Claimant's representative at the outset of the hearing that, if I found the Claimant's claim was out of time, I would expect to hear evidence from the Claimant about why she presented her complaint when she did, as part of considering whether I ought to exercise my discretion to extend the normal time limits. I was informed that the Claimant would not be attending the hearing to give such evidence. No postponement request was made. The only

documents provided to me were two flexible working request forms and an internal email of 3 September 2020.

Summary of claims

2. The Claimant's claim was that, pursuant to section 80G(1) of the ERA, the Respondent did not deal with her flexible working request in a reasonable manner and the Respondent refused her flexible working request for an impermissible reason.

3. The Respondent contended that the claim was brought outside of the normal time limits and applied for the claim to be dismissed on this basis. The purpose of this hearing was to consider this application.

4. In this regard it was acknowledged at the outset of the hearing that a key factor in determining whether the claim was presented in time was the identification of the "relevant date" as defined in section 80H(6) of the ERA. The Claimant submitted that the relevant date was 16 April 2021. The Respondent submitted it was 2 March 2021.

Findings of fact

5. As no evidence was presented by either party, these findings of fact have been based on the pleadings, the documents mentioned above and the representations made by the parties' representatives during this hearing.

6. On 30 March 2012, the Claimant's employment transferred to the Respondent from Bradford District NHS Care Trust pursuant to the Transfer of Undertakings (Protection of Employment) Regulations (**TUPE**). The Respondent is a provider of residential care services. The Claimant is employed as an Assistant Manager.

7. On 3 September 2020, an email was sent from the Respondent's Regional HR Manager which stated that if an existing employee takes a new role or they request a change to their original contract in any way (e.g. via increasing or decreasing their contractual hours of work), they will be placed onto the Respondent's terms and conditions which will supersede their existing terms and conditions. It went on to state that it would be appropriate for managers to inform employees of this to enable them to make an informed decision about any such request. Although I heard no evidence from the Claimant on this point, the Claimant's representative submitted that the Claimant was unaware of this email until the events set out below.

8. On 2 March 2021, the Claimant made a formal flexible working request in order to reduce her hours of work and change her working pattern.

9. The Respondent contacted the Claimant orally to advise that her request for a reduction in hours was agreeable providing that the Claimant transferred to the Respondents' group's terms and conditions of employment. This was because of the above mentioned email from the Respondent's Regional HR Manager.

In the Claimant's particulars of claim, she pleaded that this amounted to a refusal of her flexible working request or, alternatively, a refusal of her flexible working request on the terms that she had requested.

10. There was a dispute between the parties as to when this oral notification was made to the Claimant. In the Claimant's claim form, she stated that this occurred on 3 April 2021. However during this hearing she said that this occurred on 3 March 2021. The Respondent maintained that this occurred on 2 March 2021.

11. In support of the Respondent's position, the Respondent referred to a second flexible working request which was submitted by the Claimant also on 2 March 2021. This stated: *"initially I wanted to reduce my hours but have been informed that I would lose my terms and conditions if I reduce my hours therefore I would ask you to consider the following".* The Claimant then proposed an alternative request which was subsequently granted.

12. During this hearing the Claimant's representative accepted on the Claimant's behalf that this conversation took place. However, she submitted that the Claimant was confused about this decision and the decision only became clear when the Respondent notified her of this in writing on 16 April 2021. However, the Claimant did not attend this hearing to give any evidence of this confusion. This written notification was not provided as evidence and the Respondent's representative had received no instructions regarding it. Furthermore, it was not referred to in the Claimant's claim form. The Claimant's representative submitted that they intended to make an application for permission to amend the claim to refer to this written notification. However, no application to amend has been served on me or the Respondent. The purpose of this hearing is not to consider such application. No request for a postponement of this hearing, in order for this application to be made either today, or at a later date, was made.

13. On 30 June 2021, the Claimant started the ACAS early conciliation process. That process concluded on 11 August 2021. The Claimant lodged her ET1 on 8 September 2021. She was represented by Thompsons Solicitors at this time and throughout these proceedings.

The Law

14. The relevant parts of section 80G of ERA state:

(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.

15. The relevant parts of section 80H of the ERA state:

(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,
(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).
…
(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until—
(a) the employer notifies the employee of the employer's decision on the application, or
(b) if the decision period applicable to the application (see section 80G(1B)) comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.
…
(5) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the relevant date, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.
(7) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(a).

16. Section 207B(4) of the ERA states:

"If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

17. In ***Porter v Bandridge Ltd 1978 ICR 943*** the Court of Appeal held that the "not reasonably practicable test" 'imposes a duty upon him [the Claimant] to show precisely why it was that he did not present his complaint'.

18. Although it is not a statutory provision, I was referred to the ACAS Code of Practice on handling in a reasonable manner requests to work flexibly (**ACAS Code**). At the outset, this states: *"Throughout this Code the word 'should' is used to indicate what Acas considers to be good employment practice, rather than legal requirements. The word 'must' is used to indicate where something is a legal requirement".* It goes onto state: *"Once you have made your decision you must inform the employee of that decision as soon as possible. You should do this in writing as this can help avoid future confusion on what was decided".*

Submissions

19. Both parties provided oral submissions. They are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

20. In particular, I asked both parties to address me on whether there were any authorities supporting or rejecting the proposition that a notification of a decision in respect to a flexible working request needed to be provided in writing either at all or in the context of interpreting when the "relevant date" was.

21. No authorities were provided by either party. The representations given on how I should interpret the relevant parts of the ERA and the ACAS Code, are considered in my conclusions below.

Conclusions

22. The issue that I have had to determine is whether the Claimant's claim is in time. If it is not in time, I have had to consider whether time should be extended.

23. The starting position is section 80H(5) of the ERA which states that, subject to the extension of time provisions considered later, claims must be brought within three months of the relevant date. Section 80H(6) states that the relevant date is a reference to the first date on which the employee may make a complaint under section 80H(1)(a), (b) or (c).

24. Section 80(H)(3) states that if a request for flexible working has not been disposed of by written agreement or withdrawn, the complaint cannot be made until either:

    1. The employer notifies the employee of the decision; or

    2. If the decision period applicable to the request comes to an end without the employer notifying the employee of their decision, the end of the decision period. The decision period is defined in section 80G(1B) as being the period of three months beginning with when the application was made.

25. It was agreed by the parties therefore that I had to decide whether the Respondent notified the Claimant of its decision in respect to the flexible working request and if so, when.

26. It was also agreed between the parties that the ERA does not currently expressly provide that decisions regarding flexible working requests need to be provided in writing.

27. The Claimant's representative submitted that the ERA states that employers should deal with flexible working requests in a reasonable manner. She submitted that dealing with the request in a reasonable manner requires the provision of a written decision. She submitted that, accordingly, as the Respondent did not deal with the request in a reasonable manner until the decision was communicated in writing, the date of receipt of the written decision should be used as the relevant date. In this regard it was submitted that as the Claimant was required to submit her request in writing, it follows that the Respondent must also submit its response in writing. The Claimant submitted therefore that the relevant date was 16 April 2021, when the Claimant allegedly received written notification of the Respondent's decision.

28. The Respondent's representative submitted that although the ACAS Code advises that the decision should preferably be communicated in writing, indicating that this would be good employment practice, it specifically states that this is not a legal requirement. Furthermore, she submitted that, under the old now repealed law concerning flexible working requests, the employer had to set out in writing the grounds on which the application was refused, and to provide a sufficient explanation as to why those grounds applied, but this level of detail is not required under the new procedure. The Respondent's representative submitted that, particularly with this background in mind, it would be an error of law for me to import additional statutory language into the ERA to provide that the outcome of a flexible working request needs to be submitted in writing.

29. Considering the findings of fact outlined above, the Claimant was informed, on either 2 or 3 March 2021, that her flexible working request would be granted but she would need to forfeit her pre TUPE transfer terms and conditions. Considering the contents of the second flexible working request referred to earlier in particular, I have concluded that this notification was made on 2 March 2021.

30. The Claimant originally pleaded that this communication amounted to the Respondent's decision to refuse her first flexible working request. The Claimant is now however stating that:

    1. the decision was not clear to her until she received it in writing; and

    2. the definition of the "relevant date" should be the date that this decision was communicated to her in writing, namely 16 April 2021.

31. There is no evidence before me of the decision not being clear to the Claimant on 2 March 2021. Indeed, the contents of the second flexible working request quoted above suggest that this decision was clear to her because it appears from this document that she used this decision to mount her second flexible working request. There is also no evidence before me of a written decision being provided at all on 16 April 2021.

32. Considering all of these points, I find that the Respondent notified the Claimant of its decision in respect to her flexible working request on 2 March 2021. The ERA does not require such decision to be provided in writing. I agree with the Respondent that it would be an error of law for me to import additional statutory language into the ERA to provide that the "relevant date" is the date that the employer notifies the employee of its decision in writing. Whilst the ACAS Code states that submitting a written decision would be good employment practice, it acknowledges that this is not a legal requirement. The Claimant has not presented any authorities to me supporting the proposition that the "relevant date" should be taken as the date on which a written notification was provided.

33. The first date on which the Claimant was permitted to make a complaint under section 80H(1)(a),(b) or (c) of the ERA was therefore 2 March 2021. This was therefore the "relevant date" for the purposes of section 80H(6) of the ERA.

34. Consequently, the deadline for the Claimant to initiate the ACAS early conciliation process was 1 June 2021. As the Claimant did not do so until 30 June 2021, her claim is out of time.

35. Section 80H(5) allows me to extend time where I consider it was not reasonably practicable for the Claimant to present her claim in time. In this regard the burden of proof is on the Claimant.

36. Time limits are not judicial niceties that can be waived without good reason. The legislation imports mandatory wording that the Tribunal shall not consider a complaint brought outside of the time limits unless it considers the extension to be justified.

37. The ***Porter*** case highlighted above demonstrates that the burden of proof in this regard is on the Claimant. The Claimant has presented no evidence to enable me to find that it was not reasonably practicable for her to present her claim before 1 June 2021. The Claimant was or ought to have been aware that this would be a matter that I would need to determine at this hearing. The issues this would create for the Claimant's claim were highlighted to the Claimant's legal representative at the outset of the hearing. The Claimant's legal representative did not ask for the hearing to be postponed to enable the Claimant to attend in order to give such evidence.

38. As the Claimant has not persuaded me that it was not reasonably practicable for her to present her claim in time, the time limit to submit her claim is not extended and her claim is dismissed.

Case Number: 1804827/2021

Employment Judge McAvoy Newns

Date: 23 December 2021