



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109548/2021

Held in Edinburgh on the 26 and 27 January 2022 and the 16 February 2022
by CVP Members Meeting

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Employment Judge Porter
Tribunal Member Lorraine Brown
Tribunal Member Vernon Alexander

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Ms K Scott

**Claimant
In Person**

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HBOS plc

**Respondents
Represented by:
Mr Maguire, advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal declares that the claimant's claim under s80H of the Employment Rights Act 1996 is well founded. The respondents are ordered to make payment to the claimant of the sum of **TWO THOUSAND ONE HUNDRED AND FORTY POUNDS (£2,140)** which represents six weeks' gross wages.

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Introduction

1. The claimant was employed by the respondents between the 1 of July 2001 and the 30 June 2021. Latterly she was employed as a bank manager based at their Hawick branch. In these proceedings she claims in respect of the respondents' rejection of a flexible working application made by her on the 28 August 2020. Her claim is made under s80H(1)(b) of the Employment Rights Act 1996 on the basis that the respondents' decision was based on incorrect facts.
2. The case was set down for a Hearing on the Merits conducted in person on the 25-28 January 2022. The Tribunal did not sit on the 25 January 2022 as the claimant did not attend the Tribunal as she was under the misapprehension that her case would be conducted remotely. Evidence was heard on the 26 and 27 January 2022 and submissions were heard following the evidence on 27 January 2022. There was a Members Meeting held by CVP/Kinly on the 16 February 2022.
3. The claimant represented herself and the respondents were represented by Mr Maguire, advocate. Evidence was heard for the respondents from Pauline Smith, a manager with the respondents and the claimant's line manager. Pauline Smith took the decision to reject the claimant's flexible working application. Evidence was also led from Jamie Murphy, a Senior Manager (Area Support) who heard the claimant's appeal against the refusal of her flexible working application. The claimant gave evidence herself and led evidence from John Dickinson, her Accord union official and Lynda Graham, a Grade B Supervisor based at the respondents' Hawick branch. In the course of the claimant's evidence Pauline Smith was recalled and interposed remotely to answer additional questions. Lynda Graham also gave evidence remotely.

The Issues

4. The parties liaised to provide a Joint List of Issues which is replicated below

Breach of statutory procedure: s.80H(1)(b) Employment Rights Act 1996

The Claimant brings a claim on the basis that the Respondent's decision to reject her flexible working application was based on incorrect facts. In particular, the Claimant alleges that the Respondent has provided no evidence that the Claimant's request would have had a detrimental effect on the Respondent's ability to meet customer demand.

- Was the Respondent's decision to reject the Claimant's flexible working application based on incorrect facts? This gives rise to the following sub-issues:

- Was Friday a peak day for customer demand in the Hawick branch?
- Was the Respondent factually correct in refusing the Claimant's flexible working application on the ground that it would have a detrimental effect on the Respondent's ability to meet customer demand?

Remedy

5. What compensation, if any, should the Claimant be awarded if the above claim is well founded?

Joint Statement of Facts

The parties also agreed a Joint Statement of Facts which is replicated below

- The Claimant was employed by the Respondent from 2 July 2001 until her employment terminated by way of voluntary redundancy on 30 June 2021.
- At the time of making her flexible working application, the Claimant was employed as a Bank Manager at the Respondent's Bank of Scotland branch in Hawick.
- The Claimant worked under a Contract of Employment (35-44).

- The Respondent operates an Agile Working Policy (45-48). The Agile Working Policy is accompanied by a guidance document (49-52), and process overview documents for colleagues (53) and line managers (54).
- 5 • The Claimant commenced a period of maternity leave in 2019. Prior to her maternity leave the Claimant worked 21 hours per week, on Monday, Wednesday and Friday at the Respondent's Galashiels branch.
- 10 • Prior to the Claimant returning to work it was decided that the Claimant would transfer to the Respondent's Hawick branch on her return to work. This was because a manager at the Hawick branch was retiring. This decision was made by Nicola Noble, Area Director.
- Pauline Smith became the Claimant's Line Manager when she moved to the Hawick branch.
- 15 • In January 2020, prior to returning from maternity leave, the Claimant made an informal request to change her working pattern to Monday, Tuesday and Wednesday.
- The Claimant was advised that her proposed working pattern could not be accommodated at the Hawick branch due to resourcing.
- 20 • The Respondent discussed alternative proposals with the Claimant. The nature of these proposals is not agreed between the parties. On 2 March 2020 the Claimant confirmed by email to Pauline Smith that she did not accept these proposals (56).
- On 14 March 2020 Pauline Smith emailed the Claimant to advise that she had not received the Claimant's formal agile working request. The Claimant confirmed that she would provide it as soon as she could (55).
- 25 • The Claimant returned from maternity leave, to the Hawick branch, on 20 April 2020.
- Due to the Coronavirus pandemic, the Claimant and the rest of the branch staff worked reduced hours until July 2020 (112).
- 30 • Between 20 April 2020 and 7 June 2021 the Claimant worked on a Tuesday on 3 occasions (112).

- On 28 August 2020, the Claimant submitted a formal application to change her working pattern (69-70).
- 5 • The Claimant requested to change her working hours to working 9am-5pm on Mondays, Tuesdays and Wednesdays. The Claimant wished to work on a Tuesday instead of a Friday.
- The Claimant asked for her request to be a permanent change to her contract of employment to be implemented with effect from 17 September 2020.
- 10 • On 7 September 2020 the Claimant was invited to an agile working meeting (66).
- On 16 September 2020 the Claimant attended an agile working meeting with Pauline Smith. The Claimant was accompanied to that meeting by her trade union representative.
- 15 • The Claimant was required to resubmit her agile working application on 28 September 2020 due to a technical issue which meant that Pauline Smith could not add her decision to the application form.
- The Respondent issued its outcome to the Claimant on 6 October 2020 (68). The Respondent provided the rationale for its decision with the outcome letter (71).
- 20 • On 23 October 2020, the Claimant attended a meeting with Nicola Noble, Area Director. The Claimant and Respondent discussed a proposal for the Claimant to reduce her hours on alternate Fridays from 9am-12pm, with the Claimant to agree with her line manager when she would make up the remaining hours each month. It is agreed that the note of the proposal is
25 an accurate reflection of what was discussed (75). Following the meeting the Claimant decided not to accept this proposal.
- On 28 October 2020 the Claimant appealed the decision to reject her agile working request (76).
- 30 • On 24 November 2020 the Claimant was emailed by Jamie Murphy to arrange a suitable time to hold the appeal meeting (78).

- On 27 November 2020 the Claimant was invited by email to an appeal meeting (79). This was followed by a formal invite letter on 7 December 2020 (80).
- 5 • On 15 December 2020 the Claimant attended her appeal meeting, heard by Jamie Murphy (81-86). The Claimant provided her comments on the meeting notes on 22 December 2020 (87-92).
- On 24 December 2020 the Claimant received her appeal outcome (93). The Respondent detailed its reasons for not upholding the appeal on the appeal form (94-95).
- 10 • In March 2021 there was a nationwide business restructuring of all of the Respondent's Bank of Scotland pools. The Hawick pool was absorbed into the Galashiels pool. Following the restructure only two managers were required in the Hawick branch.
- The Claimant accepted voluntary redundancy and her employment with
15 the Respondent terminated on 30 June 2021.

Findings in Fact

6. The Tribunal made the additional Findings in Fact from the evidence before them.
- 20 7. The claimant's flexible working application (named 'agile working application' by the respondents) was rejected by letter dated the 6 October 2020 **(68)**. The reasons then given were outlined in the claimant's application form attached to that letter **(71)**. The reasons then given included the fact that Mondays and Fridays were the two busiest days in the Hawick branch; the
25 claimant's absence on a Friday meant that she was unable to conduct management reviews, checks and 'mop ups' at the end of the working week; if the claimant's flexible working application were allowed there would never be 100% cover; and there was no budget for further recruitment to allow full job share to cover the days (including Fridays) when the claimant was
30 absent.

8. There was no dispute on the evidence that there were normally 3 managers in the respondents' Hawick branch on a Friday (one of whom was the claimant) and there were 5 customer service advisers (CSAs) in the Banking Hall on Fridays. On Tuesdays there were 2 managers and 4 CSAs in the respondents' Hawick branch.
9. Pauline Smith gave evidence that the factors that led her to conclude that the claimant's flexible working request should be refused were: (i) her own presence in the Hawick branch which led her conclude that Fridays and Mondays were the busiest days and accordingly the claimant's absence would have a detrimental effect on customer demand; (ii) a conversation with Gillian Wallace, a Union representative of Accord based at the Hawick branch who confirmed that Fridays along with Mondays were busier days at the respondents' Hawick Branch; (iii) a conversation with Lesley Turnbull, a manager who worked alongside the claimant who acknowledged that Mondays and Fridays were busier days and went on to state it would put more onus on the other managers if the claimant were to be absent on Fridays; and (iv) statistical evidence which Pauline Smith stated demonstrated that Fridays were busier days than other days in the week. The statistical evidence which was relied upon by Pauline Smith was not produced before the Tribunal. Pauline Smith said it was impossible to produce the statistics, and gave evidence that the statistics were 'similar' to the statistics which were before Jamie Murphy in determining the appeal, which are to be found at **73** and **74**.
10. The Tribunal accepted the evidence of John Dickinson that at the flexible- or 'agile'- working meeting on the 16 September 2020 the claimant was not shown the statistical evidence relied upon by Pauline Smith. Pauline Smith's evidence was that the statistics were shown to the claimant at that meeting; however, the evidence of John Dickinson was accepted to the effect that that the meeting was 2 metres socially distanced; and, further, Pauline Smith sat behind a perspex screen making it impossible for her to have shown the statistics to the claimant and John Dickinson.
11. The Tribunal accepted the evidence of Lynda Graham generally. Lynda Graham gave evidence that in her role as Customer Services Grade B

Supervisor she was present in the Banking Hall at the respondents' branch in Hawick before, during and after the claimant's flexible- or 'agile'- working application. The Tribunal accepted that as an individual working in the Banking Hall she was well placed to give evidence on the respondents' ability to meet customer demand. To this end she was present to witness any lengthy queues or delays affecting customers and would receive any complaints made and pass them on to management.

12. The Tribunal accepted the evidence of Lynda Graham that as a manager, Pauline Smith was rarely in the banking hall and generally worked in her room with the door closed. Lynda Graham gave evidence that there was no detrimental effect on the respondents' ability to meet customer demand in the Banking Hall with two, rather than three managers present on any day of the week, including Fridays. She stated that there was no effect on the respondents' ability to meet customer demand when a manager was on holiday on a Friday.

13. Lynda Graham gave evidence that since the claimant's voluntary redundancy with the respondents there were a maximum of two managers in the Hawick branch on any working day, one of whom worked part-time, and that this caused no detrimental effect to customers in the branch including on busier days such as Fridays. She also stated that the reduction of managers from 3 to 2 did not result in a lack of support for the CSAs in the Banking Hall. In particular, there was no failure to lead, coach or supervise CSAs in the Banking Hall, nor was there a failure to make management checks and reviews at the end of the week.

14. After having regard to the evidence of Lynda Graham and Pauline Smith, the Tribunal accepted the evidence that management reviews, checks and 'mop-ups' could, in fact, be done by any manager at the end of the working week and that some of these tasks could be undertaken by a Grade B Supervisor. The Tribunal also accepted the evidence of the claimant and Lynda Graham that there was never 100% cover in the Hawick branch.

15. In her flexible working application, the claimant requested to work on Tuesdays rather than Fridays. Lynda Graham gave evidence that Tuesdays

were very busy days also, witnessed by the fact that she often had to work beyond her allotted hours on a Tuesday. The Tribunal also accepted the evidence of the claimant that Tuesdays were busy days and, further, accepted the uncontested evidence of the claimant that if she were to work on a Tuesday she would be able to line manage employees in the respondents' Newcastleton branch as that branch only opens on a Tuesday and a Thursday. When such employees were line managed by the claimant, she was unable to visit the branch due to her work pattern coupled with the branch's opening hours.

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10 16. The claimant appealed the refusal of her flexible-or 'agile'-working application to Jamie Murphy, a Senior Manager for Area Support. On the basis of his evidence the Tribunal found that Jamie Murphy's decision not to uphold the appeal was based on a conversation with Pauline Smith, the decision maker, which took place on Microsoft Teams in which Pauline Smith re-iterated her
15 personal experience of Mondays and Fridays being busy days within the Hawick branch. Jamie Smith also relied on data which had been produced after the claimant's flexible working application was refused (**72 onwards**). Jamie Murphy stated that he also took into account the claimant's submissions and his own personal experiences of working in various
20 branches of the respondents on a Friday. However, he had never worked in the respondents' Hawick branch.

25 17. The Tribunal concluded that Jamie Murphy carried out no independent inquiries as to whether the claimant's flexible working request could have been accommodated within the respondents' Hawick Branch. Such independent inquiries could have included asking the views of the other staff within the Hawick branch as to whether such a request could, in general terms, be accommodated. It appeared to the Tribunal that instead of carrying out such independent inquiries he relied upon Pauline Smith's own views that
30 Mondays and Fridays were the busiest day in the Hawick branch, as expressed to him in the course of their Teams conversation.

18. Jamie Murphy's refusal of the claimant's appeal is to be found at **95** and was communicated to the claimant by email dated the 24 December 2020 (**93**). The Tribunal noted that his conclusions were based on no independent

observations. His refusal stated: *“following further investigation it is clear that the business demand is much higher on the day you have requested not to work. More colleagues are resourced to meet customer demand each Friday therefore my view is that should you not work on Fridays that would have a detrimental impact on the quality of work produced by the colleagues you line manage and those you support, whilst I appreciate your role as a Bank Manager is to support and coach colleagues it is also key during these unprecedented times that all colleagues show flexibility in their role requirements to support our customers. It would also have a detrimental impact on the ability to meet customer demand which is higher each Friday.”*

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(95)

19. The Tribunal found that the reasons for the refusal of the claimant’s appeal were factually erroneous. To this end, they accepted the evidence of Lynda Graham that the reduction from 3 to 2 managers in the Hawick branch made little or no difference to meeting customer demand on Fridays; and that the reduction from 3 to 2 managers on a Friday did not result in there being a detrimental impact on the quality of work produced by the CSAs.

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20. The Tribunal accepted the evidence of the claimant that the only compromise offered to the claimant was made by a senior manager, namely Nicola Noble and was to the effect that the claimant would work reduced hours every second Friday and make up those hours during the working week. The compromise is set out in the handwritten document **75**. The claimant rejected this compromise as it still left her with significant childcare requirements. The Tribunal finds that a jobshare was never discussed with the claimant and accepted the evidence of the claimant that had a jobshare been advertised internally then there would have been several candidates for that position, given that it would have been at managerial level. The Tribunal also found that at no point did the respondents suggest that there was a trial period to investigate the feasibility of the claimant’s flexible working request.

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21. At the time of her voluntary redundancy, the claimant earned £1546 a month gross.

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Observations on the Evidence

22. The passage of evidence given by Lynda Graham was short in duration but was accepted by the Tribunal as entirely credible. The reason for this was twofold; firstly, the Tribunal noted that Lynda Graham remains an employee of the respondents and there appeared to be no possible motive for her to tell anything but the truth; and secondly Lynda Graham was the only witness in this case who had first hand experience of customer demand in the Banking Hall of the respondents' Hawick Branch on Fridays. With this in mind, where there was a dispute with the evidence of Pauline Smith the Tribunal preferred that of Lynda Graham.

Submissions

The submissions replicated below are in the parties' own words and are a summary of lengthier submissions given by them.

23. Submissions for the claimant

- I believe that the Respondent has unfairly declined a request for flexible working under the Employment Act 1996, Section 80F and used incorrect facts for the basis of its decline. The request was to change from Friday to Tuesday as a normal working day.
- The incorrect facts to which I refer are as follows:
- That Fridays are a considerably busier days than Tuesday, this can be disproved by the only data provided to the Employment Tribunal. In addition, the transactional levels used are not relevant to management;
- That 3 Managers are needed to supervise a maximum of 5 CSAs on a Friday, one of whom (CSA) is a Band B Supervisor herself when the Bank quotes a 1/10 ratio;

- That Managers' tasks need to be done on a Friday when they can be done at any time during the week. They are also carried out by the grade B supervisor;
- 5 • That I was required on a Friday afternoon to do a 'mop-up' with CSAs at the end of the week when in fact I left the when Branch doors close;
- That there would be a detrimental impact on customer service. The branch was working perfectly well with only 2 managers in on a Friday. There is a point where adding more people does not improve service;
- 10 • That the new Senior Bank Manager had to visit because the Branch was busy when his visits were to cover long term absence, were sporadic and he did not support the staff nor see customers;
- That I declined an offer of a job share and an offer detailing change of work times on a Friday from Mrs Smith, neither of which are true. In addition, it was stated that I accepted an offer from the Area Director and then changed my mind. Again this is untrue.
15 • In addition to the above Data used by the appeal Manager was not the same as that used to make the original decision. This data was from a period after the agile working decline.

20 Summary

- I believe that my request to change days was reasonable and would have benefitted the Branches in the Hawick pool. There is no reason why the bank could not have agreed this which is shown by the level of management required as opposed to that which was available.

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24. **Submissions for the respondents**

- The Claimant's ('C') claim should be dismissed.

- C made an application for flexible working in terms of Part VIIIA of the Employment Rights Act 1996 on 28 August 2020 (see §15 Agreed Statement of Facts). She requested to change her working hours at the Respondent's ("R") Hawick Branch to working 9am to 5pm on Mondays, Tuesdays and Wednesdays. C had returned from maternity leave on 20 April 2020 to work at the Hawick Branch. Immediately before taking maternity leave, C worked at R's Galashiels Branch. At that branch she worked 21 hours per week on Monday, Wednesday, and Friday.
- C's application was refused by Pauline Smith on 6 October 2020 (§21 ASOF). At the time of the decision to refuse C's application, Mrs Smith was the Senior Bank Manager of the Hawick pool, which included the Hawick branch.
- A note of Mrs Smith's meeting with C to consider C's application is at p67 of the Bundle. Further information as to the reasons for the refusal of the application are at p71.
- C appealed the decision to refuse her application. The appeal was taken by Jamie Murphy, Senior Area Support Manager. C's appeal was not successful – see pp87-95 of the Bundle.

20 Issues for Determination

- The parties agreed a List of Issues for determination by the Employment Tribunal. The first issue is whether Friday was a peak day for customer demand at the Hawick branch. R's position is that Friday is the second busiest day (after Monday) at the Hawick branch. C disputes this. She says that Tuesday is a busier day than Friday.
- It is submitted that the information available to R at the time of the refusal of the application and the appeal clearly demonstrated that Friday was a peak day for customer demand at the Hawick branch (and busier than Tuesday).
- The statistical information at pp72-74 demonstrates that Friday was a peak day at the Hawick branch. Mrs Smith's oral evidence was that the statistical information she had at the time of her decision demonstrated that Friday was a peak day and was busier than Tuesday. Mrs Smith had the Management Information for the period leading up to the application. The Management

Information which Mrs Smith had is in the same format as the information at pp57-65 of the Bundle. It is submitted that Mrs Smith's evidence is credible and reliable. Mrs Smith's evidence is also entirely consistent with the evidence at pp72-74 which covers the periods (pre-covid) February 3rd – February 29th 2020 and (post-Covid) September 21st – October 16th 2020.

- 5 • More generally, Mrs Smith's evidence was that from her experience Friday was a peak day at the Hawick branch in terms of customer demand and enquiries. C accepted in cross examination that she had not worked in the Hawick branch on a Tuesday in her capacity as a manager. C's knowledge of the level of work at the Hawick branch on a Tuesday is therefore necessarily limited.
- 10 • The second issue for determination by the Tribunal is whether R was factually correct in refusing C's application on the ground that it would have a detrimental effect on R's ability to meet customer demand (in terms of s80G(1)(b)(ii) ERA 1996). It is submitted that C has not established that R's decision was based on incorrect facts.
- 15 • The relevant law is set out in IDS Employment Law Handbook Volume 1 'Atypical' and Flexible Working at §4.34-§4.35. The Tribunal is entitled to investigate the facts relied upon by the employer but should not assess the employer's business judgment or the reasonableness of the decision (see 20 *Commotion Ltd v Ruddy* [2006] ICR 290 and *Singh v Pennine Care NHS Foundation Trust* UKEAT/0027/16/DA).
- 25 • The primary fact relied upon by R is that Friday is a peak day for customer demand at the Hawick branch. Mrs Smith gave evidence that she had spoken with the other manager working at the Hawick branch (Lesley Turnbull) about C's application. Mrs Turnbull's view was that allowing C not to work on a Friday (a peak day) would be added pressure on the other 2 managers and remaining staff to carry out their activities. The trade union representative (Gillian Wallace) confirmed to Mrs Smith that Friday was one of the busiest days at the branch.
- 30 • Mrs Smith also gave evidence that management tasks such as 'mop-up' and reviewing the Customer Support Assistant Team had to be done at the end (or towards the end) of the week. Furthermore, her evidence was that managers were required to lead, coach and supervise colleagues and this was particularly important on the busiest days (Mondays and Fridays). Mrs Smith's evidence

was also that she did not discuss the application with the other staff because this would be a breach of confidentiality. In any event, it is submitted that Mrs Smith was entitled to rely on her own extensive experience of the workings of the branch (and the views of the other manager) in reaching her decision. In such circumstances it cannot be said that C has established that R's decision was based on incorrect facts.

- Mr Murphy's decision on appeal was based on essentially the same facts as had been taken into consideration by Mrs Smith. He recognised that Mondays and Fridays were the busiest days at the branch and that C was required on those days to coach and supervise her colleagues. He was clear that the loss of a manager on Fridays would inevitably have a negative effect on R's ability to meet customer demand.
- It is submitted that the evidence of Lynda Graham was not particularly relevant to the issues to be determined by the Tribunal. Mrs Graham has never worked in the role of a manager at the Hawick branch. She may on occasion 'assist' management in carrying out roles, but she does not have the authority or status of a manager such as C (or her managerial colleagues).
- It is submitted that for the reasons set out above, C's claim should be dismissed.
- If C is successful, she is entitled to a declaration and an award of compensation on a 'just and equitable' basis (s80I ERA 1996). The amount of compensation cannot exceed 8 weeks' pay (Flexible Working Regulations 2014, regulation 6). It is submitted that if compensation is awarded, the amount should not exceed 4 week's pay. C's sole ground of challenge was that the decision was based on incorrect facts. It has not been suggested, for example, that the application was not dealt with in a reasonable manner as required by s80G(1)(a) ERA 1996. C was offered an alternative to her application which would have involved her working reduced hours on a Friday (see p75 Bundle).

The Law

25. S80H of the Employment Rights Act 1996 provides:

“Complaints to employment tribunals

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal-

(b) that a decision by his employer to reject the application was based on incorrect facts;”

S80I of the Employment Rights Act 1996 provides:

“(1) Where an employment tribunal finds a complaint under section 80H well-founded it shall make a declaration to that effect and may-

(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.”

26. Regulation 6 of the Flexible Working Regulations 2014 provides that the maximum amount of compensation will be 8 weeks’ pay for any employee who has presented an application under s80H of the Employment Rights Act 1996.

27. The case of **Commotion Ltd v Ruty (2006) IRLR 171** remains good law on the issue of incorrect facts. In that case Judge Burke QC in the EAT held that a Tribunal is entitled to investigate the evidence to see if it was factually correct and that this may require an investigation of the situation at the time of the request and an investigation of what the effects of granting the request would have been. Judge Burke QC stated: *“37 The true position, in our judgment, is that the tribunal is entitled to look at the assertion made by the employer ie the ground which he asserts is the reason why he has not granted the application and to see whether it is factually correct. 38 In order for the Tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the Tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the Tribunal are entitled to enquire into what would have been the effect of granting the application.*

5 *Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? And matters of that type. We do not propose to go exhaustively through the matters at which a Tribunal might wish to look, but if the Tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law.”*

10 28. The Tribunal considered the authority of **Commotion Ltd v Ruddy** to be authority for the proposition that in such cases the Tribunal can look into the correctness of the facts themselves, and not simply the facts as perceived by the employer.

Discussion and Decision

15 29. In deciding and determining this case the Tribunal turned to the issues as agreed between the parties. Accordingly it is appropriate to repeat the issues here:

20 **Was the respondents’ decision to reject the claimant’s flexible working application based on incorrect facts?**

Was a Friday a peak day for customer demand in the Hawick branch?

25 30. The Tribunal finds that the evidence supported the conclusion that Friday was a busier day in the Hawick branch. In reaching this conclusion the Tribunal had regard to the statistical evidence produced together with the evidence of Pauline Smith of her own experiences within the Hawick Branch. The Tribunal did however consider it unfortunate that the statistical evidence before Pauline Smith in reaching her conclusion was not before the Tribunal and observed that the explanation provided for this omission was wholly unsatisfactory.

31. In reaching the conclusion that Friday was a busier day in the Hawick branch the Tribunal accepted also the evidence of Lynda Graham and concluded that Tuesdays were also busy days in the respondents' Borders branches.

5 **Was the respondent factually correct in refusing the claimant's flexible working application on the ground that it would have a detrimental effect on the respondents' ability to meet customer demand?**

32. In determining this issue, the Tribunal considered carefully the evidence before them. The Tribunal concluded that the high water mark of the
10 respondents' evidence was (i) Pauline Smith's own observations; and (ii) the conversation between Pauline Smith and Lesley Turnbull in the course of which the latter stated that it would put more onus on the other managers were the claimant not to work on Fridays.

33. Against this, the Tribunal had the evidence of the claimant and Lynda
15 Graham. The Tribunal accepted the evidence of Lynda Graham that Pauline Smith worked mainly from her room in the Hawick branch with the room closed and rarely came into the Banking Hall. In contrast, the Tribunal noted that Lynda Graham had been present in the Banking Hall at the respondents' Hawick branch before, during and after the claimant's flexible working
20 application and appeal. The Tribunal accepted the evidence of Lynda Graham that a reduction from 3 to 2 managers in the Banking Hall when a manager took holidays and after the claimant took voluntary redundancy caused no detrimental effect on the respondents' ability to meet customer demand at any time, including Fridays.

25 34. It is for these reasons that it is the decision of the Tribunal that the respondents were not factually correct in refusing the claimant's flexible working application on the ground that it would have a detrimental effect on the respondents' ability to meet customer demand on Fridays.

35. In reaching this conclusion the Tribunal observed that the respondents' led
30 little evidence of the issue of their actual ability to meet customer demand and instead focussed on the position from the perception of managers. To

5 this end, the Tribunal observed that whilst Pauline Smith stated that she could not discuss the claimant's flexible working request with other colleagues for confidentiality reasons it would have been open to her to discuss the feasibility of such a request in general terms with those who were able to comment meaningfully on its effect, such as those in the Banking Hall.

Remedy

10 **What compensation, if any, should the claimant be awarded if the above claim is well-founded?**

36. In determining what compensation is just and equitable in all the circumstances of this case the Tribunal had regard to the behaviour of the respondents overall coupled with the willingness of the claimant to accept any compromise suggested.
- 15 37. In considering the behaviour of the respondents the Tribunal had regard to the fact that Pauline Smith made no enquiries of any employees working within the Banking Hall of the respondents on the detrimental effect of the respondents' ability to meet customer demand on a Friday. Further, at the meeting with the claimant and John Dickinson to determine the claimant's flexible working request Pauline Smith did not show the statistics to the claimant upon which she relied in stating that Fridays were the busiest days within the respondents' Hawick branch.
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38. The Tribunal also considered the fact that Jamie Murphy determined the claimant's appeal without making any independent inquiries himself and instead relied upon information provided to him by Pauline Smith in the course of a conversation conducted with her on Microsoft Teams.
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39. The Tribunal also had regard to the fact that, although a compromise was suggested to the claimant **(75)** the hours suggested would have still left the claimant with considerable child care issues and therefore the compromise was not viable. The Tribunal considered it significant that the respondents did not explore the possibility of a job share with the claimant and to this end
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accepted the claimant's evidence that there would have been considerable internal interest in such a job-share, given that it was at managerial level. The Tribunal also noted that no consideration had been given to the claimant working her suggested hours for a trial period.

5 40. Against this, the Tribunal considered the fact that the respondents did follow a process in their determination of the claimant's flexible or 'agile' working request.

41. After having regard to all of the above, it is the unanimous decision of the Tribunal that it is just and equitable to order the respondents to make
10 payment to the claimant of the sum of six weeks' salary, in the sum of £2,140 gross.

Employment Judge: Jane Porter

Date of Judgment: 16 February 2022

15 Entered in register: 17 February 2022

and copied to parties