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Flexible working requests on the increase post Lockdown

Perhaps unsurprisingly as Furlough has come to an end, employees are asking for managers to consider allowing different ways of working. An employee may make a Flexible Working request.

Employees- without all those hours commuting and overlong meetings- may have developed some very positive patterns: mixing childcare and looking after elderly relatives whilst getting things done; finishing at 5 and being mentally present for the young ones…and many of these may of course benefit you: Zoom meetings are a good example of productive use of time without travel and costs.

Employees may wish to formalise FW patterns developed recently. There is no need to be a parent or carer and the only hurdle is they've worked for you for more than **26 weeks**.

But it's not always a rosy picture. Working from home presents pressures for managers: how can they be sure that staff are actively engaged rather than just doing the bare minimum? Are some tasks *really* doable via Zoom? How do we maintain team spirit tucked away at home? And do those expensive premises remain empty?

A recent case of ours RE v Slough Children's Services Trust (attached to this PDF) illustrates how the pursuit of a work life balance can sometimes become a burden to employers. In this case the employee's FW application was found by the tribunal to be unreasonable and that he'd used it to pursue a groundless claim for sex discrimination and whistleblowing (both struck out at a Preliminary Hearing). The case shows how the facts of each application are crucial. Here the employee didn't compare himself with (female) employees in similar circumstances. None of his comparators' requests would impact on the service in the way which his did.

Other cases suggest that even senior employees can expect the working world to revolve around them in disruptive ways, making unworkable requests.

This note will hopefully help with more difficult FW requests.

Making a FW application

- The process begins with a **written** request. You may have a standard FW request if not, use the ACAS standard (you can download a copy here). This is called a 'statutory application' and must:
    - state that it is a flexible working request
    - explain the change being requested
    - have a proposed start date
    - identify the impact the change would have on the business and how that might be dealt with

    - state whether the employee has made any previous flexible working requests.

- You may receive vague references to flexible working (for example in a lengthy grievance) in which case ask the employee to submit a statutory application and ideally send them a standard application so that they address the specifics.

- An employer must deal with flexible working requests in a reasonable manner and in a reasonable time. The time between the request and the final decision (including the outcome of any appeal) should be less than **3 months** unless a longer period is agreed.

- Types of flexible working include:

    - Job sharing
    - Working from home
    - Part-time
    - Compressed hours
    - Flexitime
    - Annualised hours
    - Staggered hours
    - Phased retirement

- While the right to request FW is generally viewed as a right to request a *permanent* change to terms and conditions, an employee can request a *temporary* change although they will need to state the duration

- The ACAS Guide suggests that where the employee is looking for an informal change for a short period, for example, to cope with a bereavement or for a short course of study, the employer may wish to consider agreeing that they may revert back to their previous terms at the end of a fixed period or after a specified event.

Responding to a FW request

Whilst the timescales for responding are generous, it always better to be prompt. You want to keep your employees motivated and delays may cause resentment or a feeling that you are making life difficult.

Be open minded and reflective. There are stereotypes to be avoided- women as carers and men as breadwinners is an obvious one…

Look at the specifics of the role, be flexible, try to meet the employee half-way if you can.

RE (Claimant) v Slough Children Services Trust (Respondent)

Note of the Judgment of the Employment Tribunal

The unanimous decision of the tribunal is:

1. C's complaint of detriment for a reason relating to time off for dependents contrary to s47C fails and is dismissed.

2. C was not treated less favourably because of his sex, his claim for sex discrimination fails and is dismissed.

3. C did not have any untaken but accrued holiday on the termination of his employment and his claim for holiday pay fails and is dismissed.

4. There was insufficient evidence of any mileage expenses owing to C on the termination of his employment and this claim fails and is dismissed.

5. The respondent's application for an award of costs in respect of those complaints which were dismissed under rule 37 of the Employment Tribunal Rules of Procedure is refused.

Reasons

Findings of fact

We have to consider the evidence that we read and heard, based on balance of probabilities.

C worked as Family Support Worker for R from 3 January 2017 to 30 September 2018. His role was to visit vulnerable children and families in their homes and work with them to identify their needs, support them. He had an annual holiday entitlement of 25 days and the holiday year was April to September.

On 28 August, his partner became unwell, he called his manager SH to let her know that he couldn't come to work, they agreed that day as annual leave. On the following day his partner was still ill and he was not able to go to work. He did not contact SH in the morning. She contacted him by text and he called back shortly after. She made a note of that conversation which we accept was contemporaneous.

C explained that he couldn't come to work. SH told C that it was not acceptable to not turn up at work, she asked whether he would be able to come in the next day. He said he didn't know. She said she needed to know to plan ahead. C said she was asking him to predict his partner's illness. She said to lower his tone. He asked what do you mean. She said his tone was rude. He said he would contact VP. The conversation was heated and left C feeling that SH would not be supportive. He did not attend work for the rest of week. On Sunday 2 September he emailed VP to say he would not attend work the following day. He said his

partner was happy to allow access to her medical file. R did not follow up on that offer at that point. C was unable to work for remainder of the week. He told this to R on 4 September, on 5 September and 6 September but failed to notify R on 7 September.

During the week he mentioned to SH that he may need to work around school times. SH said she needed him to come into the office to discuss his request. On 4 September, C sent an email to say the doctor said it would take up to 6 weeks for his partner to recover.

SH took advice from IR and decided C would need to make formal request for Flexible Working. SH and C met on 10 September to discuss. In that meeting SH also told C that he had failed to comply with the absence policy on more than one occasion. This was causing problems in terms of planning. She confirmed that he could take 10 and 11 September as annual leave. C completed the Flexible Working form on 11 September and sent it to SH. The Form requested for his working hours to be from 9am to 5pm to 9.30am to 2.30pm. SH and C met again, with IR. SH said his request could not be approved because of the need to visit the children at home, and if a crisis situation occurred it might need to be picked up by another member of staff. She also said that C's request was not a Flexible Working request but a request for reduced hours. She felt that C wanted to unilaterally change his contracted hours. She allowed 2 further days for childcare arrangements but expected C in work on 18 September.

After the meeting SH completed the response on the Flexible Working form but did not send it to C.

The following day, an investigation invitation letter was sent to C about failing to provide adequate notice to take leave. It invited him to a meeting on 2 October. It said that he had right to be accompanied, and asked him to confirm whether he would be accompanied by 26 September.

On 17 Sep C called SH that he had been told by his union rep that a request for reduced hours fell within Flexible Working regulations. She said his request would still not work and he was expected to work the following day.

C contacted VP, he said he was expected to attend work but his partner was still ill. He said the offer of medical records was still open. VP spoke to SH then contacted him by email on 18 September to invite him to a meeting on 20 September to discuss options. SH said in her evidence that other options could have been more annual leave or other roles in the trust. None of these roles were suggested to C.

In her email VP suggested C send his partner's medical records to SH. He replied he was not comfortable with that. He did not confirm whether he would attend the meeting or not.

On 19 September he told SH that he was signed off with stress by his GP.

He did not attend the meeting on 20 September. SH called him and left a voicemail, asking him to discuss an OH appointment, the OH process having been triggered by him being signed off sick.

Around 24 September she filled in an OH referral, including the background including the reasons why refused. These reasons had not yet been given in writing to C. The OH referral also said a meeting had been offered to discuss options.

On 28 September, SH received the OH report and wrote to C to say that investigatory meeting would go ahead and another sickness review meeting was scheduled for 10 October. She also offered to discuss ways to support him back to work.

On 30 September he resigned. His resignation email says he was resigning because of unfair treatment followings statutory application for Flexible Working, refused without an explanation, and failure to follow the statutory process. Ms Rao replied on 1 October, to say she was sorry to hear he had resigned and invited him to discuss further. On 2 October she emailed again responding to points in his resignation email, and attaching the Flexible Working form with the written reasons. This was the first time that he was given written reasons.

We accept R's evidence that C had taken 15 days leave in that year.

At the time of the events, R did not have a policy about time off for dependants. Sickness absence policy said that employees should report on first day of absence and again on 4th day if the absence is longer than 3 days.

C relied on 4 female colleagues, Comparator 1 was allowed to adjust her working hours from 10am to 4pm and make up her hours in evening. C said this comparator had Flexible Working arrangement after his resignation, but we had no evidence to make a finding about that. Comparator 2 was allowed to work from home 1 day a week. Comparator 3 was agency week, agreed at start of employment that she would work flexible hours 1 day a week.

Comparator 4 was SH, she worked compressed hours and had one non-working day per week. She is Consultant Support Worker.

None of the comparators were Family Support Workers. Their role included visiting vulnerable children but they had other responsibilities, including statutory visits.

Conclusions

We apply the relevant legal principles to the facts we found. There were 4 complaints after the strike out judgment in May:

1. Detriment because of time off for dependants, detriment (a) only.
2. Sex discrimination, based on detriment (a) to (m) and constructive dismissal
3. Holiday pay
4. Wages – C clarified this at the start of the hearing, being about mileage pay.

Time off for dependents

S.57A ERA says that an employee is entitled to be permitted by his employer to take reasonable time off to take action necessary to provide assistance when dependant falls ill or in case of the unexpected termination of arrangements for care of a dependent. It does not apply unless C tells R the reason for his absence as soon as reasonably practicable and the length of his absence, unless that is not possible until after he has returned to work.

Dependents include a child and a partner.

S.47C ERA gives employees the right to be protected against detriment for reasons relating to time off for dependants under s.57A ERA.

There is more information about this protection under Regulation 19 MAPLE, which describe the protection as a right not to be subjected to detriment by an employer, including that the employee sought to take or took time off under s.57A ERA.

This leads us to 2 questions:

1. Was C subjected to detriment during the call with SH on 29 August (detriment (a))?

2. If so, was that act done because C took or sought to take time off under s.57A?

We considered whether he was subjected to a detriment. We found that SH told him it was not acceptable to not turn up. She said she needed to know so she can plan ahead. She asked him to lower his tone and when he asked what that meant she said his tone was rude. Detriment is widely defined in the case law. In discrimination case law, the courts have said that detriment puts C under a disadvantage, or C reasonably believes the treatment put him at a disadvantage.

In the House of Lords case of Shamoon it was held that physical or economic consequences are not required, but a sense of grievance that is not justified is not sufficient.

We concluded the conversation was a detriment, it was not bullying or harassment but it was heated. It left him uncertain about whether he would be supported by his manager.

Was the treatment done because C sought to take time off for dependants? To decide that we have to decide whether he was entitled to take time off. His partner is a dependent. On 28 August he had to take time off to care for her. His children are also dependants and the arrangement for childcare had been disrupted. C was therefore entitled to time off, if he met the notification requirements.

R accepted that C met the requirement on 28 August. He said he needed one day, he was entitled to take time off for dependants on that day although they agreed that he should take annual leave instead.

On the following day, C did not notify R. He explained the reason for his absence on that call. R said that C had not told his employer the reason for his absence as soon as practicable.

We find that he sought to take time off on 28 and 29 August for dependants. We are satisfied that on 28 August and 29 August, he took or sought to take time off under s.57A.

Causation

In complaints for detriment for whistle-blowing, the test is where the disclosure materially influences the treatment of the whistle-blower. The law on whistleblowing protects an employee from detriment “because of” the protected disclosures. This is not exactly the same as the words of s.47C, where the question is whether the treatment is done “for” a prescribed reason, but in our view it does not change the test required. In another context, in Amnesty International v Ahmed, the court said the terms ‘because of’ and ‘on the grounds of’ are not substantially different.

Therefore, the test is ‘because of’. In Chief Constable v Khan, the court said we must look at the reason for the treatment, not using a ‘but for’ test.

We’ve decided that in considering whether the treatment was one for a prescribed reason, we need to focus on the real reason for the treatment complained of and whether it was him seeking to take time off for dependants.

We find that the real reason for the heated conversation was not that he was seeking to take time off for dependants, but because he had not contacted SH to tell her he would be absent. It was this that she said was not acceptable and led to their heated exchange. While it was understandable that he did not know the length of his partner’s absence, R was entitled to know how long he thought he would be absent.

So the claim of detriment for time off for dependants fails.

Direct sex discrimination

Detriments (a) to (m).

C said he was subjected to less favourable treatment because of sex. That is the wording of s.13 EqA. In complaints of discrimination at work, s39 EqA must also be met. It says that employers must not discriminate against employees in offering them employment, in the terms of their employment, by dismissing them or by subjecting them to any other detriment.

The law recognises that it is difficult to prove discrimination and a shifting burden of proof is made because of this. The burden of proof starts with C, to show facts from which we could conclude, in the absence of an explanation, that there was discrimination. Then the burden shifts to R to prove that it was not because of sex.

C must show more than a difference in sex and more than a difference in treatment. That is not enough.

We need to consider 3 questions:

1. **Were the acts a detriment or otherwise prohibited by s.39?**
2. **Has C established facts from which we could conclude that he was treated less favourably because of sex?**
3. **Has R proved, on balance of probs, that it did not discriminate against C by showing the treatment was not because of sex.**

In relation to detriment (a), as explained, we've found that it is a detriment.

Detriment (b) is the failure to ask to provide medical records. We find that this was not a detriment. R did not doubt that his partner was unwell and did not see the need to take up this offer at this time. If C regarded it as a detriment, it was not reasonable for him to do so.

Detriment (c) relates to the requirement to attend the office, communicated to C on 5 September to discuss the Flexible Working proposal. There was no suggestion that C was unwell, he had said he was able to attend the office between 9.30 and 2.30, so requiring him to attend on the 10th to discuss his Flexible Working request was not a detriment and it was not reasonable for him to think it was.

Detriment (d) relates to meeting itself on the 10th and initiating a conversation about sickness policy, C was not sick, it was not obvious that sickness policy applied, but an informal reminder of the need to follow the reporting procedure when absent is not a detriment. This was not unlawful discrimination.

Respondent accepts that (e), the refusal to grant Flexible Working application, was a refusal to allow a benefit in terms of C's employment. We agree and find that this brings it within s.39(a) and (b) as it was a request to change the terms of employment under 39(a), and a refusal to provide a benefit under 39(b).

We reached the same conclusion for Detriments (f) and (g) as they are tied up with the refusal to grant the Flexible Working request: the delay in sending the written reasons and the requirement that C attend work FT on 18 September.

Detriment (h) is email from VP, to explore meetings to explore options. It was not a detriment, it was an attempt to resolve things for C. If he saw it as a detriment because he was unable to attend office, he could have suggested a phone call.

Detriment (i) relates to offer of access to C's partner's medical records, which was accepted by VP at this stage. The suggestion that he should send it to SH and the failure to respond to his email about that is not a detriment. It can't be objectively regarded as a detriment or falling under any other part of s.39

Detriment (j) relates to SH's voicemail on 20 September to tell him he would be assessed by OH so that R could consider OH advice in relation to his sickness absence, that does not amount to a detriment.

Detriment (k) is the OH referral form completed on 24 September. It's true that C had not received written notification of the refusal at the time, but it was not a detriment to him. Also true that he had not been told of his right to appeal, but his right to appeal had been on the Flexible Working form which he had completed at the start of the process. Completing the OH form with information that was known to C, at least conveyed to him verbally, is not a detriment.

Detriment (l) is the timeframe about notifying R that C wished to be accompanied at a meeting. We find this did not take place as alleged. The letter of 14 September set a deadline on 26 September. The other letter did not include a date for response. Allegation (l) did not happen and cannot succeed.

Detriment (m) is about IR's email on 2 October that responded to some of points in C's resignation email. It was not a detriment to follow up the email of 1 October even though IR had left the email to say that C should contact her if she wanted to discuss further. We find that this did not mean there should be no further communication. The email does not amount to detriment.

So we found act (a), (e) and (f) and (g) to fall under the meaning of detriment or are otherwise less favourable treatment under s.39 EqA.

The next question is whether they are facts from which we could decide, in the absence of an explanation that C was treated less favourably because of his sex.

For reasons similar to the detriment claim, on detriment (a) there are no facts from which we could conclude this was sex discrimination. There is no evidence that a woman in the same circumstances would have been treated differently.

Detriment (e) to (g) are about the Flexible Working request. Comparator 1 reduced her hours for a short period. None of the other comparators reduced their hours. None of the comparators were in the same role as C. So they were not comparable for the purposes of discrimination, although we could take them into account when considering whether a hypothetical comparator would have been treated the same.

We looked at the reasons for the Flexible Working refusal and the way it was refused. There were a number of features about the way C was treated which might have been dealt with better by R. For example, R did not have a policy about time off for dependants. The requirement that C should notify his absence every day was difficult for him and not practical for SH for planning. During the period 28 August to 30 September, R did not suggest any options to assist C with the problems he was having. The options suggested at the hearing (a period of unpaid leave, more annual leave or different roles) were not suggested to C at the time. It would have been better to offer them to C at the time, which may have avoided

him being signed off work with stress. It was only on 18 September that VP said that options could be explored.

One of the reasons that R gave was that the request for the change was for an unspecified period of time, but it was clear that he needed it for the period of his partner's illness. And he had explained that this could take up to 6 weeks.

SH thought that the Flexible Working process does not include a reduction of hours, but s.80F does expressly include reduced hours.

There was a delay in providing C the written reasons after a meeting when he was told that it was refused, and no steps were taken to make sure he was aware of his right to appeal.

On the other hand, in favour of R, R considered the Flexible Working request swiftly and quickly told C verbally of the refusal.

(…)

There is no evidence that these aspects of R's treatment were in any way related to his sex. We have not found any facts suggesting that a female worker in the same circumstances would have been treated differently. Therefore the burden does not shift to R.

If it had done, we would have found that the reasons for the Flexible Working refusal was that it was not workable. The delay in ending the reasons was because R wanted to explore options with C.

We've therefore concluded that none of C's complaints of less favourable treatment in relation (a) to (m) succeed.

Since we find that there was no discrimination, his resignation could not have been because of discrimination and therefore it cannot amount to a discriminatory constructive dismissal.

Holiday pay

His holiday entitlement was 25 days, by 30 September, he had taken 15 days and had 10 days left. As he left on 30 September, he had only worked 6 months in the holiday year, and was therefore entitled to 12.5 days. As he had taken more than that, he is not entitled to any holiday pay.

Wages pay

He ticked a box on the ET1 about 'other payments'. He explained on the first day of the hearing that this was about mileage. The basis of this claim was not clear to R before the hearing but some evidence was found at the end of the first, including his payslips.

C's contract entitled him to mileage and a lump sum of £1000 for 1000 miles covered. His last pay slip shows the lump sum being paid. There was no indication of C being paid for miles undertaken in August, but he was unable to say how many miles he had covered that month. He did not have any record of his claims of how many miles he had done or any log. The burden of proof is on C in these types of claims, and he has not discharged it. So we are unable to award him any award.

R's costs application

We don't make any order for costs. R's application is refused.

An automatic judgment explaining this will be put on online database. The reasons will not be sent automatically to the parties or put on the database except if parties request it.

The power to avoid costs is set out in rule 74 to 78 ET Rules of Procedure. Unlike in civil litigation where the successful party would expect to receive costs from the losing party, in the ET the parties bear their own costs. The ET has a discretion to make an order for costs but they are the exception rather than rule.

R relies on Rule 76(1)(a) and (b): no reasonable prospects of success or a party acted unreasonably in bringing the proceedings.

We have to decide whether one of those grounds is made out and if it is, whether to make an order or not. We look objectively at the time it was brought and judge it on the information that C had. It is an objective assessment.

Looking at 76(1)(b), whether the claim had no reasonable prospect of success. Even before the disclosure and exchange of witness statement, which EJ Gumbiti-Zimuto had at the time of his assessment, there were aspects of the claim which seemed very unlikely to succeed. For example, detriment (c), (h) and (l), so it was not reasonable to include them in the claim. So one of the grounds does apply, and the tribunal should consider whether a costs order should be made.

Our decision that it should not is based on a following reasons: orders for costs are the exception rather than the rule. We took into account the costs warning given by R to C, but an important factor is C's status as a litigant in person. It was reasonable for him to be reluctant to accept R's view on the merits of his complaints.

The detriments and dismissal claims that were struck out are technically complex, and many of them overlap with the discrimination complaints, which R did not suggest had no reasonable prospect of success. We also took into account C's ability to pay and are not satisfied that he has sufficient resources to mean he has the ability to pay a costs order.

So we have decided the costs order should not be made.