EMPLOYMENT TRIBUNALS

Claimant: Mr M Vallis-Wilks

Respondent: London Underground Ltd

Heard at: London (by CVP) **On:** 9 to 17 September 2024

Before: Employment Judge Heydon
Ms J Holgate
Ms C Brayson

REPRESENTATION:

Claimant: Represented himself
Respondent: Ms Gillian Crew (Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is not well-founded and is dismissed.

2. The complaint of being subjected to detriment for making an application to amend the terms and conditions of employment is not well founded, and therefore is dismissed.

3. The complaint that the claimant's application to amend the terms and conditions of employment was not dealt with in a reasonable manner is not well founded, and therefore is dismissed.

4. The complaint that the claimant's application to amend the terms and conditions of employment was not determined within the statutory time-limit is well founded and therefore succeeds.

Remedy

5. The respondent is ordered to pay compensation of 5 weeks' wages, limited to the statutory cap in 2022/23 of £571 per week.

6. The total compensation payable is:

   5 x £571 = £2,855 gross.

REASONS

Introduction

1. Mr Malcolm Vallis-Wills (the claimant) was employed by London Underground Ltd (the respondent), as a Network Incident Response Manager, from 14 January 2008 until 17 December 2023.

The claim and issues

2. The claim arises from a flexible working request which the claimant submitted on 10 July 2022. He brings claims for unfair constructive dismissal; automatic unfair dismissal; failure to deal with a request for flexible working in accordance with the statutory requirements; and that he was subjected to detriments due to his flexible working request. Early conciliation started on 7 February 2023 and ended on 21 March 2023. The claim form was presented on 17 April 2023.

3. The respondent's response is that: the claims may be out of time and are not continuing acts; the respondent denies that the claimant was dismissed, denies there was a breach of s. 80G of the Employment Rights Act and denies subjecting the claimant to a detriment for submitting a flexible working request or at all.

Procedure, documents and evidence heard

4. Case management hearings took place on 18 July 2023 before Employment Judge Adkin and then on 21 September 2023 before Employment Judge Taylor. Judge Taylor made a case management order dated 22 September, setting out the list of issues for the Tribunal to determine. At the request of the Claimant, and with the agreement of the Respondent, the Tribunal decided to work from the list of issues which the parties had agreed between each other shortly after the case management hearing, but before the case management order had been promulgated. In all material respects, this listed the same issues as in the case management order, but with a few subtle differences in wording.

5. The final hearing lasted 7 days. The Claimant represented himself (very ably), and the Respondent was represented by Counsel, Ms Gillian Crew. For the Claimant, the Tribunal heard oral evidence from the claimant himself and from Mr Kebba Jobe, a colleague who was a trade union representative. For the respondent we heard oral evidence from Mr Stephen Manuel, Mr Paul Maugher, Ms Marissa Lynn and Mr Richard Jones, all employees at London Underground.

6. The Tribunal was provided with a bundle of documents containing approximately 840 pages. The respondent provided written closing submissions, and both claimant the respondent made oral submissions following the end of the oral evidence.

The Facts

7. The Claimant was employed by the Respondent from 14 January 2008, until the employment ended 17 December. He resigned by email on 16 November, and worked his month's notice.

8. The Claimant was a Network Incident Response Manager (referred to as a NIRM). NIRMs were required to respond to major incidents on the London Underground network, for example if a train derailed. During the second half of 2022, there were 12 NIRMs.

9. The NIRMs were line-managed by Steve Manuel. In July 2022, Mr Manuel was relatively new in his post. He had previously been a London Underground Control Centre Manager. Mr Manuel's line manager was Paul Maugher.

10. NIRMs worked shifts and provided coverage 24 hours per day, 7 days per week. They were paid for 35 hours per week, but in fact worked a 40 hour week. Additional hours worked were then combined together and taken as banked rest days in other weeks.

11. Shifts were allocated by way of a roster over a 12-week rotation period. During each 12-week period, each NIRM would have 9 weeks in which they had allocated duty shifts (sometimes referred to in this case as “core shifts”). The remaining 3 weeks each would be a “cover week”. During cover weeks, NIRMs would not have any standard rostered shifts, but they were required to cover core shifts for other NIRMs who were sick, on leave, or on training. If they were not required to cover shifts, they would be required to work in the office. Two of the NIRMs were given the responsibility for preparing the rosters. They were known as the "roster champions”. At all material times, the roster champions were Marissa Lynn and Tim Bingle.

12. The Claimant has significant caring responsibilities for his son, who has a condition known as HIE 3, a form of serious brain injury. As a result of this and other medical conditions, his son has significant caring needs. The Claimant and his wife had for some time been devising a long-term plan that would allow them to assist their son to become more independent.

13. As part of this plan, on 10 July 2022, the Claimant made a flexible working application by email to his line manager Steve Manuel. He asked to reduce his contracted hours from 35 to 21 hours per week but said “I would also be willing to consider any other offers of reduced working hours to suit the business needs.” He attached a proposed roster which would see him working all but 5 of his usual core shifts over the 12-week roster. He asserted that his proposal would save the Respondent over £45,000 per year in salary, employer’s NI and pension contributions. He also said that he would be willing to look at any other roster proposals which may be offered. The application was made on the appropriate London Underground form. The form did not require the Claimant to set out why he wanted the new arrangement.

14. Mr Manuel held a meeting with the Claimant on 3 August to discuss the application. During the meeting, Mr Manuel typed up a brief summary of the discussion on the relevant London Underground form which was designed to be a record of a flexible working application interview. In the form, Mr Manuel noted that the Claimant had a disabled son and that he had a long-term plan to move out of London to help his son to become more independent. It referred to the fact that education and support for his son were required. It referred to the fact that the Claimant had requested a permanent reduction in his hours. During the meeting, the claimant gave details of his son’s medical condition, but Mr Manuel did not record any details and did not question the

reasons behind the claimant's application – he took it at face value that the claimant had good reasons for the request.

15. In the same form, Mr Manuel ticked a box that suggested that an extension of up to 14 days to consider the decision had been agreed with the Claimant. In oral evidence, Mr Manuel confirmed that he meant that he had said to claimant that he needed 14 days to talk to colleagues and to consider the application. The claimant had not agreed to any extension to the statutory timescales.

16. Mr Manuel is an experienced London Underground manager, but had only recently transferred to the department. Previously he had worked on train operations, managing hundreds of people, where he had considered, granted and refused many flexible working arrangements. Due to his recent arrival in the department, he was unsure what the impact on the NIRM roster would be if he granted the application. There are far fewer NIRMs (12) than in his previous role managing train drivers and managers, so he was concerned about the limited flexibility he had, and whether he would be able to cover all shifts.

17. Following the interview on 3 August, Mr Manuel consulted Tim Bingle (one of the NIRM roster champions) about what the impact would be on the roster if he agreed to the proposed arrangement for 6 months. In doing so, he did not mention who the applicant was. Mr Bingle replied on 8 August, saying that he could not assess the full impact on the roster, that there were lots of other variables and that he did not yet know what holiday requirements there were from January 2023. Tim Bingle had said they would lose 22 workable shifts over 12-week cycle. He asked Mr Manuel how he would propose to cover these shifts, whether on overtime, or by diverting people from other duties. Mr Manuel replied to Mr Bingle saying that he would consult Alan Monk, who is an expert within the Respondent on devising rosters.

18. Mr Manuel had a discussion with Alan Monk on 10 August. In the morning of 11 August, Mr Monk sent Mr Manuel a draft roster showing the Claimant working 22.5 hours per week (as opposed to the 21 hours which was the Claimant's main request).

19. On the same day, Mr Manuel was in a meeting with the Claimant. By this point, he had decided to refuse the Claimant's application for a permanent part-time working arrangement. At the meeting, he informally told the Claimant this, but also said that he could appeal. At the same time, he asked the Claimant for details of his son's medical conditions. Later that day, the Claimant sent him details in writing.

20. The following day (12 August) Mr Manuel sent his written decision to the Claimant. As he had already indicated orally, he refused the application for a permanent reduction in hours.

21. In the decision letter, Mr Manuel summarised the Claimant's reason for the application, stating that he wished to spend more time with his some to help him to become more independent, to assist his development and explore options to relocate outside London. He noted that the Claimant was seeking a permanent arrangement. Some (but not all) of the details of the Claimant's son's medical condition were copied and pasted into the decision letter from the email that the Claimant had sent the day before.

22. In the letter, the reason given for refusing the application was "There would be a detrimental impact on business performance". It went on to say:

> "Further to this, the resource available to cover your vacant shifts would likely result in a detrimental impact on business performance. With only a pool of 12 NIRM's, I will not be able to accommodate all of your uncovered shifts.
>
> As discussed at the meeting you could explore a job share with one of your colleagues as an alternative arrangement. This would require (a current NIRM) to be able to job share / share a roster line with you.
>
> I would however, be inclined to introduce a short term local agreement for six months where you could work a 22.5hrs week. I have attached a copy of the proposal with this letter for you to consider. This will allow you to spend time with your son and put plans in place to assist him becoming independent. This will also give you time to relocate. The above will also allow you time to explore other options.
>
> This short term agreement could come into effect from the 09/10/2022 and end on the 08/04/2023. Working a 22.5hr week rota will mean pay, annual leave and pension contributions will be paid / processed pro-rata."

23. The Claimant had 14 days to appeal, that is, to 26 August.

24. On 18 August, the Claimant contacted Kebba Jobe (a London Underground union representative) to ask how much cover is needed for the NIRM roster. Mr Jobe contacted Alan Monk who sent through the formula which shows how London Underground calculate how many NIRMs are required to provide cover. Essentially, this is a formula which shows how many additional staff you need on a roster for cover, taking into account holidays, assumptions about sick days, training etc. The formula

which Mr Monk provided showed that 9 staff are required to cover NIRM shifts; and that based on 9 staff you needed cover of 2.75 (rounded up to 3) to provide sufficient cover. Hence, there are 12 NIRMs. So, in theory, with 9 full-time NIRMs, the NIRM team was 0.25 of a full time person over capacity.

25. On 25 August, the Claimant submitted an appeal in writing to Paul Maugher (Steve Manuel's manager). In his appeal letter, he cited 5 grounds of appeal -

> "1. There was no valid business reason to refuse my request.
> 2. No reason/s were given when refusing the request on the grounds that 'There would be a detrimental impact on business performance'.
> 3. The decision to refuse the request was not based on fact.
> 4. London Underground's Flexible Working Guidelines were not followed when determining the decision.
> 5. My statutory request was not dealt with in a reasonable manner."

26. On 26 August, Mr Maugher acknowledged receipt of the appeal, and explained that there would be some delay because both he and Steven Manuel would be on leave one after the other – Mr Manuel was due back from leave on 1 September, and Mr Maugher back on 12 September. The statutory 3-month deadline for determining the appeal was 9 October. Mr Maugher indicated that he would meet the 9 Oct deadline, so it must have been assumed that sometime between 12 September and 9 October there would be an appeal meeting, and then a decision.

27. In the meantime, Mr Manuel returned to work on 1 September, and immediately got to work on the short-term agreement that he had proposed to the Claimant. He had not discussed or agreed it with the Claimant at this point – there had been no communication apart from the decision letter. It seems that he had forgotten the exact wording of his decision letter, and had assumed that the Claimant would want to proceed with the 6-month temporary arrangement.

28. At first Mr Manuel approached Alan Monk in hope he could arrange the new roster. He told Alan Monk that he would contact HR about implementing pay. Alan Monk and Tim Bingle set up the roster for the temporary arrangement on 6 September.

29. Also on 1 September, Mr Manuel emailed the HR helpdesk (called 1729 helpdesk) setting out what the terms of the temporary arrangement were, and asking them to implement it. HR replied on 7 September saying that he could not implement his proposal as a "local agreement" and that he needed to make a formal flexible working request. He replied setting out more background, but was told again on 26 September

that it couldn't be a local agreement because it involved changes to pay and pension contributions.

30. It took a considerable amount of time for Steve Manuel to get the temporary arrangement recorded on the HR system in order to change the Claimant's pay. On 27 September, Jacqueline Parker (an HR business partner) emailed to say she had spoken to Mr Manuel and said it's a formal working arrangement, gives the start and end dates – and that the arrangement could later be reviewed and a decision made on its permanency. Following a lot more correspondence, only on 16 November were the Claimant's pay and hours finally changed on HR system, with Jacqueline Parker chasing throughout.

31. In the meantime, the Claimant saw the new published rosters showing him working reduced hours. At this point he still had not had a discussion with Mr Manuel about his proposal for a 6-month arrangement. On 8 September he emailed Mr Manuel stating that he assumed that the new rosters meant that his appeal had been successful. On the same day, Mr Manuel replied, apologised, and explained the temporary arrangement. He said that he would call the Claimant to discuss.

32. A few days later they had spoken on the phone and, on 12 September, the Claimant emailed Mr Manuel stating that he wished to continue with his appeal;

> "However without prejudice, I would like to accept this 6 month flexible working arrangement".

33. The same day, Mr Manuel replied and apologised again. He says he was not sure why he didn't speak to the Claimant about the temporary arrangement, and assumed he would accept it.

The Appeal

34. Her Majesty Queen Elizabeth II died on 8 September, while Mr Maugher was on leave. He returned to work on 12 September, and the Queen's funeral was scheduled for 19 September. This was going to be an exceptionally busy time for London Underground, with many additional visitors travelling to London for the Queen's lying in state and the funeral. Mr Maugher was fully involved with these arrangements and would have been extremely busy. This played a part in delaying scheduling of the appeal meeting.

35. A week after the funeral, the Claimant chased Mr Maugher for news about the appeal, first on 27 and then again on 30 September. On 2 October, Mr Maugher gave notice

that the appeal interview would take place 3 and a half weeks later on 25 October. The statutory 3-month deadline for completing the process ended on 9 October, so this meant that the deadline would not be complied with. In his email, Mr Maugher said that he had now seen the original application and decision paperwork and had discussed it with Steve Manuel.

36. On 3 October Claimant accepted the meeting invitation by email, but added:

> "For clarity, my acceptance of the calendar invite for the appeal hearing is not my acceptance of any extension to the time limits.
>
> I continue to remain available at all times for the appeal hearing and anything else you may wish to discuss."

37. The appeal hearing took place on 25 October. At the meeting, the Claimant had a full opportunity to set out his case to Mr Maugher. Mr Maugher's decision was communicated to the Claimant on 11 November (in a letter dated 8 November) - just over a month after the 3-month deadline. Mr Maugher upheld Steve Manuel's decision, refusing the application for a permanent reduction in hours.

38. In giving his decision, Mr Maugher agreed with the Claimant that Steve Manuel's decision "would have benefitted from a more expansive rationale to fully address your needs." Mr Maugher's decision letter runs to over 5 pages and more than two of them are devoted solely to explaining the reasons for the decision. The decision letter refers to three "themes", each one of which is a statutory ground upon which flexible working applications may properly be refused.

39. One of those grounds referred to is "Where there is a burden of additional cost". On a proper reading of the letter, additional cost is not one of the grounds on which the appeal is refused. However, there is a section of the letter under this heading which Mr Maugher used to counter the Claimant's view that the arrangement would be a significant cost saving for London Undergound. Mr Maugher acknowledged that there would be a cost saving, but said that the Claimant had overstated it because his calculation had not taken into account that there would be a need for additional working on overtime to cover some of his shifts.

40. In significant detail, the letter addresses the difficulty in providing sufficient cover for the NIRMs; that although the Claimant would continue to work most of his existing core shifts, he would mostly be unavailable for cover for 3 weeks in 12 as a full-time NIRM would be. It refers to the loss of flexibility as operational demand varies. In particular, Mr Mauger stated the following:

"From my perspective this is the crux of your request, if we step away from the minimal financial saving, we will realise this is the area that we need to consider further for several reasons and relate to the operational impact and effect on the other team members.

While I note your point about that you are working 87% of your core shifts, the reallocation of cover because of your flexible working request would have an overall detrimental impact to the business and the wider team for the reasons, I set out below.

The minimal operating levels of two NIRMs on early and late shifts with one NIRM on site was set for a specific operational demand with the appropriate level of cover built in to minimise any operational abstraction, 'Flex up' when operational demand is high and to minimise fatigue within the entire team.

It is your view that cover would be sufficient to provide the necessary level of cover required so that overtime requirements would be minimised, assuming of course it could be found. To clarify, cover was set at 3 for a very intentional reason, to provide sufficient resource to cover all business requirements and the associated work life balance for the wider team. For clarity these requirements are to minimise the operational impact on performance delivery and includes Annual Leave/ Time Off in Lieu, training & development, shortages due to sickness and vacancies in the team. Had 2 on cover (even for a small number of shifts) been deemed sufficient to cover all these elements then this is the level it would have been set at originally.

To bring this point to life, by fixing your shifts in the cover weeks the business loses about 60% of your cover availability which immediately has an impact on your colleagues and our ability to cover the other abstractions previously listed above.

> At a headline level, the reallocation of cover described above would have resulted in a material number of shifts over the past 6 months not having the appropriate cover, either resulting in an uncovered shift (and insufficient resource on shift) or the use of overtime. It also unfavourably impacts seven of your colleagues who are impacted on weeks three, four and eleven of the rosters where you propose to fix your shifts, leaving just four people in the team unaffected. By fixing your shifts in this way with no cover you reduce further the flexibility in the roster as you would also no longer be available to cover nights or weekend shifts again with an expectation others pick up the resilience required to deliver our operational commitments. As an example, I have taken the opportunity to review your current short-term local agreement, this reinforces my observations above with you having booked out all SCMI duties with training."

The Annotations on the Rosters

41. The roster for the week commencing 23 October included the day of the Claimant's appeal meeting, 25 October. Prior to his temporary part-time working, he would also have been expected to be working a shift on 28 October. In the published rosters, both of these shifts were marked with the words "Leave uncovered" in red, followed by "Leave uncovered as per SM". This is the only time that this wording in red appears in the roster. It indicates that no-one due to cover that week was available to work those shifts, and that Steve Manuel had decided that no other NIRMs would be permitted to work this shift on overtime.

42. Usually, 2 NIRMs will work on each shift. However, Steve Manuel had the authority to go down to 1 NIRM at a time, and occasionally decided to do so. At the time, he was under pressure to reduce the NIRM team's overtime spend. He was also keen to ensure that his decision to offer a temporary part-time arrangement to the Claimant did not put additional strain on the other NIRMs.

43. It was the practice of the roster champions to make amendments to the roster in red and in her evidence, Marissa Lynn said that this is why "Leave uncovered" was marked in red, because it was added after the roster was originally published. It is unclear exactly when the amendment was made, but it must have been before the week in question, beginning 23 October. We find that it was made shortly after 6 October, which is when Mr Manuel gave the instruction to the roster champions to leave the shift uncovered.

44. On 30 October, the Claimant's colleague, Denis mentioned the red "leave uncovered" annotations to the Claimant. Dennis drew the Claimant's attention to it, and suggested

that this was being put on the roster to draw attention to the Claimant's new flexible working pattern, and seeking to undermine it. The Claimant felt embarrassed about this.

45. On 15 November – a little over two weeks after the conversation with Denis, and 4 days after the appeal decision, the Claimant went to speak to Paul Maugher to raise concerns about the annotations on roster. At this time, the Claimant was under the impression that Steve Manuel was directing that the rosters be amended in this way. He told Paul Maugher that he was being targeted with unwanted behaviour by SM. Paul Maugher looked at the rosters and said he doubted that this was a deliberate attempt to upset or undermine the Claimant, and that he would speak to Steve Manuel. The Claimant felt at the time that Paul Maugher appeared to take him seriously, and he left the meeting much happier.

46. As a result of the meeting, Paul Maugher spoke to Steve Manuel and asked him to amend the annotations on the roster. In turn, Steve Manuel spoke to Tim Bingle to ask him to stop putting "Leave uncovered" in red. Tim Bingle actioned this, and said that the roster champions had marked it up to make it clear that people could not take this shift on overtime.

47. The following morning (16 November) Paul Maugher emailed the Claimant to say he had spoken to Steve Manuel and the roster issue had been resolved. At 13:57, the Claimant emailed both Steve Manuel and Paul Maugher. He addressed the first part of the email to Paul Maugher thanking him for his prompt intervention. He said that the annotations on the roster had felt like harassment, and he had thought that Steve Manuel had directed it. He said that this does not resolve the issue as he now knows it was the roster champion/s; and that they had been altering the schedule to reflect negatively on his Flexible Working Application and the outcome. He said that this is harassment and it was his aim to stop it immediately. He said that he was devastated to hear this news. He addressed the second, shorter, part of the email to Mr Manuel in which he asked him for a day's special leave the following day while he comes to terms with what he described as "harassment in the workplace".

48. At 4pm, the Claimant went to see Steve Manuel, initially about the request for a day's special leave, which he granted. In the meeting, the Claimant reiterated his belief he was being harassed by the red "leave uncovered" annotation. Mr Manuel said he didn't understand what the harassment was and the conversation became quite heated. At some point in the conversation, Mr Manuel laughed. Mr Manuel says he laughed in disbelief at what was happening. The Claimant perceived this laughter as disrespectful and belittling, and he walked out.

49. Immediately after leaving Steve Manuel, the Claimant went to find Richard Jones. Mr Jones was an old colleague who the Claimant had known well for many years and was now a very senior employee. At that point, the Claimant was very emotional. He asked Mr Jones if he had 5 minutes. He told Mr Jones about his flexible working application and his belief that the annotations on the rosters amounted to harassment. Mr Jones told the Claimant that there was nothing he could do. The conversation got very heated.

50. Shortly afterwards, the Claimant apologised to Mr Jones for the way in which he spoke to him via an email at 16:51.

51. That evening, the Claimant gave his resignation by an email to Steve Manuel. He then proceeded to work his notice period, and remained employed until 17 December.

The Law

Constructive unfair dismissal

52. The Claimant claims unfair constructive dismissal. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee will be treated as having been dismissed if:

> "....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

53. The Claimant would be entitled to terminate the contract if the employer had committed a repudiatory breach of a term of the contract. In this case, it is alleged that there was a repudiatory breach of the implied term of mutual trust and confidence. Such a breach will occur if the employer conducts itself without reasonable and proper cause in a manner likely to destroy or seriously damage the relationship of trust and confidence.

54. If the Tribunal determines that the resignation did amount to a dismissal, it can then go on to consider whether or not the dismissal was fair in accordance with Part X of the Employment Rights Act 1996.

Flexible working applications

55. Section 80F of the Employment Rights Act 1996 provides a right for employees to apply to their employer for a change to the terms and conditions of employment if the change relates to certain types of terms. This includes a change to the hours the employee is required to work.

56. When such an application has been made, then section 80G imposes certain obligations on the employer. This includes an obligation to deal with such an application in a reasonable manner (s80G(1)(a)); not to refuse the application without consultation with the employee (s80G(1)(aza)); to only refuse it on certain specified grounds (s80G(1)(b)); and to determine the application (including any appeal) within a specified time (section 80G(1)(aa), (1A), (1B)-(1C)). At the time of the application the specified time was 3 months from the date of the initial application.

DECISION

Constructive unfair dismissal

57. The first question before the tribunal is whether the Respondent committed a repudiatory breach of the implied term of mutual trust and confidence in one of a number of ways. We take each in turn.

(i) Failing to consider the Claimant's flexible working application ("the FWA") made on the 10th July 2022 in a reasonable time frame, the Claimant says that he did not attend an appeal hearing until the 25th October 2022 and did not receive the appeal outcome until the 11th November 2022, in breach of the Respondent's flexible working policy.

58. Steve Manuel completed the first part of the process in just over a month, but the appeal took about 2 and a half months. Paul Maugher did have the option to pass the appeal onto someone else but decided to keep it to himself. The Tribunal accepts that the unexpected and significant pressures of the Queen's funeral made the 3-month deadline difficult. But even after the funeral there were still 3 weeks to the deadline which should have allowed sufficient time. The Claimant chased a few times, and apart from responses to his chasers, was not kept up to date particularly well. We therefore agree that there was a failure to conclude the process within a reasonable period. However, the delay was relatively contained and there was never any suggestion that the respondent was not going to deal with the appeal, and do so seriously. Given other factors – Mr Maugher said at the outset this is going to take a bit more time as both he and Mr Manuel were on leave at different times during the period, plus the Queen's funeral – the Tribunal finds that the Respondent did not act without reasonable and proper cause in a manner likely to destroy or seriously

damage the relationship of trust and confidence. There was therefore no repudiatory breach of contract.

59. The next issue for the Tribunal to consider:

(ii) Failing to consider the Claimant's FWA made on the 10th July 2022 in a reasonable manner by dismissing it without due consideration, failing to consider the request in good faith, failing to follow the ACAS guidelines and internal policies and procedures, indicating that it was going to refuse the FWA before considering the Claimant's medical evidence and despite requesting the same on the 11th August 2022, and denying the FWA based on subjective judgments or assumptions.

60. Steve Manuel was very new to his role at the time at which he made the initial decision on the flexible working application. However, plenty of consideration went into his decision. He looked in a lot of detail at how a part-time arrangement might work. He recognised the limitations in his own knowledge and sought advice from one of the roster champions (Tim Bingle) and Alan Monk who between them had considerable expertise in putting together NIRM rosters. The advice he had from Tim Bingle in particular highlighted that there were a lot of unknown factors which made it difficult to predict, and therefore very difficult to commit to on a long-term basis. Nonetheless, although he refused the application, he was willing to try it out over a decent period of time, covering 2 x 12 week cycles.

61. Steve Manuel's decision letter gives a very brief reason, but very little detail. However, on appeal, it is clear from Paul Maugher's decision that very careful consideration was given to the request.

62. It is alleged that there was a failure to consider objective evidence. By this, the Claimant is referring primarily to the cover formula provided by Alan Monk calculation. The Claimant argues that by applying this formula, you can conclude that there was still sufficient cover, and that this is the only truly objective piece of evidence. However, this assumes the cover formula provides a perfect answer to how much cover is needed. The Tribunal finds that reality is more complicated than this. The formula is based on certain assumptions e.g. about the number of sick days and training days which may or may not prove to be incorrect. And it is clear that despite there having been more than sufficient cover (based on the cover formula) prior to October 2022, there were still shifts which needed to be done on overtime. The formula is not a perfect science. It was inevitable that 1 of 12 NIRMs moving to part-time working would mean more core shifts to cover, and fewer person-hours to cover them. It also reduced flexibility and it was legitimate for the decision makers to have this at the forefront of their minds when deciding whether to commit to a permanent arrangement.

63. It is alleged that Steve Manuel took a decision prematurely before considering medical evidence and/or was wrong to indicate his decision to the Claimant before formally communicating it. We have found that Mr Manuel did decide before asking for the medical evidence. However, we find that he did not need it. From the discussion on 3 August, he already knew sufficient details about the Claimant's son's medical details. He never questioned the need for the request and accepted what his needs were. He knew what the Claimant was asking for and why. He knew he had caring responsibilities. He knew the gist of the Claimant's son's condition. He knew that he wanted a permanent reduction in hours because of the long-term nature of the caring responsibilities. Knowing the Claimant's son's precise condition was not going to make a difference to his judgement. The only question Steve Manuel was asking himself – quite correctly – was whether he could facilitate part-time working for the Claimant. He was not questioning whether the Claimant truly needed it or was deserving of it.

64. There is no evidence that either decision was taken in bad faith. It was done fairly and transparently. As to whether Steven Manuel's decision was premature, we have already addressed that point.

65. We do find that that the Respondent could have put more effort into looking at other alternative options such as a jobshare. Had Steve Manuel had a conversation with the Claimant shortly after his decision, maybe they could have found a way to explore this in more detail, instead of Mr Manuel assuming that a short term agreement would meet the Claimant's needs. ACAS guidelines say you should discuss with the applicant if you can't agree to their request. Initially, Mr Manuel didn't his proposed solution with the Claimant and put all his energy into implementing the solution which he hoped would go a long way to meeting the Claimant's concerns. However, eventually he did discuss the proposal with the Claimant in time for it to be agreed.

66. Mr Manuel's priority was to put something in place as soon as possible, to meet the Claimant's desire to work part-time from October and was acting in good faith. We also find that there remained potential to work towards an alternative option such as a job-share something in the 6-month period. So while more could have been done, the respondent did not act without reasonable and proper cause in a manner likely to destroy or seriously damage the relationship of trust and confidence. This did not constitute a repudiatory breach of contract.

67. Some of the Respondent's witness statements refer to old versions of the London Underground processes for flexible working applications, which were out of date at the time of the decision. Although it may be that the wrong versions may have been used at times, we have found no instances where important points of substance within the process were not followed as a result and it would have made no difference to the process or the outcome. We therefore find that in this respect, the respondent did not act without reasonable and proper cause in a manner likely to destroy or seriously damage the relationship of trust and confidence. As a result this did not amount to a repudiatory breach of contract.

"(iii) subjecting the Claimant to a detriment for making the FWA from the 24th October 2022 onwards by Mr Steve Manuel treating the Claimant unfairly by not cover his shifts and instructing the roster champions to leave some of the Claimant's duties uncovered during his temporary flexible working so that the temporary working arrangements would appear unworkable.

68. "Detriment" has a very wide meaning. However, it must be interpreted objectively. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? The Tribunal accepts that this was the only week in which a shift was marked in red "leave uncovered", and it was only directed at two of the Claimant's shifts. We note other amendments are routinely marked in red. And that other shifts have been marked "uncovered" before. We note that the first time the Claimant saw anything remiss about the rosters was when it was mentioned to him by Denis on 30 October and the rosters must have been amended more than a week beforehand, and probably over 3 weeks earlier. We find that there was no intention on the part of the respondent to make the temporary part-time arrangement appear unworkable, nor did it in fact make the arrangement unworkable. In the short period of time that it was in place, it appeared to be working. There was no tangible disadvantage to the Claimant. As soon as the Clamant made his unhappiness about the annotations clear to PM they were changed.

69. We accepted the Claimant's evidence that Denis had indicated to him that the roster indicated that something was being "done" to him. And we accept that the Claimant was embarrassed and felt harassed. However, applying an objective test, the Tribunal finds that there was no detriment to the Claimant by the fact that two of the shifts that he would previously have done were not covered, and marked in that way on the roster.

70. In considering whether the respondent in this respect acted without reasonable and proper cause, in a manner likely to destroy or seriously damage the relationship of

trust and confidence, we find that it did not. Therefore this did not amount to a repudiatory breach of contract.

(iv) On the 16th November 2022 Steve Manuel, Richard Jones & Paul Mauger not taking the Claimant's claim of harassment seriously and failing to permit him to submit a grievance.

71. A formal written grievance does not have to use the precise words "this is formal grievance". However, lots of people complain and say they are unhappy in the workplace, and they are not all grievances, even if they refer to harassment. The first stage of raising a grievance is to seek to resolve it informally. This had been followed. The first time the Claimant mentioned any concern about the rosters was when he mentioned it orally to Paul Maugher on 15 November. Mr Maugher listened and immediately took a number of actions, leaving the Claimant feeling better. As of the morning of 16 November, Paul Mauger thought he had resolved the matter. The Claimant raised it in writing for the first time at 13:57 on 16 November, addressed to Paul Mauger, not his line manager. He then resigned later that day before giving the respondent any opportunity to do anything more.

72. We find that the Claimant did not submit a formal grievance as it did not meet the requirements of the policy. Had he wished to submit a formal grievance, he could have done so – he needed no permission to do so.

73. We find that in this regard, the respondent did not act without reasonable and proper cause in a manner likely to destroy or seriously damage the relationship of trust and confidence. This therefore did not amount to a repudiatory breach of contract.

"(v) On the 16th November 2022 Richard Jones telling the Claimant that the FWA process had been followed and was at and an end and refusing to deal with the Claimant's continued concerns about the process."

74. Richard Jones had no previous involvement in the flexible working application, and had no role in relation to the rosters. On 16 November, the Claimant approached him with no notice and had a short, discussion about it while in an agitated state. It was true that the flexible working application process was at an end and it was unrealistic to expect him to take any action in these circumstances. Later that evening, the Claimant resigned. Mr Jones had no opportunity to reflect on the conversation and consider whether there was any action that might be appropriate for him to take.

75. It cannot be said that Mr Jones acted without reasonable and proper cause in a

manner likely to destroy or seriously damage the relationship of trust and confidence. This therefore did not amount to a repudiatory breach of contract.

"(vi) On 9th October 2022 making unilateral changes to the Claimants' employment contract in the form of the Respondent introducing short-term flexible working arrangements for 6 months based on reduced weekly working hours of 22.6 hour week. The respondent implemented these changes without obtaining the claimant's prior consent or engaging in proper consultation, thereby altering the terms and conditions of the employment contract."

76. The temporary reduction in hours was not initially communicated very well, and Steve Manuel readily accepted that he should have discussed it with the Claimant before working to put this temporary arrangement into place. However, the arrangement was explained to the Claimant by Mr Manuel between 8-12 September. On 12 September, the Claimant accepted a local arrangement on 22.5 hours per week without prejudice to his appeal, in writing. The arrangement did not begin until 9 October.

77. The Claimant says that the amendment that he agreed to (referred to as a "local agreement") was not the same as the arrangement which was eventually put in place (referred to by HR as a formal working arrangement", and that there was the possibility of a review with a consideration of possible permanency). With a genuine local agreement, Mr Manuel could have granted it and revoked it at his discretion, and there could be no possibility of permanency.

78. The Tribunal finds that it was the same thing. Any agreement which reduced hours, pay and pension needs to be recorded formally in the system. Although initially referred to as a "local agreement" it was clear that a reduction in hours, pay and pension would be a fundamental feature of the arrangement. As to the possibility of permanency, it was just that – a possibility. While the default of a temporary arrangement was it would revert back to full-time hours when it expired, there was always a possibility to consider and discuss what would happen next. In summary the Claimant agreed on 12 September to the arrangement which went ahead on 9 October. There was no change to his contract without his consent or consultation.

79. The Tribunal therefore concludes that there was no repudiatory breach of contract, and therefore no dismissal. We find that the primary reason that the Claimant resigned was because he didn't get the permanent arrangement that he was hoping for.

80. Having found that there was no dismissal, we therefore also find that there was no unfair dismissal, nor an automatically unfair dismissal.

Dealing with the flexible working application ("FWA")

Failure to notify the Claimant of FWA decision within statutory time limit

81. The Tribunal has found that the Respondent finally determined the Claimant's flexible working application a little over 4 months after he submitted it. We also find that the Claimant never agreed to any extension.

82. The statutory time limit at the time was 3 months. We therefore conclude that the Respondent failed to determine the flexible working application within the statutory time limit.

Failure to deal with FWA application in a reasonable manner

83. The Tribunal has already considered similar issues which arise under this heading, when considering whether there was a breach of contract. We find that the application was given due consideration, and was based on facts based in evidence. The fact that medical evidence was not considered was immaterial to the outcome. The Tribunal therefore concludes that the application was dealt with in a reasonable manner and in accordance with all other statutory requirements.

Detriments

84. The Tribunal has already considered similar issues which arise under this heading when considering whether there was a breach of contract.

85. By not covering his shifts and instructing the roster champions to leave some of his duties uncovered, we find that the Respondent did not subject the Claimant to any detriment.

86. The Tribunal does not accept that Steve Manuel, Richard Jones & Paul Mauger failed to take the Claimant's grievance seriously, nor that they failed to permit him to submit a grievance. He did not submit a formal grievance, but was fully able to do so had he so wished.

87. The Tribunal does not accept that by Richard Jones caused any detriment on 16 November by telling the Claimant that the FWA process had been followed and was at and an end and refusing to deal with the Claimant's continued concerns about the process and the altering of the roster.

88. The Tribunal has decided that there was no unilateral change to the Claimant's contract. Therefore this did not amount to a detriment.

Jurisdiction

89. The Tribunal will now consider whether it has jurisdiction to entertain the complaint that the flexible working application was not determined on time.

90. When taking into account the time for ACAS conciliation, the only acts which fall within the 3-month time limit are those which occurred on or after 7 November 2022.

91. The first date on which a complaint could be brought for not meeting the statutory deadline is 10 October 2022 i.e. the day after the deadline had expired. It is therefore outside the 3-month time limit.

92. It is open to the Tribunal to extend that period by a period that it considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of 3-month period.

93. In this case, the Tribunal is satisfied that in this case it was not reasonably practicable for the Claimant to meet the deadline. The complainant is a litigant in person. This was not a straightforward case. He did not have the benefit of legal advice until January, which would have taken him to the 3-month deadline as it was.

94. Furthermore, it would not have been reasonable for him to even consider bringing a claim until after 11 November when the appeal decision was delivered. Up until that point, despite the delay, there was every possibility the appeal could have delivered a positive outcome for him.

95. The Tribunal therefore considers it reasonable to extend the deadline for bringing the complaint to 17 April 2023. It therefore has jurisdiction to hear the complaint.

Employment Judge Heydon
2 December 2024

Judgment sent to the parties on:

6 December 2024