



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Corke

**Respondent:** Department for Transport

**Heard at:** London Central (by CVP)      **On:** 9 & 10 May 2023

**Before:** Employment Judge H Grewal  
Mr T Robinson and Ms N Sandler

## Representation

**Claimant:** Mr C Devlin, Counsel

**Respondent:** Mr A Henderson, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's application to change his terms and conditions from requiring him to work at the Respondent's office in London to requiring him to work from his home in Luxembourg was not an application under section 80F(1)(iii) of the Employment Rights Act 1996.

# REASONS

1 In a claim form presented on 3 October 2022 the Claimant complained that the Respondent had failed to comply with section 80G of the Employment Rights Act 1996 in relation to his application made under section 80F of that Act. Early

Conciliation (“EC”) had commenced on 25 July 2022 and the EC certificate had been granted on 5 September 2022.

### The Issues

2 It was agreed that the issues that we had to determine were:

2.1 Whether on 22/25 April 2022 the Claimant made an application under section 80F of the Employment Rights Act 1996;

2.2 If he did, whether the Respondent failed to comply with section 80G(1) of the Employment Rights Act 1996 in dealing with his application.

2.3 If the claim succeeded, whether the Tribunal should award compensation and, if so, how much.

### The Law

3 Section 80F of the Employment Rights Act 1996 is headed “*Statutory right to request contract variation*” and provides,

*“(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if –*

*(a) the change relates to –*

- (i) the hours he is required to work,*
- (ii) the times when he is required to work,*
- (iii) where, as between his home and a place of business of his employer, he is required to work, or*
- (iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations*

...

*(2) An application under this section must –*

- (a) state that it is such an application,*
- (b) specify the change applied for and the date on which it is proposed the change should become effective, and*
- (c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.”*

4 Section 80G of the Employment Rights Act 1996 provides,

*“(1) An employer to whom an application under section 80F is made –*

- (a) shall deal with the application in a reasonable manner*
  - (aa) shall notify the employee of the decision on the application within the decision period, and*
  - (b) shall only refuse the application because he considers that one or more of the grounds applies –*
    - (i) the burden of additional costs,*
    - (ii) detrimental effect on ability to meet customer demand,*
    - (iii) inability to re-organise work among existing staff,*

- (iv) inability to recruit additional staff,*
- (v) detrimental impact on quality,*
- (vi) detrimental impact on performance,*
- (vii) insufficiency of work during the periods the employee proposes to work,*
- (viii) planned structural changes and*
- (ix) such other grounds as the Secretary of State may specify by regulation.”*

5 Section 80I 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 –*

- (a) make an order for reconsideration of the application, and*
- (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.”*

6 Regulation 4 of the Flexible Working Regulations 2014 provides,

*“A flexible working application must –*

- (a) be in writing.*
- (b) state whether the employee has previously made any such application and, if so, when; and*
- (c) be dated”*

Regulation 6 provides,

*“For the purposes of section 80I of the 1996 Act (remedies) the maximum amount of compensation is 8 weeks’ pay of the employee who presented the complaint under section 80H of the 1996 Act.”*

7 The ACAS Code of Practice 5 Handling in a reasonable manner requests to work flexibly (2014), which can be taken into account by employment tribunals, contains the following guidance to employers,

*“6. You should discuss the request with your employee. It will help you get a better idea of what changes they are looking for and how they might benefit your business and the employee...”*

*8 You should consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and your business and weighing these against any adverse business impact of implementing the changes ...*

*12 If you reject the request you should allow your employee to appeal the decision.”*

## **The Evidence**

8 The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent (the job titles given in brackets are those that applied at the material time) – Peter Robinson (Regional Manager, the Gulf, Aviation Security International Operations), Laura Cooke (Deputy Director, Aviation Security International Operations) and Charlotte Grant (HR Policy and Reward Project Lead). The documentary evidence in the case comprised a little over 400 pages. Having considered all the oral and documentary evidence the Tribunal made the following findings of fact.

## **Findings of fact**

9 The Claimant commenced employment with the Respondent as an Aviation Security Liaison Officer (“ASLO”) on 21 January 2019. He had worked for the Home Office as an immigration officer and entry clearance officer since 20 February 2006 and that counted as part of his continuous period of employment with the Respondent. The core function of the ASLO role was to undertake regular assessments of aviation security standards at a wide range of overseas airports with direct flights to the UK and to engage with the host states, international partners and the aviation industry to ensure that mitigation was in place to address potential threats.

10 The Claimant’s contract of employment contained the following provisions,

*“5. Place of work*

*5.1 Your normal place of work will be Great Minster House, 33 Horseferry Road, London, SW1 4DR.”*

*“9. Hours of work*

*9.1 Except where you are authorised to be absent, you must attend punctually for duty at your place of work on each working day, and must, in any week work your contracted hours in accordance with paragraphs 9.2-9.11”*

11 From March 2020 until mid-2021 most of the Respondent’s employees were required to work remotely away from their permanent contractual office location because of Covid lockdown requirements. After that period the Respondent undertook a review of its policies around workplace and location and flexible working and the broad approach taken in the core Department was to apply a hybrid model which required staff to attend workplaces for at least 40% of their working time over a month, along with permitted remote working for the rest of the time on a non-contractual basis. An employee who wished to work in this way did not need to make a flexible working application. The Workplace and Location Principles that confirmed that approach was subject to consultation with the trade union and was put in place in February 2022.

12 During 2021 the Respondent developed a Working Remotely Overseas Policy (“WROP”) to cover requests from staff to work remotely outside the UK when that was not a requirement of their role. The policy was developed in conjunction with

Civil Service HR and the Respondent's Security and IT teams. The need for such a policy is set out at the start of the policy. It states,

*“Employees are appointed to UK Civil Service roles on the understanding that they will be UK based unless the role requires official travel on a temporary posting overseas. There is no contractual right for UK Civil Servants to work from a location outside the UK, unless it is a requirement of their role. Therefore, we need this policy to ensure that any flexibility the department offers, to permit temporary remote working overseas to support our staff, gives appropriate consideration of any potential security (including cyber security) risks and potential legal obligations (including employment law, tax and health and safety), in order to protect both the department's and the employee's interests.*

*As such, permission to use either departmental IT kit or alternative modes of accessing DfT's digital systems {via Citrix or Office 365} on personal IT kit to work remotely overseas for a temporary period, requires approval under this policy.*

*Where applications are approved, any requirements which are set out in the approval (including but not limited to advice from Corporate Security and Digital Services) to support safe and secure remote working overseas, should be followed by the applicant.”*

At the end of the policy it sets out a large number of matters in relation to security, IT and data protection that anyone who had been given approval to work remotely overseas is obliged to consider and action.

13 Under the policy the Respondent's employees can be permitted to work remotely outside the UK on a temporary and non-contractual basis. It does not involve any changes to their terms and conditions of employment. Applications under the policy can only be made for one of the following three reasons:

- (i) in order for an employee to accompany a recognised spouse or partner of a diplomatically accredited UK crown servant on an overseas posting for the UK Government (a posting outside of the UK exceeding four months);
- (ii) in order for an employee to deal with a personal situation either:
  - (a) covered under the “special domestic responsibilities” set out in the Paid Special Leave Policy, or
  - (b) relating to the bereavement of a child, close relative or partner as set out in the Paid Special Leave Policy.
- (iii) In order for an employee to comply with urgent legal responsibilities overseas.

Approved applications under (ii) and (iii) are limited to a maximum period of four calendar weeks.

14 The Policy also sets out how applications are considered. It states that the submitted application is reviewed by the HR Business Partner who assesses whether the application is line with the policy and whether all the required information has been provided. If it satisfies those conditions, the HR Business Partner will share it with the Corporate Security and Digital Services team who will provide their advice to the Deputy Director of HR who will then make the decision on the basis of the advice given and, where required, will consult the employee's Director.

15 The Respondent has had a Flexible Working Policy for many years. It was updated in February 2022 to take into account the Workplace and Location Principles and the Working Remotely Overseas Policy. It states at the beginning of the policy,

*“This policy is intended for flexible working requests in the UK. Please see the Working remotely overseas policy.”*

The Respondent’s Flexible Working Policy does not address working outside the UK because its policymakers reached the conclusion that requests to work outside the UK did not meet the terms of the Employment Rights Act 1996 which was the basis of the policy. Their view was that for a UK resident a workplace outside the UK would not have constituted a place *“between his home and a place of business of his employer.”* Furthermore, any application under section 80F is an application to vary the terms of the employee’s contract. The Respondent’s position was that it could not agree to a variation of contractual terms which would allow the employee to work from an overseas location for the following reasons:

- (a) It would effectively create a UK government workplace within the jurisdiction of another sovereign government;
- (b) Such employment would not fall solely under the jurisdiction of UK law;
- (c) Reputational risk would apply if the employee failed to comply with local laws on tax, residency and permission to work – HR did not have a remit to provide assurance on that point;
- (d) Were the Respondent to require the employee to attend in person for meetings, etc considerable expense would be incurred and additional time;
- (e) Remote working would rely on access to IT and data systems which would need to be withdrawn without notice if a security risk was identified in the country of residence; and
- (f) The utilisation and taking of IT equipment overseas would pose a range of security risks such as the ability to recover lost equipment, accessing secure internet connections and ensuring that equipment and information was kept secure including private and confidential materials.

16 Paragraph 2.11.10 of the policy sets out the flexible working practices that are available under the policy. They are:

- flexible working
- staggered hours
- part-time working and job sharing
- compressed hours
- contractual homeworking
- combination of the above flexible working practices.

Paragraphs 2.11.18 – 2.11.20D deal with contractual homeworking. Paragraph 2.11.18 states,

*“We anticipate that for most roles, hybrid working will offer appropriate flexibility to allow you to balance your personal needs and the requirements of your work. As such, the department does not anticipate that requests for home to become the principal workplace (known as contractual homeworking) will be agreed unless there are exceptional reasons for such a request. This does not negate an employee’s right to make such a flexible working request under this policy, but may be taken into account when a decision is made.”*

Paragraph 2.11.19 states,

*“Unless it is agreed that more than 50% of you working time/contracted hours per week are worked at home, a DfT workplace will be regarded as your principal workplace in your contract. If homeworking is agreed for more than 50% of your working time/contracted hours after you have made a statutory request for this change, your home will be regarded as your principal workplace. Your arrangement will not be deemed a hybrid working arrangement as hybrid working is not a contractual change.”*

Paragraph 2.11.20 states that any request for home working for more than 50% of working time/contractual hours will require the approval of the employee’s line manager. Paragraph 2.11.20B states,

*“Where it has been agreed that you work at home as your principal workplace, you will be issued with a variation to your contract of employment ... This contract variation will state:*

- *that your home will be regarded as your principal workplace*
- *the days of the week you will work at home;*
- *your salary on becoming a contractual homeworker – London pay and any location related allowances will not be applicable to roles where home is the principal workplace*
- *you will be entitled to claim expenses (which may be subject to tax) and travel time when attending DfT workplaces for official purposes.”*

17 The policy states that applications for flexible working will considered by the employee’s line manager who will decide whether the application should be approved or rejected.

18 Soon after Peter Robinson became the Claimant’s line manager in January 2022 the Claimant informed him that his wife, who is a teacher, was applying for a teaching job in Luxembourg and that, if she got the job, he might seek to work from there. The Claimant’s wife was offered the job and in February/March she accepted the job which was to commence on 1 August 2022. Their child was three years old at the time and the Claimant wanted to live with his wife and child in Luxembourg. He informed Mr Robinson of this and they discussed his making an application to work remotely from overseas under the Respondent’s Working Remotely Overseas Policy. Mr Robinson had previously supported another ASLO’s application to work remotely overseas after that ASLO’s spouse, a civil servant, had been posted overseas. That had led to a change in the Working Remotely Overseas Policy to include that as a reason for making an application under the policy (the first reason set out at paragraph 13 above).. Both the Claimant and Mr Robinson recognised that he did not strictly fall within that policy but felt that his circumstances were similar to those of a civil servant accompanying a civil servant spouse on a governmental posting overseas and that there were strong grounds for asking for an exception to be made in his case.

19 On 29 March 2022 the Claimant sent Mr Robinson his first draft of the completed application form under the Working Remotely Overseas Policy. He sent an amended version of that the following day. In Section A of the form he said the location for remote working overseas would be his *“family home in Luxembourg City”* and that his

intended dates for remote working were 1 August 2022 to 31 July 2023. He was asked which pieces of DfT equipment he would take with him and he said “*TRA laptop, DFT laptop, DFT phone, DFT ‘burner’ phone*” all of which had already been issued to him. In section B of the form the Claimant was asked to set out the reasons for his request and how he planned to manage working overseas remotely to ensure that he was able to effectively work overseas and to do so securely and safely. He was asked to refer to the Application Form checklist when he did this. **64** In the draft on 30 March the Claimant said,

*“My spouse has accepted a new job overseas and I wish to accompany her, and our child, whilst continuing in my current role, in order to maintain the family unit and provide emotional, practical and financial support to them both.*

*I firmly believe that I can continue in my current role, securely and effectively, from overseas with no extra cost or burden to the business and at no higher a risk.*

*The issue I have is that there is no current DfT policy in place that allows me to do this, which is what the following business case seeks to address.”*

He then set out the permitted reasons for making an application under the Working Remotely Overseas Policy and stated that none of them applied to him and he was, therefore, making the application outside of existing policy on “*exceptional and compassionate grounds.*”

20 Mr Robinson suggested a few minor amendments. Mr Robinson was away from 2 April to 18 April 2022. On 20 April 2022 Mr Robinson had a discussion with the Claimant about his application. Following the discussion the Claimant sent Mr Robinson an email in which he said, “*please see attached drafts of my remote working application*”. Attached to the email were two documents – a completed application form under the Working Remotely Overseas Policy and a letter to Mr Robinson headed “*Statutory Flexible Working Request*”. In that letter the Claimant said,

*“I am writing to make an application for a flexible working arrangement. This application is being made under the statutory right to request flexible working.*

*The date I propose for this flexible working arrangement to commence is the 01<sup>st</sup> August 2022.”*

He submitted three options for consideration in order of preference. They were:

- (i) to work from home retaining full-time hours (7.4 hours a day) for 12 months from 1 August 2022 until 31 July 2023. He said that his home would be in Luxembourg City, Luxembourg at a yet unconfirmed address.
- (ii) to work from home on a part-time basis (three or four days a week or six hours a day for five days) for 12 months from 1 August 2022 to 31 July 2023;
- (iii) to work from home for three months.

21 Mr Robinson responded on 21 April 2022. He made comments on each of the drafts. In his email to the Claimant he said,



*"I have commented on both documents. I think the first, the working remotely overseas document is almost there..."*

*The second document, with your three options for flexible working is more challenging from me. I have commented in the document but options 1 and 2 are, to me, simply requests to work full-time overseas, as per the working remotely request, along with a second request, in option 2, to work remotely from overseas part-time. Both will be dependent upon the consideration of others to agree whether you can work overseas before I can consider whether to grant the part-time element. For option 3, I feel your logic is flawed in that you think you can make repeated requests for three months working overseas. I see it as being able to make one application and undertake a period of maximum three months, in every 12 month period...*

*From a procedural perspective, I suggest you launch the working remotely overseas application, when you are ready. We can continue to work on your other options whilst the first goes through the pipeline."*

22 On 22 April the Claimant sent Mr Robinson what he said was his "final version" of the application form under the Working Remotely Overseas Policy. He said,

*"Please give it one final look over and feel free to make any minor changes – once done, please submit to the appropriate person."*

He did not ask Mr Robinson to consider it because he understood that an application to work remotely from overseas would not be considered by Mr Robinson. He did not send him the letter requesting to work flexibly.

23 In the application form in section A when asked to give the location for remote working overseas the Claimant said *"in new, rented accommodation, in Luxembourg City, which will become my family home."* In section B the Claimant said,

*"My spouse had accepted a new job overseas, in Luxembourg, and I wish to make a statutory flexible working request to accompany her, and our child, whilst continuing in my current role, in order to maintain the family unit and provide emotional, practical and financial support to them both.*

*I firmly believe that I can continue in my current role, securely and effectively, from Luxembourg, without extra cost or burden to the business and at no higher a risk in terms of security and IT.*

*The issue I have is that there is no current DfT policy in place that allows for me to follow my non-Crown spouse, which is what this application seeks to address."*

He accepted that none of the permitted reasons for applying to work remotely overseas applied in his case and said that he was making the application "outside of existing policy, on exceptional and compassionate grounds." He made his request on the following grounds.

*"I wish to exercise my right to a private and family life;*

*I wish to provide ongoing practical, emotional and financial support to my spouse and child;  
I believe that I can effectively and securely continue in current role remotely, from overseas;  
I believe that I can do so at no cost or additional burden to the department or taxpayer;  
I believe that any increased security risk is minimal, and any threat can be mitigated; and  
I do not foresee any immigration, tax, or employment law implications.”*

He then expanded on each of those grounds. In respect of the third ground he said,

*“There are currently over 20 ASLOs in ASIO [Aviation Security International Operations] , with 11 of those posted overseas at high-risk last points of departure...*

*Furthermore, I would add that I am requesting the ability to continue my role in an EU Member State, where the cyber and physical security risks are lower than many of the countries in which we currently have ASLOs posted and in which we operate. Those working overseas, whether on a posting or a short-term deployment, often in high risk and challenging environments, do so securely and effectively and I am confident that I can too.”*

In respect of the fourth ground he said,

*“my access to systems for the role would be conducted on the same DfT IT arrangements that have already been agreed with Digital Services for the deployment of existing ASLOs based overseas,*

*A requirement of the role of the ASLOs, regardless of where they are based, is to deploy overseas to carry out assessments. My line manager supports my ability to deploy on ASIO business from Luxembourg and that travel costs for deployments should be the same as if UK-based and can be met from existing budgets.*

*Should I be required to return to London to attend the office, training courses, away days, face-to-face meetings etc, then I am prepared to do so at my own expense, thereby not costing the department any extra.”*

In respect of security, IT and data protection he said that he would ensure that all DfT data and equipment was stored securely in his residence at all times, unless he was permitted to travel with it. He would keep his system locked when not using it and would lock it away when not in use or if he was away from home in the same way as did in the UK. If required, he was willing to purchase a lockable cabinet at his own expense. If that still caused concern, he would use only his TRA equipment whilst in Luxembourg. He said that overall the risk from crime in Luxembourg was low compared to the UK. In light of the above, he did not consider the risk to DfT data or equipment to be any greater in Luxembourg than it would be in the UK.

24 On 25 April Mr Robinson sent the Claimant’s application, without amending it, to Sally Farmer, HR Business Partner and copied it to Robert Block, Deputy Head of

ASIO and Mr Robinson's line manager, and Laura Cooke, Deputy Director, ASIO and Mr Block's line manager, The subject of the mail was "Application to work remotely overseas." He said in his email,

*"Please find attached an application by Peter Corke to be permitted to work remotely, overseas, in a spouse following spouse move. Whilst Peter's circumstances do not fit exactly with the categories shown in the guidance, he is asking, and I am supporting, that his application be considered in his exceptional circumstances."*

25 There were discussions between Sally Farmer, Robert Block and Laura Cooke about the application. They all understood it to be an application under the Working Remotely Overseas Policy and considered it under that policy. Ms Cooke's view was that she could not see the justification for it from a business/ASIO perspective but she felt that the simpler answer was that it was outside the scope of the policy as it was not being made for one of the permitted three reasons and should, therefore, not be progressed. Ms Farmer agreed and felt that it also did not comply with the Respondent's hybrid working policy which required staff to spend a minimum of 40% of the time in an office location. Mr Block accepted that as the policy stood, the application would have to be rejected. He pointed out, however, that there had been a precedence for the policy being amended and he thought that it would be helpful to understand whether there was likely to be any reconsideration of the policy in light of the Claimant's application. He said that the only difference between his application and the earlier one from an ASIO officer, which had led to the change, was that the Claimant's spouse did not work in the Civil Service. Ms Cooke took the view that the difference was an important one. In the earlier case the spouse had been a civil servant who had been posted overseas. Mr Block told Mr Robinson that there had been "no appetite to review." Ms Cooke had a discussion with Benjamin Smith, Aviation Director and her line manager, about the application on 10 May. He agreed with her decision.

26 Mr Block drafted a response to send to the Claimant and shared it with Mr Robinson.. Although Mr Robinson had previously said that the refusal should say something about the Respondent having decided that they did not need to review the policy, Mr Block's draft did not say that. Mr Robinson sent the response as drafted by Mr Block to the Claimant on 12 May 2022. It said that HR, Ms Cook and Mr Smith had been consulted and his application could not be approved. It said that the Working Remotely Overseas Policy was clear and that there were only three permitted reasons for making an application under the policy. Reasons 2 and 3 did not apply in his case and reason 1 only applied if the spouse was on an overseas posting for the UK Government.

27 On 9 June 2022 the Claimant responded in writing to Mr Robinson's email of 12 May. The Claimant said that he wanted to appeal against the decision on the grounds that his application had not been properly considered as it appeared that insufficient account had been taken of his individual and personal circumstances as detailed in his comprehensive application. He continued,

*"As you are aware, there is a precedent for an existing London-based ASLO being granted permission to work remotely in an overseas location, which required a bespoke change in DfT policy to accommodate for her specific needs, demonstrating that requests can be dealt with on a case-by-case basis, instead of*

*what has happened in my case, by following an unreasonable policy that does not take into account the individual circumstances of an employee. Based on the information that you have provided to me below, I do not feel that my application has been given the equal and fair consideration that was afforded to the aforementioned colleague. In particular, I would be interested to understand in further detail the specific aspects and characteristics of my request that might explain this disparity.”*

He also said that he had made it clear in his application that he had a statutory right to request flexible working, he met the legislative conditions to make such a request, the Respondent had not handled his request in a reasonable manner, it had not assessed the advantages and disadvantages of his application, he had not been afforded a meeting once it was clear that the Respondent was intending to refuse his application and he had not been informed of his appeal rights. He continued,

*“More concerning, the reason you have provided for rejecting my request is not one of the grounds or business reasons set out in the relevant legislation covering flexible working requests. As I made clear in the Executive Summary of my application, my request was a statutory flexible working request, a right Departmental employees are afforded under the Employment Rights Act 1996. Instead a blanket refusal seems to have been made on the grounds that my request falls outside the narrow and very limited reasons set out within an internal policy.”*

He asked for the decision to be revisited and to be given further information about his rights of appeal.

28 Mr Robinson forwarded the email to Mr Block. Having consulted with HR, Mr Block informed Mr Robinson that there was no right of appeal against a decision made under the Working Remotely Overseas Policy and the only way to challenge it was by raising a grievance. Mr Robinson conveyed that information to the Claimant on 10 June. He also said that as the Claimant would be challenging his decision in the email he might wish to have his grievance considered by someone more senior i.e. Mr Block or Ms Cooke. That was a strange way to proceed as the decision had in fact been made by Ms Cooke in consultation with Mr Block and Mr Robinson had only communicated the decision.

29 On 14 June the Claimant sent Mr Block a *“formal grievance in relation to the refusal of statutory flexible working request.”* He said that his grievance related to the way the Respondent had handled his statutory flexible working request and the basis upon which the refusal decision had been made. He said that in his application to work remotely made on 25 April 2022 he had made it *“explicitly clear”* that he was making his request under his statutory right to seek a flexible arrangement. He said that under section 80F of the Employment Rights Act 1996 he was entitled to make such a request and that a request under that section could include an employee requesting a change in his place of work. His request to work remotely overseas fell within section 80F. He said that the refusal reason given in Mr Robinson’s email demonstrated clearly that the decision had been made solely on the basis that his request did not meet the condition set out in the Working Remotely Overseas Policy. However, the law (section 80G of the Employment Rights Act 1996) made it clear that employers must consider the merits of each flexible working request and that they could only refuse it on one or more of the grounds set out in section 80G. His

request had been refused for a reason that was not one of those eight reasons. He also said that the Respondent's decision would breach his right to family life under Article 8. He further said that the Respondent had not considered his request in accordance with the provisions of its Flexible Working Policy and that the Respondent's Working Remotely Overseas Policy was discriminatory. He also raised the issue of the other ASLO, whose case had led to the change in the policy, and said that other than the fact that her spouse was a Crown servant, their circumstances were the same. He said that the Respondent had changed its policy to allow her to maintain her family life but the same consideration had not been afforded to him. He asked the Respondent to reconsider its decision and to grant his flexible working request.

30 An HR caseworker, Gary Barnes, was assigned to help Mr Block and Ms Cooke to deal with the Claimant's grievance. Mr Barnes suggested that as both Ms Cook and Mr Block had been involved in making the decision the grievance should be heard by someone else. In response to an email from Ms Cooke about the grievance, Sally Farmer, the HR worker who had advised on the Claimant's application, said,

*"I wasn't aware this was made as a Statutory request for flexible working, were you? I think it might be one we need legal input on as working remotely overseas is different to a request to work from home in the UK."*

31 On 27 June Sevv Palmer, who was appointed to deal with the Claimant's grievance, asked Sally Farmer questions about the relationship between the Working Remotely Overseas Policy and section 80F of the Employment Rights Act 1996. He raised the following points,

*"The question is essentially whether DfT's working overseas policy layers on top of the statutory flexible working provisions under section 80F of the Employment Rights Act 1996. My impression is that this is the relevant legislation, and DfT's working overseas policy is a means of determining business needs regarding location requests under the statutory contract variation provisions, in a consistent way. Is that right? If there is some other legal basis for the overseas working policy then let me know."*

*If that is right, however, it raises a couple of questions:*

- *if the working overseas policy does layer on top of s80F, why does it not have an appeals process but the statutory flexible working process does have an appeals process (as set out under the legislation)?*
- *Do contract variation requests with respect to location under the Employment Rights Act 1996 (the act), cover overseas locations? The act doesn't seem to say what is meant by location so I wondered if there's something elsewhere in the act where this is defined or whether there is any relevant case law that suggests that location requests should be within the UK as opposed to overseas?"*

There was no reply to those questions in the bundle of documents before us.

32 On 19 July 2022 Mr Palmer sent the Claimant his decision on the grievance. He said that he had reviewed all the relevant documents (including the Employment Rights Act 1996) had sought clarification from HR policy on the relevant policies and their application in the case and had offered the Claimant a chance to discuss the

matter if he wished. He had not felt that any additional investigation was necessary. He also said that it was outside his remit to change any of the relevant policies. As was made clear in the Respondent's dispute resolution process, the process could not be used to raise concerns about the Respondent's policies but employees could use it to dispute decisions made by managers when implementing policies. He said that as the Respondent's Flexible Working Policy applied only to location changes within the UK, his application to work overseas could not have been considered under that policy. He said that based on the evidence that he had seen the Respondent had given due consideration to the Claimant's specific case and the grounds set out in his application. Both sides had agreed that his circumstances did not meet the conditions set out in the Working Remotely Overseas Policy. Amending the policy so as to permit his application was not within the scope of the dispute resolution process. He noted, however, that it would be a significant change for the following reasons,

*"It would set a precedent and significantly expand the number of people who would then be eligible to apply to work remotely overseas, and the Department could be faced with a challenge in meeting its "workplace location principles", in which it states that there is an expectation of a "minimum of 40% of your working time being spent in your principal workplace." This policy is similar to many other government departments, and would be challenging for you to meet whilst working from Luxembourg. Whilst you have offered to travel regularly to the office at your own expense, the substance of your application is that you wished to be based primarily in Luxembourg, in order to be with your family and would likely not be attending any of the DfT offices 40% of the time, nor would it seem practical to do so. Your request would therefore not be in line with the Department's "workplace location principles."*

He said that he had sought "expert advice" from DfT HR on the legal aspects of his application and his arguments that his application had been an application made under section 80F of the ERA 1996 and should have been considered in accordance with section 80G. The advice that he had been given was,

*"Civil Servants are appointed to UK Civil Service roles on the understanding that they will be UK based unless the role requires official travel or a temporary posting overseas. There is no contractual right for UK Civil Servants to work from a location outside the UK, unless it is a requirement of their role. .. UK employment law and employment rights are more likely to apply where the employee only works temporarily in the host country for a limited period... our position on remote working [is] not to allow this for anything other than exceptional, short term and compassionate reasons."*

As far as the case of the ASLO who had been permitted to work remotely overseas was concerned, Mr Palmer said that there were two main factors that distinguished her case from his. Firstly, her case fell within the policy because her spouse was a Crown Servant. That seems to ignore the fact that the policy had been changed to that to accommodate her position. The second was that her request had been time-limited and the Claimant's request had been open-ended. Her request had been for a period of one year. The Claimant's request had also been for one year with an option to extend on a rolling basis. He did not uphold the Claimant's grievance and advised him of his right of appeal.

33 The Claimant appealed on 21 July 2022. His main ground of appeal was that Mr Palmer had failed to consider the irrefutable evidence in his complaint letter that he had made an application under section 80F of the Employment Rights Act 1996 and the Respondent had failed to consider it under section 80G of the Act. He said that Mr Palmer had failed to explain how the Respondent had met its legislative duties under those sections when considering his request.

34 The Claimant was on annual leave from 25 July to 16 September 2022 and was granted Special Unpaid Leave for a period of one year after that. He accompanied his wife and child to Luxembourg on 1 August. The Claimant returned to work in London on 23 January 2023, cutting short his Special Unpaid Leave. He returned to ASIO as an Aviation Security Assessor as his the ASLO role had been disbanded following an internal reorganisation.

35 The Claimant's grievance appeal was dismissed on 20 September 2022.

36 Charlotte Grant's evidence was that if an application to vary contractual terms which would allow an employee to work from an overseas location were to be considered under the Respondent's Flexible Working Policy it "*would ordinarily fail on the grounds of 'burden of additional costs' (assuring the legal position, cost of travel/subsistence) and 'detrimental impact on quality' (in the event of IT needing to be withdrawn or restricted due to changes or events at the overseas location or because of the location itself)*"

### **Conclusions**

37 The first issue that we had to decide was whether the Claimant's application had complied with section 80F(2) ERA 1996. The Respondent's case was that it had not complied with section 80F(2)(a) as the Claimant had not stated that he was making an application under section 80F and, furthermore, there were a numerous factors that indicated that it was not an application being made under that section.

38 We think that it is important to note that none of the Respondent's policies and principles covers the making of an application under section 80F to work from a home outside the UK. There was no policy under which the Claimant could have made such an application. We also think that there is nothing to prevent the Claimant from making an application under both section 80F ERA 1996 and the Respondent's Working Remotely Overseas Policy. In either case if the application succeeded the Claimant would be permitted to work from his home outside the UK. It would be implemented in different ways (with possibly different consequences) – under s80F ERA 1996 there would be a variation of his contract as to the location of his normal place of work, under the WROP there would be no such contractual change. The Claimant wanted to work from his home in Luxembourg however that might be accommodated.

39 In light of the above, the fact that the Claimant applied on a WROP form does not preclude his application form also being an application under section 80F ERA 1996. In the application, the Claimant stated very clearly in the introduction that he wished to make "*a statutory flexible working request*" to work from what would be his family home in Luxembourg City. He did not specifically cite section 80F, but that is the only statutory provision under which he could make a flexible working request. It is self-evident that a statutory flexible working request is one that is being made under

section 80F ERA 1996. In addition, he made it clear that what he was applying for was a change of location from where he would work, when that would come into effect and the effect of that on his employment (the requirements of section 80F(2)(b) and (c) ERA 1996. He also dealt with some of the factors in section 80G that might have led to such an application being refused by explaining how he could continue in his role effectively and securely at no additional cost or burden to the Respondent. The Claimant clearly stated in his application that he was making an application under section 80F ERA 1996. The Claimant had originally submitted to Mr Robinson a separate document making such an application. He did not send it with his final application because Mr Robinson had advised him that two out of the three options that he had sought in it were the same as what he was seeking in his application under the WROP, namely to work full-time overseas (see paragraph 21 above). The fact that the Claimant did not submit that separate application does not indicate to us that he abandoned it but that he accepted Mr Robinson's advice that it did not add anything to his existing application. The fact that the Respondent's employees did not understand it to be an application under section 80F does not persuade us that it was not such an application. Their view was that such an application could not be made in respect of a request to work from a home overseas and they focused on the form on which the application was made. We concluded that the Claimant's application of 22/25 April 2021 complied with section 80F(2)(a). If the Respondent's employees had not understood it to be such an application when they received it, the Claimant's letter of 9 June 2021 and his subsequent grievance/appeal made it abundantly clear that that was what it had been.

40 The Respondent also argued that the Claimant's application did not fall within section 80F(1)(a)(iii) because:

(a) His application was not to work from "*his home*", which in April 2021 was 16 Park Close Road, Alton GU34 2HA, but to work from a location in Luxembourg city which would become his family home and/or

(b) "*home*" in that section means a person's home in the UK and does not apply to a home outside the jurisdiction.

We deal with those in turn below.

41 "Home" is defined in the Oxford English Dictionary (second edition) as follows,

*"A dwelling-place, house, abode; the fixed residence of a family or household; the seat of domestic life and interests; one's own house; the dwelling in which one habitually lives, or which one regards as one's proper abode."*

The Respondent's submission was that it is clear from that definition that the reference to "home" in section 80F is to the place where the applicant is habitually living, not a broad location (identified with no more specificity than a city or town) to where the applicant intends to move in the future. The essence of the Respondent's submission was that "home" in section 80F cannot include a place, the precise address of which is known at the time, which will become the applicant's home. The Respondent relied on reported cases relating to possession proceedings and adoption proceedings as to the meaning of "home". We did not consider that those cases assisted us. In all those cases, it was clear from the context that what was being looked at was whether a particular place was the individual's "home" at that



time A tenant cannot enjoy protection from possession in respect of a place that is not his home at that time. The same applies to an applicant for an adoption order who has to satisfy a requirement that he/she has a home within a certain local authority. Under section 80F ERA 1996 an applicant is applying to change his terms and conditions where the change will become effective in the future. In those circumstances, we do not consider that “home” in section 80F is limited to what is his home at that time and excludes what will be his home at the time when the change comes into effect. The important date for the purpose of section 80F is the date on which the change takes effect and “home” in that section refers to what will be the applicant’s home on that date. It would be absurd to say that an applicant could only make the section 80F application after he has moved to his new home when his decision on whether he makes it his home is dependant on whether his application is successful.

42 Nor do we consider that the failure to have the precise address of the new home stops it being “home” under section 80F. The issue is whether the place from which the applicant wants to work will be the dwelling-place or abode where he and his family will habitually live. In the present case, the Claimant said that he was moving to Luxembourg with his wife and child and that he wanted to work from “*new rented accommodation in Luxembourg which will become my family home*”. We considered that that amounts to “home” within the meaning of section 80F(1)(iii). If the Claimant had wanted to move to Manchester because his wife had been offered a teaching job there and had said that he wanted to work from accommodation that they would rent in Manchester which would be their family home, we do not believe that it would have been said that that was not an application within section 80F(1)(iii) because it would be his home in the future and he did not have a precise address for it at the time that he made his application.

43 We then considered whether “home” in section 80F(1)(iii) means “home” within the UK or it applies to a home anywhere in the world. The Employment Rights Act 1996 is silent on that point. The obvious point to make is that all employees who work full-time at a place of business in the UK will have their home (their usual abode or residence) in the UK. We also think that it needs to be borne in mind that prior to the onset of the Covid 19 Pandemic in March 2020 the question of employees employed in the UK working remotely from abroad for any length of time hardly ever arose. It is also important that an application to work full-time outside the UK, if successful, would lead to the employee’s normal place of work being in another jurisdiction. In the case of a civil servant it would effectively create a UK government workplace within the jurisdiction of another sovereign government. Furthermore, any such employment would not fall solely within the jurisdiction of UK employment law. In order to ascertain what employment laws might impact on the individual’s employment the employer would have to take legal advice on the employment laws that applied in the country in question. It would have to seek such legal advice every time it made a decision that impacted on his employment or if the employee argued that he was entitled to additional benefits under the laws of the host country. Reputational risk would also apply if the employee failed to comply with local laws on tax, residency and permission to work. Remote working would rely on access to IT and data systems which would need to be withdrawn without notice if a security risk was identified in the country of residence and the utilisation and taking of IT equipment overseas would pose additional security risks such as the ability to recover lost equipment and accessing secure internet connections. It would be very difficult for the employer in the UK to assess and evaluate all the above risks without

obtaining professional external advice on all such risks or to deal with such situations as and when they arose without seeking professional external advice. Parliament could not have intended that in dealing with an application under section 80F the employer would have to conduct country risk assessments, including obtaining advice about the employment laws applied in that country. Having considered all the above matters we concluded that when Parliament enacted section 80F it envisaged “home” as meaning home within the UK and it was not intended to cover a situation where an employee’s workplace would be changed to an address in a country outside the UK. The fact that none of the reasons for refusal in section 80G refer to the circumstances prevailing in the country in which the applicant wishes to work reinforces our view that it was never intended to apply to working outside the jurisdiction. We concluded that “home” in section 80F(1)(iii) means home within the UK and the Claimant’s application to work full-time from his home outside the jurisdiction did not fall within section 80F(1)(iii) ERA 1996.

44 In case we are wrong in that conclusion, we would have concluded that the Respondent did not consider the Claimant’s request and refused it for the same reasons that it believed that it did not fall within section 80F(1)(iii) of the Act. The reasons are those set out in paragraph 15 and 43 (above). Those are reasons that fall within section 80G(1)(b)(i), (v) and (vi). Most of the factors listed in paragraphs 15 and 43 would create an burden of additional costs and could have detrimental impact on quality and performance. The Respondent took the view that for those reasons it could not accede to and would refuse all requests to work from a home outside the UK. We would have concluded that the Respondent refused the application because it considered that the grounds set out in subsections (i), (v) and (vi) applied. We would have concluded that the Respondent did not deal with the request in a reasonable manner because it did not explain clearly to the Claimant why it had refused his section 80F application.

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Employment Judge - Grewal

Date: 05/07/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON  
05/07/2023

FOR THE TRIBUNAL OFFICE