Appeal No. UKEATS/0018/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 10 March 2015

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR JOHN BARTON — APPELLANT

SECRETARY OF STATE FOR SCOTLAND & 2 OTHERS — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	Mr J Barton (The Appellant in person)
For all Respondents	Mr B Napier (One of Her Majesty's Counsel) Instructed by: Morton Fraser LLP Quartermile Two 2 Lister Square Edinburgh EH3 9GL

SUMMARY

The claimant made a claim under the Part-Time workers (Prevention of Less Favourable Treatment) Regulations 2000. The claimant worked as clerk to the General Commissioners of Income Tax until that body was abolished in 2009. The Taxes Management Act 1970 provided by section 3(3) a discretionary power to award a pension to a clerk if the clerk was "required to devote substantially the whole of his time to the duties of his office." The claimant was refused consideration of payment of a pension on the basis that he worked part-time and so did not fulfil the requirements of section 3(3). Held: the purpose of the regulations is to eliminate discrimination against part time workers. The reason why the claimant was not considered for a pension was because he worked part time. The respondent failed to give effect to the regulations. Appeal allowed and remitted to the same Employment Tribunal for consideration of remedy.

THE HONOURABLE LADY STACEY

1. This is a full hearing. I shall refer to the parties as claimant and respondent as they were in the ET. The respondents each have the same interest in the case and are represented by one firm of solicitors and one senior counsel. The appeal is against the decision made by Employment Judge M MacLeod, sitting alone in Edinburgh following a hearing on 7 March and 25 April 2014. His written reasons were sent to parties on 26 May 2014. He decided that the claimant's claim in respect of less favourable treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the regulations") should be dismissed on the basis that the claimant failed to identify a valid comparator.

2. A preliminary hearing and a hearing under rule 3(10) were heard together before Langstaff P on 21 October 2014. When originally considering the notice of appeal, Langstaff P rejected the third ground of appeal, and fixed a preliminary hearing on grounds 1 and 2. The claimant sought a hearing under rule 3(10) in respect of the rejection of ground 3. The decision made by the president at the hearing was that a full hearing should be fixed on grounds 1 and 2, and the proposed ground of appeal 3 should be rejected as having no reasonable prospects of success. He gave a full written judgment which is produced in the papers before me. The grounds of appeal allowed to go to a full hearing are as follows:-

> 1. There was an error of judgment in paragraph 91 of the Judgment of the Employment Tribunal in that on the basis of the facts set out in paragraphs 39 to 45, the "Less Favourable Treatment" was a continuing act from 2001.
>
> 2. There was an error of judgment in paragraph 107 of the Judgment of the Employment Tribunal in interpreting "custom and practice" in relation to Mr Howey; in that Mr Howey was awarded a pension under the provisions of sec.3(3) of the Taxes

Management Act 1970 on the basis that he was a "full time clerk". At the time that he was awarded a pension, it was known that he was only engaged for 70% of his time, demonstrating that there was indeed a "custom and practice" to regard someone who worked for 70% of his time as being full time.

3. The background to this case is that the claimant was clerk in Scotland to the General Commissioners of Income Tax until that body was abolished in 2009 by the Tribunal Courts and Enforcement Act 2007. He started in 1971, had held that position for about 38 years during which time he worked.

4. The facts were never in dispute. The claimant is legally qualified and acted as clerk, the General Commissioners relying on him for administrative support and for legal advice. The post was set up under the Taxes Management Act 1970 ("the Act"). By section 3(3) of the Act it is provided as follows:-

> **"The Lord Chancellor or, in Scotland, the Secretary of State may, in such cases as he may in his discretion determine, pay to or in respect of any full-time clerk such pension allowance or gratuity, or make such provisions for the payment of pension allowance or gratuity to or in respect of any full-time clerk, as he may, with the approval of the Treasury, determine.**
>
> **In this subsection 'full-time clerk' means a clerk as regards whom the Lord Chancellor or Secretary of State is satisfied that he is required to devote substantially the whole of his time to the duties of his office."**

The claimant argues that the section sets up a requirement for a clerk to be full-time as defined before the respondent can exercise his discretion to grant a pension.

5. The claimant accepts that he was never a full-time clerk as defined. He argues that the regulations, which are dated 2000 and therefore after the date of Act, prohibit an employer from treating a part-time worker less favourably than he treats a comparable full-time worker. The claimant submits that if he can show that a full-time clerk has been paid a pension, he may compare his own treatment, in that he is not paid a pension, to the treatment given to the

full-time clerk.

6. This case has been sisted for some time to await the outcome of the case of **O'Brien v Department for Constitutional Affairs, reported as Ministry of Justice v O'Brien 2013 UKCS 6**. That case concerned a recorder, that is a part-time judge in England and Wales, who was successful in arguing that he should be regarded as a worker and that he should have access to the judicial pension scheme.

7. It was not in dispute between the parties that Mr Howey, who acted as clerk to the Income Tax Commissioners in England, retired in 2001 from his position as clerk and was awarded a pension. He worked for three and half days per week. The policy of the respondent at the time of Mr Howey's retirement was that the test set out in section 3(3) above would be met by a person spending 70% or more of his time on his duties as clerk.

8. The claimant, who was in post at the time of Mr Howey's retiring, argues that had he sought retirement at the same time, which he could have done, he would not, if the policy was applied, have succeeded in crossing the threshold and being considered for payment of a pension. The reason for that would be that the number of hours worked by him was much less than the number worked by Mr Howey and in particular was below 70% of the number of hours said by the respondent to be the notional maximum which could be worked in a normal working year. The claimant therefore argues that the respondent has discriminated against him by treating him less favourably because he is a part-time worker.

9. The regulations are, in so far as relevant, in the following terms:-

"1(2) In these regulations –
….
'worker' means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under-
(a) a contract of employment; or
(b) any other contract…

2(1) A worker is a full-time worker for the purpose of these regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.

(2) A worker is a part-time worker for the purpose of these regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contact, is not identifiable as a full-time worker.

(3) ...

(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place –

(a) both workers are –

(i) employed by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification skills and experience; and

(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of subparagraph (a), works or is based at a different establishment and satisfies those requirements.

5(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –

as regards to the terms of his contact; or

by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if – (a) the treatment is on the ground that the worker is a part-time worker and (b) the treatment is not justified on objective grounds.

8(1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).
(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months….beginning with the date of the less favourable treatment or detriment to which the complaint relates…

8(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2) –

(a) where a term in a contact is less favourable, that treatment shall be treated, subject to paragraph (b) as taking place on each day of the period during which the terms is less favourable;

(b) ..

(c) A deliberate failure to act contrary to regulation 5 or 7(2) shall be treated as done when it was decided on"

The claimant argues that the contract under which he worked has been interpreted by the respondent as including a term that no pension shall be payable except to those who work full-time as defined. He argues that his employer is thereby treating him less favourably than

he treats a comparable full-time worker as regards the terms of his contract and that his employer is subjecting him to detriment.

10. The claimant argues that he is entitled to compare himself to Mr Howey because while Mr Howey did not work for the respondent at the date that the claimant retired, he did work for the respondent during a period in which the claimant also worked. The claimant argues that he therefore is covered by regulation 2(4) in that he was working until Mr Howey retired in 2001 under a regime which involved treating him less favourably than Mr Howey was treated. Mr Howey was working under a contract which enabled him to cross the threshold of those entitled to be considered for a pension, and each year that he worked was taken into account. The claimant, in contrast, carried out the same work, but for fewer hours. Due to the difference in hours, the claimant could not cross the threshold.

11. Mr Napier on behalf of the respondent argued that the test of detriment is the same as in other examples of discrimination law. Therefore in reference to the case of **Shamoon v RUC** Mr Napier accepted that a reasonable worker might take the view that his not getting a pension because of the hours which he worked was to his detriment. He argued however that that is not the situation in which the claimant found himself. The claimant sought clarification of his pension status in 2002 and was informed of the policy which would apply if he sought a pension. Thus he was told that the policy would be applied when he sought to retire, and that, whether he crossed the threshold to have discretion exercised would depend on what work the claimant was doing at the time and on what the policy was at the time. The ET found at paragraph 43 that the respondent wrote to the claimant in the following terms:-

> **"I am afraid the Lord Chancellor cannot make a decision on whether or not to exercise his discretion to award a pension before the end of a Clerk's tenure of office so I am unable to tell you whether you can look forward to a pension. What I can say is that he only has the discretion to award a pension if he is 'satisfied that he [the Clerk] is required to devote substantially the whole of his time to the duties of his office.' Therefore if he does not consider you to be full time at the time of your retirement he could not award you a pension."**

The respondent asked the claimant to make his application for a pension before the abolition of the post, stating that he should "provide any evidence in support of your claim to show that you are full time within the meaning of the act…"

12. Counsel argued that while this case had been sisted to await the outcome of the **O'Brien** case, that case was different in that there was a judicial pension scheme to which judicial office holders had a right of access. In the current case there was only a discretion which might or might not be exercised. He did however accept that one would expect the discretion to be exercised lawfully, that is not arbitrarily. The point which Mr Napier sought to make however was that the employment judge was correct to say that the claimant was subjected to a potential detriment and not an actual detriment. The employment judge was correct in paragraph 90 of his written reasons, because the 70% rule could exclude the claimant only in certain circumstances. It is in any event a policy and not a rule and could be changed at any time.

13. Mr Napier argued that these regulations demand an actual comparator and do not have provision for a hypothetical comparator. I note that regulations 3 and 4 deal with those who become part-time workers or who return to part-time work after an absence and make provision for a hypothetical comparator. It is however correct that as regards a person who always worked part-time there is no provision for a hypothetical comparator. Mr Napier argued that Mr Howey could not be comparator because Mr Barton did not retire until 2009. Therefore at the date of Mr Barton's retirement Mr Howey had been retired for many years and had no interest in the matter. There was no full time clerk at the date of the claimant's retirement. There was therefore no less favourable treatment as there was nobody to whom Mr Barton could compare himself.

14. Mr Napier noted that there is provision for a continuing act in the regulations at

regulation 8(4) (a). He argued that this did not in fact assist the claimant. Any less favourable treatment took place when the claimant was refused a pension. At that date, Mr Howey was not working, having retired some years before. Therefore he could not be a comparator.

15. Mr Napier began to argue that if there was detriment then it was in 2001, and now time barred; he accepted that had not been argued in the ET and did not press the argument.

16. Mr Napier referred to regulation 2(4) (1) (a) which gives the definition of a full-time worker who is comparable to a part-time worker. It is in the following terms:

> **"(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place-**
>
> **(a) both workers are-**
>
> **employed by the same employer under the same type of contract, and**
>
> **engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and**
>
> **(b) The full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of subparagraph (a), works or is based at a different establishment and satisfies those requirements."**

17. Mr Napier, in regard to the second ground of appeal from the claimant, argued that Mr Howey was not a full-time worker for the purposes of the regulation. He accepted that the regulations could be described as circular and were difficult to interpret as regulation 2 indicated that a full-time worker is a person who is identifiable as full-time worker. Close examination of that regulation indicates that that identification is to be made having regard to the custom and practice of the employer in relation to workers employed by him. Counsel agreed that the definition did not set out a number of hours. However he referred to the policy of the employer and noted that in it it is stated as follows:-

> **"The assessment of pension entitlement calculation must be taken in four stages in line with the test specified in section 3(3) of the Act.**
>
> **Stage one: to determine whether the clerk was a full-time clerk.**
>
> **Maximum number of hours available in one year: the approach to be taken in calculating the available hours is to assume a seven hour working day across a year of 228 working days (365 days minus weekends, public holidays and personal holidays); therefore the total number of available working hours is 1596 per year.**

Clerks required hours: the second question in this stage is to determine how many hours the clerk was 'required to devote to the duties of his or her office.'

Threshold of hours allowed compared to the maximum.

The total hours allowed under in any one year under the above calculations will then be compared to the maximum number of hours available (1596) to assess whether or not the clerk had 'devoted substantially the whole of their time to the duties of his office'.

The threshold of 70% used in pervious claims will be retained. If the actual hours exceed the threshold of 70% (i.e. 1117 hours per annum) the application may move to the second stage which is the exercise of the Lord Chancellor's discretion.

Where a clerk does not meet the 70% threshold his/her application cannot proceed to the second stage and the Lord Chancellor has no power to exercise his statutory discretion.

Stage two: the Lord Chancellor's discretion

If the Lord Chancellor is satisfied that the clerk is a full-time clerk within the meaning of the Act it then falls to the Lord Chancellor to decide whether in his discretion a pension should be awarded. There is no presumption that being full-time automatically entitles the clerk to a pension. Evidence of misconduct or deceit in the exercise of the duties as clerk or in the application for a pension may be factors that contribute to a decision not to award a pension just as additional voluntary work or exemplary conduct may be factors that contribute to a decision to award a pension.

Stage three: the pension calculation

Where the Lord Chancellor does award a pension the method of calculating that pension would be the same as that used for the Principal Civil Service Pension Scheme calculation which is 1/80th of remuneration multiplied by the individual's years of reckonable service. This is subject to stage four below.

Stage four: treasury approval section 3(3) of the Act provides that any award is still subject to approval by the treasury. This approval is as to the amount of the award rather than the validity of the award itself."

18. Counsel argued that the respondent had not by that policy recognised Mr Howey as a full-time worker. The policy was to the effect that a clerk working at least 70% of notional full time hours would be considered for payment of a pension. Therefore in terms of the regulations, such worker was not "identifiable as a full time worker" as required by regulation 2(1). The respondent chose to regard a worker who worked 70% of notional full time hours as "required to devote substantially the whole of his time to the duties of his office" as provided for in section 3)3) of the Act. If the respondent chose to treat two part time workers differently, then he did not discriminate between full-time and part-time workers.

19. In applying that policy to the claimant, the respondent found that the number of hours

spent by the claimant in the relevant year (and he did take, under his discretion, the best year) was 216 hours and 30 minutes. That is plainly less than the 70% figure of 1117. The respondent therefore advised the claimant that he did not satisfy the policy which the respondent chose to apply.

20. The ET decided at paragraphs 87 and 88 the following:-

> **"87. Accordingly, when assessing when the less favourable treatment took place, it is necessary to consider when it might be said that the claimant was subjected to any other detriment by any act, or deliberate failure to act by his employer. In this case, the claimant's reference to the decision in favour of Mr Howey, which took place in 2001, cannot be an act or a deliberate failure to act, to which the claimant was subjected. It was a decision relating only to Mr Howey and of itself was unrelated to the claimant. The claimant himself did not make application at that time for a pension and so no decision was made.**
>
> **88. Accordingly, the act of which the claimant complains, by way of detriment, did not take place in 2001 as there was no act or deliberate failure to act to which the claimant himself was subjected at that time. He did not apply for a pension until 2009, some 8 years later."**

The ET found that the date upon which the alleged less favourable treatment occurred was 6 April 2009. Having so decided, the ET was bound to make the finding which it made at paragraph 96 to the effect that Mr Howey was no longer working for the respondent at the date of the less favourable treatment. The ET was aware of the terms of regulation 1(2) which provides that "worker" includes a person who worked, but ceased to work under a contract of employment, except where a provision of the Regulations otherwise requires. The ET held that regulation 2(4) did otherwise require, and so the fact that Mr Howey had worked for the respondent and had ceased doing so did not make him available as a comparator.

21. The ET considered whether the respondent had identified Mr Howey as a full time worker. The conclusion, at paragraph 105 is that it had not. The ET judged that 'a full time worker's work takes up 100% of his time, in the ordinary meaning of the term full time. Certainly, in my judgment, 70% falls short of the requirement to meet the definition of full time." The ET decided that section 3(3) of the Act allows the respondent to consider that a person who devotes his time to his work for the respondent, substantially, that is not wholly, is

eligible to cross the threshold. Thus the ET found that the respondent treated differently 2 part time workers, which is not prohibited by the Act.

DECISION

22. I note that there is no indication in the respondent's decision that he considered the terms of the regulations when reviewing his policy. I have come to the view that the respondent requires to consider the regulations. Under the case of **Marleasing S.A. v La Comercial Internacionale Alimentation S.A.(Case 106/89**) it is necessary to attempt to read the Act so as to take into account the provisions of the regulations. The effect of the regulations is that the requirement of full-time work, as defined, in order to cross the threshold cannot stand because it is discriminatory to part time workers. The purpose of the regulations is set out in annex to the Directive 97/81/EC, in clause 1 of the Framework Agreement on Part Time Work where it is stated

> **"The purpose of this framework agreement is: (a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;**
> **to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.**
>
> **...**
>
> **Clause 4 principle of non-discrimination**
>
> **In respect of employment condition, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.**
>
> **Where appropriate the principle of pro rata temporis shall apply."**

Thus, it is clear from the Directive and the regulations which implement it that the granting of the possibility of a pension to a full-time worker but denying a part-time worker access to that possibility is discriminatory. I therefore hold that the Act requires to be read down by omitting the words "full-time" and the definition of that term.

23. I do not accept counsel's argument that the respondent is treating two part-time workers

differently. The relevant policy begins as follows:

> **"The assessment of pension entitlement calculation must be taken in four stages in line with the test specified in section 3(3) of the Act.**
>
> **Stage one: to determine whether the clerk was a full-time clerk."**

It is clear that it is a policy to be used to decide who may come into the definition of "full time clerk" referred to in section 3(3) of the Act. It continues thus:

> **"The threshold of 70% used in pervious claims will be retained. If the actual hours exceed the threshold of 70% (i.e. 1117 hours per annum) the application may move to the second stage which is the exercise of the Lord Chancellor's discretion.**
>
> **Where a clerk does not meet the 70% threshold his/her application cannot proceed to the second stage and the Lord Chancellor has no power to exercise his statutory discretion."**

The respondent has by the terms of that policy made a person who works 70% of the maximum notionally available (such as Mr Howey), identifiable as a full time worker. I hold that the terms of regulation 2(1) are satisfied in relation to Mr Howey; that is,

> **"having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract [Mr Howey] is identifiable as a full-time worker."**

The claimant is covered by the definition set out in regulation 2(2): he is a worker who is not identifiable as a full-time worker. In my opinion it does not matter that Mr Howey might be regarded for some purposes as working less than full-time. The question in this case is how is he regarded for the purpose of crossing the threshold for consideration of payment of a pension. The answer is that he is regarded as full-time. That is clear from the correspondence referred to above, where the respondent invited the claimant to produce evidence of his working full time.

24. I do not accept that the necessity for an actual comparator means that the claimant cannot compare himself to Mr Howey. It is quite clear that at the date that Mr Howey was granted a pension the policy, which I am not told was any different from the current policy, would have excluded the claimant had he sought a pension. I do not accept that it is necessary that two people apply for a pension on the same day before these regulations can apply; that is

the logical effect of Mr Napier's argument and it is not one which I find acceptable. The pension, if granted, would be calculated by reference to the length of service. That is commonly found in occupational pensions. Therefore I find that less favourable treatment was applied to the claimant throughout his period of work with the respondent. Regulation 8(4) provides for calculation of the date of less favourable treatment for the purpose of calculating that date when deciding if a claim is time barred. While it is not argued in this case that the claim is time barred, I note that regulation 8(4)(c) provides that

> **"a deliberate failure to act contrary to regulation 5…shall be treated as done when it was decided on."**

Regulation 5 provides :

> **"5(1) A part time worker has the right not to be treated by his employer less favourably than the employer treats a full time worker –**
>
> **as regards the terms of his contract; or**
>
> **by his being subjected to any other detriment by any act, or deliberate failure to act, of his employer."**

I hold that the respondent decided to treat the claimant less favourably than a full-time worker when it decided on its policy. Mr Howey was working at that time. He is therefore a valid comparator.

25. The grounds of appeal refer to errors of judgment. That expression is ambiguous and if it had referred to the weight put on certain facts by the ET then it would not have amounted to an error of law and the appeal would have been refused. It may be intended to refer to errors of law. I find that there are errors of law in the construction of the legislation. I will therefore allow this appeal.

26. The claimant sought to have the appeal allowed and a declaration as to his rights made. This is dealt with by the regulations under regulation 8. In regulation 8(7) it is provided that where an Employment Tribunal finds that a complaint presented to it is well-founded it shall take such as the following as it considers just and equitable –

(a) making a declaration as to the rights of the complainant and the employer in relation to matter to which the complaint relates.

(b) ordering the employer to pay compensation to the complainant;

(c) recommending that the employer take, within a specified period, action appearing to the Tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

By subsection 8 it is provided:-

> Where a Tribunal finds a complaint to be well-founded on the ground that the complainant has been treated less favourably in respect of either the terms in which he is afforded access to membership of an occupational pension scheme or his treatment under the rules of such a scheme, the steps taken by a Tribunal under paragraph 7 as regards that less favourable treatment shall not relate to a period earlier than two years before the date in which the complaint was presented.

27. I was not addressed fully on these matters and while I have the powers of the Employment Tribunal, and there is no dispute about the facts before me it does seem to me that this matter should be remitted to the same Employment Tribunal, which was the claimant's secondary position, in order that the Tribunal may be fully addressed on the provisions of this regulation.