Appeal No. UKEAT/0368/13/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 January 2014

Before

HIS HONOUR JUDGE SHANKS

MR C EDWARDS

MR B M WARMAN

MR S HOWLETT — APPELLANT

ROYAL MAIL GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES ROZIER (of Counsel) Instructed by: Irwin Mitchell LLP Imperial House 31 Temple Street Birmingham B2 5DB
For the Respondent	MR STEPHEN PEACOCK (Solicitor) Weightmans LLP India Buildings Water Street Liverpool L2 0GA

SUMMARY

HEALTH & SAFETY

The Claimant was employed as a Royal Mail engineer but in 2012 became a "full-time" health and safety rep. The issue was whether he was entitled under Schedule 2 to the **Safety Representatives and Safety Committees Regulations 1977** to be paid in lieu of Sunday overtime which was normally available to engineers. On a proper construction of the Regulations he was only entitled to be paid for time he was given off, which on the Employment Tribunal's findings was the normal working week days. It remained open to him to work on a Sunday as an engineer and receive the overtime payment for that work.

HIS HONOUR JUDGE SHANKS

The Regulations

1. This is an appeal by Mr Howlett against a decision of the London (Central) Employment Tribunal, which was sent to him on 17 April 2013. His claim was brought under the **Safety Representatives and Safety Committees Regulations 1977**. Those Regulations are infrequently referred to, certainly in this Tribunal, which may be part of the reason that the case was allowed through to a full hearing. It may be helpful to quote right at the outset the relevant provisions of those Regulations. The first one is Regulation 4(2), which says that:

> **"An employer shall permit a safety representative to take such time off with pay during the employee's working hours as shall be necessary for the purposes of --**
>
> > **(a) performing his functions under section 2(4) of the 1974 Act [that is a reference to the Health and Safety at Work etc Act] …**
>
> **In this paragraph 'with pay' means with pay in accordance with Schedule 2 to these Regulations.**

Paragraph 1 of Schedule 2 says this:

> **"Subject to paragraph 3 below** [which I do not think is relevant] **where a safety representative is permitted to take time off in accordance with Regulation 4(2) of the Regulations his employer shall pay him**
>
> > **(a) where the safety representative's remuneration for the work he would ordinarily have been doing during that time does not vary with the amount of work done, as if he had worked at that work for the whole of that time; and**
> >
> > **(b) where the safety representative's remuneration for that work varies with the amount of work done an amount calculated by reference to the average hourly earnings for that work ascertained in accordance with paragraph 2 below."**

The facts

2. The facts are that the Claimant has been an engineer with the Royal Mail for more than 20 years. In recent years, he has dedicated more and more time to health and safety. In 1997 he became the Area Safety Representative for London, and it was agreed between the Royal Mail and his union, the CWU, that he would be released from work for three days per

working week, i.e. between Monday and Friday, in order to perform his functions as an Area Safety Representative. That was described as a 60% release.

3. There are important findings as to what happened thereafter at paragraphs 10, 11 and 12 of the Tribunal's Judgment:

> **"10. In December 2006, the claimant transferred to a 24-hour shift pattern. This involved working 150 weekday hours in every 4-week cycle and Sunday working one week in four. There was also occasional Bank Holiday work. The Sunday and Bank Holiday work was paid at overtime rates. The claimant also worked ad-hoc weekday overtime shifts on occasions, which, again, attracted an overtime pay premium. Throughout the period from December 2006 until January 2012, the 60% release arrangement remained in force. It was not, and is not, in question that it applied to the claimant's standard hours only. In other words he was released for safety duties for exactly three (weekday) days per week, regardless of the proportion which those days bore to the overall total hours worked in any particular week."**

The Tribunal then deals with how much he earned from that arrangement: for the 12 months to January 2012 he made nearly £44,000. They continue:

> **"11. A new arrangement came into effect in January 2012 under which, pursuant to a collective agreement between the Respondents and the CWU, the Claimant became a full-time safety representative. This was described as a 100% release. It meant that he was required to work Mondays to Fridays on safety duties. One additional consequence was that he was no longer scheduled for the one-in-four Sunday engineers' overtime shifts. (Presumably this was because he was no longer regarded as an 'active' engineer, but the precise rationale has not been explained to us.). The result was that he worked a regular Monday to Friday pattern only. The schedule of his earnings for the 12 months from February 2012 shows that he received basic salary and shift allowance as before and some payments by way of bonus, but no overtime pay. Although the *rate* of pay increased (when measured against the previous year), the absence of overtime meant that his overall gross pay for the period fell to [just short of £43,000].**
>
> **12. In April 2012 the Claimant raised a concern about his pay. He pointed out that the new arrangement left him worse off than he had been under the 60% release arrangements. The Respondents replied in the person of Mr Danny French, Regional Maintenance Manager, who sent an email to the Claimant dated 26 April 2012...acknowledging that he should not be financially disadvantaged as a result of taking on full-time safety duties and assuring him that Sunday overtime work was available if desired, up to and even beyond the original allocation of eight hours every four weeks. The offer related to, and was understood to relate to, Sunday *engineering* work. There was never any question of Sunday overtime (or any other form of overtime) for the performance of additional safety duties. The Claimant did not take up the offer. He told us:**
>
> > *I refused [the offer] as I did not see why I should be required to work a full additional day on top of my full-time Health and Safety Representative work, just to receive what I should have been receiving anyway.*
>
> **With respect to him, that remark begs the question."**

The question of course is what he *should have* been receiving.

4. In paragraph 13 the Tribunal refers to the Claimant's position that he was unable to work overtime and say they are clear there was no obstacle to him undertaking such work. They then make a finding that the Sunday overtime "one in four" arrangement was not obligatory, in other words an engineer could elect not to work on a particular Sunday and not be in breach of his contract and not be failing to work to his contractual hours. They recorded a concession that the Claimant in fact works on health and safety matters beyond his scheduled Monday to Friday 37.5 hours for no additional reward, and there was also a concession that things could have been made a lot clearer and could have been put into writing properly in January 2012, although the Tribunal remarked that once the e-mail of 26 April 2012 was sent, the Claimant could have been in no doubt as to the position.

The appeal

5. Mr Rozier, who has very attractively argued the case on behalf of the Appellant, submits is that it is unfair that a full-time health and safety rep should receive less pay than those who do not take on that heavy responsibility but who are also engineers. He reminds us, in this context, that the Claimant does a great deal of work during the working week beyond the 37.5 hours, and he says that the Regulations must be interpreted in a way so as not to discourage anyone from taking up a full-time position as a health and safety representative. He says, in effect, that any other interpretation of the Regulations is so unfair as to be perverse and that, if we properly interpret Schedule 2 paragraph 1(b) and look at the overall remuneration that the Claimant was receiving before he became a full-time rep, we can interpret the Regulations so as to preserve his pay as what it would have been.

6. We agree that it was very unsatisfactory that matters were not resolved fully and clearly in writing in January 2012, but the claim is brought under the Regulations and we must look to the Regulations to resolve the claim. The crucial point which comes out of Regulation 4(2) and Schedule 2 is that the Regulations focus on the *time off* which has been given by the Employer to enable the health and safety representative to perform his functions. What they require is that he is paid for the time off or paid what he would have earned during that time. That is really the purpose of both paragraphs (a) and (b) under paragraph (1) of Schedule 2. On the Employment Tribunal's findings of fact referred to above, the time that the Claimant was given off from his work was the time he would otherwise have worked during the normal working week, Monday to Friday: that is clear from the finding at paragraph 11 that he was required to work Mondays to Fridays on safety duties, and it must also follow from the finding at paragraph 13 that Sunday overtime work was, in a sense, voluntary and therefore was not time given off. Whether the right answer in the circumstances is that 1(a) or 1(b) of Schedule 2 applies does not seem to us to be relevant because the Claimant is, on our reading of the Regulations, only entitled to be paid for the time he was given off during the working week, Monday to Friday, so the result would be the same.

7. However unfortunate that result is in this case, we see no way around the clear wording of the Regulations. We cannot interpret them in such a way as to give what we might have perceived to be a fair result in this case, but we do note that it is perfectly open to the Claimant to work every fourth Sunday by way of overtime as an engineer if he so wishes and that the precise scope of the work he does as a health and safety representative is not laid down by the Employer.

8. For those reasons we dismiss the appeal.