

YG



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Ilobi

**Respondent:** Financial Ombudsman Service Limited

**Heard at:** East London Hearing Centre      **On:** 22 September 2017

**Before:** Employment Judge Prichard (sitting alone)

## Representation

**Claimant:** In person

**Respondent:** Mr R Hignett (Barrister, Direct Access)  
Also attending Mr J Upsdale (HR with FOS)

## RESERVED JUDGMENT

**It is the judgment of the Employment Tribunal that the claimant's claim for overtime payments fails and is dismissed.**

## REASONS

1. The claimant, Ms Adaora Ilobi, is currently 30 years old. She started employment with the Financial Ombudsman when she was 25. She worked originally as a consumer consultant and then joined a team of adjudicators. As an adjudicator she was paid a basic salary of £30,000 per annum, but also worked discretionary overtime at weekends. For the last 6 months of her employment she worked approximately 3 Saturdays per month doing on average 7 hour days for which she was paid at double time, so it made a substantial difference to her take home pay.

2. The Financial Ombudsman is a large organisation based in 2 buildings in London Docklands employing 3,500 employees. It is funded by a levy from banking, insurance, and other financial services. When consumers and businesses make complaints about specific services they are referred to the FOS. Latterly, the claimant was working in the banking department when she resigned to take up another job. Her team was about to transfer to work on short term loans. The FOS banking departments include bank accounts, package bank accounts, and insurance services.

3. The length of time to deal with a complaint varies greatly. Some might be a day or two, some might be several weeks, depending on how many enquiries needed to be made. Typical complaints are over interest rates, wrongful cancellation of a direct debit, or exchange rates on international transfers (which would take longer).

4. This is a claim for 12 hours' overtime pay, amounting to £395.52 net.

5. There is a process for overtime. The claimant provided a helpful document on this – a FAQ document. Overtime is intended to deal with special situations, such as a large backlog or a temporary peak in complaints. Management ensures it is not used as a way of catching up with a heavy workload.

6. I understood the importance of this when I was informed that overtime is only worked at weekends and not by staying late or arriving early in the office on weekdays. Until the last days of the claimant's employment, overtime could only be worked in the office, not at home. Overtime was generally intended for new complaints which would be allocated to overtime volunteers when there was a business need. Clearly, if the respondent was paying double time for overtime, it would not be the way to deal with an excessive general workload. The answer to that would be to recruit more adjudicators or to work more efficiently.

7. Gerry Doherty, the head of casework, informed the tribunal that overtime is not intended to deal with the run-off in an adjudicator's period of notice. I accept the respondent's evidence surrounding the rationale behind overtime. I can see why there might have been a policy prohibiting such overtime in a notice period. This has been the focus of this hearing.

8. Adjudicators giving notice of termination have to give at least 4 weeks' notice. The claimant gave notice on 6 March which was due to end on 3 April. She was resigning and leaving as she had another job to go to. The ET1 mentioned the claimant's general dissatisfaction with her direct line manager, the team manager, Sarah Avery. Ms Avery had a team of some 7 or 8 adjudicators. She had previously been an adjudicator before becoming a team manager.

9. When overtime is worked on a Saturday, a manager would always attend to supervise. The hours worked had to be worked sometime between 8am and 5pm.

10. Latterly, overtime was booked through the overtime tool on the respondent's IT system. Employees would have to book their overtime through the tool, and then log in and log out through the same tool on the Saturday. That created a time record for pay purposes. Booking used to be done on a spreadsheet, and sometimes still is when the overtime tool is not working.

11. Working from home was more flexible. Everybody who works full-time knows that doctor's appointments, physiotherapy, staying at home for repairers, deliveries, collections, child and dependent care, are a problem requiring some flexibility. The respondent had introduced a flexible system which permitted working from home. It involved the use of a remote random number app which you could log on to. You did not physically have to have a token or device to get onto the main database remotely. It was only in March, just after the claimant had given her notice, that the possibility of

working overtime from home was introduced in addition. However this case only involves working from home during the week, and overtime requests.

12. On Tuesday 7 March 2017 at 2.59pm, the claimant requested a working from home day in 2 days' time, on Thursday 9 March. It was requested through the People Portal where Sarah Avery, her line manager, was able to respond to it. Ms Avery could not respond the same day (Tuesday 7 March 2017) because she never works on Tuesdays. As soon as she was in on the Wednesday she saw the request. Ms Avery was aware that there was an issue about working from home during a notice period. She sent an email to her manager, Gerry Doherty, and then later talked to him as part of a short management huddle at about 10.15 am. Subsequently, she responded to the claimant's People Portal request at 10.33am on Wednesday 8 March as follows:

"Once you are working your notice period as you now are, working from home is no longer available. So I have to decline this request."

13. Later that day, she says she also had a management meeting with Mr Doherty. She would far prefer to have talked to the claimant about this because it appeared to be an area of some uncertainty both amongst managers and between team managers and their adjudicators. Ms Avery wrote that response having talked to Gerry Doherty. It cannot have been in response to an email he later sent because it would have been too quick.

14. In the meantime at 10.31am on that same day, Mr Doherty sent a message to all his managers, including David Trueman and Sarah Avery, in the following terms:

Subject: "People on notice"

Message: "As I mentioned yesterday we have a few adjudicators working their notice in the pod at the moment. We need to be consistent in our approach so I thought it was worth reminding everyone that anyone on notice should not be working at home or doing overtime. We also do not pay anyone on notice for sickness absence.

Any questions please let me know."

15. Mr Doherty was pressed by the claimant and by the tribunal on why everyone needed "reminding" if it was that obvious as the respondent has been contending in these proceedings. The answer he gave, which was convincing, was that due to the recent organisational change, he had acquired responsibility for managers from other teams and he was not sure that there would be consistency. Some of the evidence that the claimant's witness, Sarah Iyinkanmi, provided indicated that there was not that consistency of understanding. Her manager David Trueman had certainly needed reminding. I deal with this below.

16. Mr Doherty's reminder email was at 10.31 am, literally 2 minutes before Ms Avery's response to the claimant. It is therefore likely that Ms Avery wrote her response on the basis of her prior conversation with Mr Doherty. She said although she wanted to discuss the whole thing with the claimant, she had to go straight into another meeting and needed to respond to the claimant as soon as possible because the claimant would need to make alternative plans. That seemed to be a reasonable and considerate view to have taken because, although the request was on Tuesday, she had not had a chance to action it before the Wednesday as she was out of the

office on the Tuesday. By then the request related to the following day. Subsequently, at 10.35am she replied again to the same request on the People Portal probably having read the Doherty email to rephrase the policy as she saw it:

“Once you are working your notice period as you now are working from home and overtime are no longer available. So I have to decline this request.”

This was to emphasise that the overtime had been stopped as well as homeworking. There was no need for her to talk about sick pay because there was no question about sick pay.

17. Overtime, as I find, is an altogether more difficult problem than working from home. Overtime is strictly controlled for budgetary reasons. One can understand why. There are overtime eligibility criteria:

You must have an active case load;

You must have been in the organisation for more than 6 months and not on probation;

You must not be on a PIP or having performance difficulty;

You must not have an active disciplinary warning on file;

You must have obtained 100% or more in the previous quarter's performance. [This is referring to performance targets for disposing of complaints].

18. The claimant's contract of employment under clause 5 states:

**“Hours of work**

Your normal hours of work (unless otherwise specified in Part B) are 35 per week, excluding lunch and other breaks. Office hours within the customer contact division, at present, are between 8.00am to 8.00pm Monday – Friday, 9.00am to 1.00pm Saturday. Shift patterns will be within office hours and your manager will inform you of the hours which you will be expected to work. You may be eligible to be paid in respect of additional hours worked at the discretion of the Service. Details of the Service's policies on overtime and hours of work are set out in the Employee Handbook.”

19. The Employee Handbook, which is on the intranet, has a section entitled: “Where you'll be working and when”. Under the title “Working overtime” it states:

“We might sometimes ask you to work longer than your usual hours. To check whether you're eligible for paid overtime, have a look at your contract. Make sure you do find out whether you are eligible before you present a request for paid overtime – it won't apply to everyone. If you are eligible, talk to your manager, and try to give an indication of the number of additional hours you are likely to work and agree these first. Overtime rates are:

- weekdays: 1.5 x hourly rate
- weekends and public holidays: 2 x hourly rate.”

20. The weekday time does not need to concern us because it does not apply to this case. This employee handbook operates across the whole business. We are only dealing here with the adjudicator teams. The FAQ on overtime confirm the above about Saturday working hours. The weekend pay rate is always double time. The hours need to be worked between 8am and 5pm on a Saturday. A team manager is

present on the Saturday to manage those who attend. There are usually several volunteers because the pay rate is attractive. Working overtime after you had been in the office all day was not permitted. That was expressly stated in the handbook.

21. The FAQ document must have been quite recent because it mentions working overtime hours from home on a Saturday. It states:

“...there are limited homeworking tokens available. Any that are available on Saturday will be allocated to the first people who request them. It's not guaranteed you will be allocated a token, so we expect the majority of people to come into the office.”

22. Subsequently, the claimant worked, as we now know, on Saturday 11 March and Saturday 18 March and that is why she now claims 12 hours' worked at double time. She worked for 5 hours on 11 March and 7 hours on 18 March. 11 March was a shorter day because everyone on overtime had been warned that there was limited log-on access that day. Only 5 hours would be available. The claimant, despite being told on 8 March that overtime was not available, nonetheless went ahead and worked overtime 2 Saturdays running.

23. The claimant who has argued well at this hearing has stated, correctly, that the embargo on overtime during the notice period is not mentioned in black and white anywhere in any of the policy documents. Indeed, on 8 March before the claimant subsequently went to speak directly to Gerry Doherty she spoke to HR to ask them whether there was such a policy about no overtime in the notice period. HR informed her there was not.

24. If there had been, it is doubtful if it would have been visible to HR. It was not in writing and I am quite certain that if it was in writing anywhere at all within the respondent's organisation at that stage, I would have been shown that evidence because it would have been a more complete defence to the claimant's claim.

25. The claimant talked about the “overtime people”. These are the people who contact you when you have booked overtime through the overtime tool. The claimant stated that despite the terms of her contract she did not routinely seek Ms Avery's approval to do overtime, she simply went onto the overtime tool and booked the overtime regardless. She did not seek any clarification from Ms Avery about the apparent overtime embargo in the notice period. She simply went ahead and worked overtime in the office on those 2 Saturdays. Subsequently, she found that payroll had refused to pay her for either of those days.

26. I accept the payroll realities and that the general practice of the respondent is that employees are paid on the 23<sup>rd</sup> of each month. The payroll cut off date is on the 12<sup>th</sup> of each month. Further, any overtime worked in a calendar month, even if it was before the 12<sup>th</sup> of the month, would not be paid until the end of the following month. The respondent aims to issue a P45 and close down the employee's PAYE account on the day an employee's notice expires. That is more satisfactory for the employee moving straight on to another job, who does not then need an emergency tax code to get started there. A P45 cannot be issued with balancing payments still owing. This was another reason why overtime was not permitted during a notice period. I can see it may be a consideration.

27. Both the respondent's witnesses said that the purpose of overtime was to deal with new complaints which had arisen, i.e. special peaks in complaints and finite backlogs which needed tackling, for which the respondent was prepared to pay double time rather than to take on more adjudicators, who then might be left idle once the peak had passed. I accept this evidence. It therefore did not make a lot of sense for departing adjudicators to be taking on new complaints, many of which might then need reallocation.

28. The claimant never reverted to Ms Avery to check with her whether it would be alright if she continued to do overtime despite the clear prohibition on the People Portal which reached her as an email on 8 March at 10.35 am. Instead she liaised with Andrew Lander who administers overtime when it is booked through the overtime booking tool.

29. The claimant has a strong sense of fairness and considered that the justification for the ban on homeworking and overtime did not make a lot of sense. I myself pressed the respondent hard on this because I could not see it was so obvious that such a policy had to exist for operational reasons, particularly the one about homeworking. Both the respondent's witnesses gave evidence to the effect that there was less management oversight in cases that were going to be finished and closed. Also, adjudicators might need to be in the office and talking to others to whom their unfinished cases might have to be reallocated.

30. Management oversight was more necessary because the adjudicator would not be there forever and queries might come up as to their handling of a complaint after they had left. One can see these might be considerations.

31. No one has had anything but praise for the claimant's work record. She always met her targets, she was a good adjudicator and people trusted her work. She was not one of a small category of people who Mr Doherty stated might become lazy in their notice period and coast until the departure date unless closely supervised.

32. Unfortunately, relations between Ms Avery and the claimant had deteriorated. The claimant submitted a long, formal grievance to HR on Monday 13 March in respect of the whole policy of no homeworking and against the declining of her requests by Ms Avery. After Ms Avery had got out of her management meeting on 8 March she tried to find the claimant to discuss this policy on no overtime and no homeworking, but the claimant at that stage was in a meeting with Gerry Doherty. Ms Avery failed to catch the claimant before the end of the week. The following week, the claimant had started her grievance and emailed Ms Avery requesting that all communication between them should now be in writing only.

33. I find it difficult to know exactly where the truth lies here. On balance, I am left favouring the claimant's account. She believed, after speaking to Mr Doherty about the homeworking, in particular that he had asked her to let him consult with his management and that is why the claimant emailed Ms Avery the same day about the possibility of the position changing and that she might want the Friday off as a home working day instead. That was at 4.30pm on Wednesday 8 March.

34. The claimant needed to be at home because, of all the people in her family, she was probably the most flexible. She has an aunt who works shifts. Her father's work is

apparently not flexible. Her mother is a teacher who finds it hard to take time off in the term. Her mother's car had been damaged. The garage had offered to come to their home to pick it up and, I presume, leave off a courtesy car. Somebody had to be at home in order to meet them. If this did not happen on Thursday, it could be rescheduled to Friday. That is why the claimant asked for the Friday home working.

35. She had been left with the impression from Mr Doherty that he had not given a clear answer. That is contrary to his evidence to the tribunal that he, on the Wednesday, clearly granted her the time off on the Thursday. I cannot explain that email otherwise. She considered that that request initially made to Ms Avery was still not resolved because she had referred the matter to the next manager, Mr Doherty, who in turn had referred it to his management. I consider the claimant's recollection was genuine, even if it might have been mistaken.

36. I asked both the respondent's witnesses if the notice period is not precisely the time when you might need more overtime in order to close cases which would otherwise have to be reallocated at the end of the notice period. Both said it was not. Overtime was only to be used for new cases.

37. The claimant informed the tribunal that Azariah Nukajam, a woman based in another department of the respondent, worked overtime in her notice period. I find it probable that different managers in different departments might have had a different understanding of this unwritten policy and of the strictness with which it should be applied. Mr Doherty's email of 8 March at 10.31am, to his team managers, suggests that the policy was strict, particularly on overtime.

38. The respondent stated they had found no record of this overtime being worked by Ms Nukajam. Perhaps they could have found a final payslip to demonstrate, either way, if there were any overtime payments included.

39. I heard evidence from Sarah Iyinkanmi who is a former colleague of the claimant. Her evidence was undisputed. She had given her notice on 23 February 2017 (a fortnight before the claimant). She subsequently booked overtime on 4 and 11 March; and I was shown an interesting email from her line manager, Mr David Trueman. At the time of the email Ms Iyinkanmi was on annual leave, then she was due to work at home on the Friday, and overtime on Saturday. On 8 March at 3.08pm he emailed Ms Iyinkanmi to say:

"It would be better to talk to you about this in person, but unfortunately as you're working from home on Friday, we can't do that until next week."

He stated:

"Across the service there's been some questions about Saturday overtime, working from home (and a combination of the two) during notice periods. It seems the general approach is both of these shouldn't really be done – unless there's good reason for doing so."

40. He then asked her for details about her physio regime which she used to back her complaints for working from home. In respect of the overtime which she was then to work on 11 March, he stated:

“So, please don't work this Saturday unless I let you know otherwise. I've not yet cancelled your homeworking for that day just in case – but unless I let you know otherwise, if you do any work on Saturday you won't be paid any overtime for it.”

41. This seems to me a clear indication that David Trueman had just received and understood the email from Gerry Doherty about an embargo and realised that he had previously authorised overtime the week before. He decided that he could not now allow this to repeat itself because it was clearly against management policy. It seems to me that the tone of his email was tentative in order to let Ms Lyinkanmi down as gently as possible, because it would come as a disappointment. It was a real inconvenience to her because she only saw this email on the Friday before the Saturday and had already booked a carer for her father (who is a stroke victim) for £150 in order to cover her when she was doing the overtime.

42. In her case, payment was refused for Saturday 11 March because she had been told not to work that day. She raised a grievance in respect of this non-payment which was declined, however on appeal that was allowed. The person conducting the appeal took particular account of the uncancellable carer, and allowed her claim for payment. The claim for the 4 Mar when he was apparently not aware of the strictness of the policy.

43. The example of Ms Lyinkanmi helps the respondent more than it helps the claimant as it is an illustration of the strictness of this policy in practice. The claimant is right in stating that the whole matter is a management discretion rather than a hard documented policy. That discretion has to be exercised reasonably and fairly across the board. That is so as a matter of contract law. If a management discretion or policy is exercised in such a way that it breaches the implied term of trust and confidence in a contract of employment there may be a justifiable employee claim. In my view that degree of breach has not happened here on these facts. See, for instance, *United Bank v Akhtar* [1989] IRLR, 507, EAT. It was a good argument by the claimant, but not supported by the facts.

44. There has to be the same contractual analysis, whether this is an unlawful deductions claim or a breach of contract claim. The same principles apply. The management discretion is there in the contract of employment itself. It is also echoed in the employee handbook. Overtime is at the discretion of management.

45. The claimant is genuinely puzzled as to how the administrative arrangements for overtime are managed as a project by the “overtime people”. However for the contract to work effectively, “management” must mean line management. The claimant is not saying she did not know who her line manager was or that somehow the authority of Andrew Lander and the HR department trumped the authority of the person appointed to line manage her in her employment as an adjudicator. It is significant that the claimant never followed up her overtime requests with Ms Avery. She probably knew what she would have been told if she had.

46. In all the circumstances therefore, and, despite the excellent way in which the claimant has presented her case as a lay person, it would be wrong as a matter of contract law to uphold the claim just on general principles of fairness.

47. On the evidence I have heard, I am satisfied that the respondent was within its



contractual rights to decline payment despite the fact that the claimant worked for 12 hours on 2 Saturdays and they have now had the benefit of her work for free. It feels harsh, but this is a contract case and not an unfair dismissal case. Contract outcomes can be harsh.

Employment Judge Prichard

4 October 2017