Appeal No. UKEAT/0299/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 & 26 March 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR P RODDIS — APPELLANT

SHEFFIELD HALLAM UNIVERSITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MASSARELLA (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR NIGEL GRUNDY (of Counsel) Instructed by: Eversheds LLP Eversheds House 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

PART TIME WORKERS

A worker employed under an associate lecturer's contract of employment described by the Employment Tribunal as a zero-hours contract, was employed under the same type of contract as a lecturer on a full-time contract for the purposes of Regulation 2(2) and 2(4)(a)(i) **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000**.

The Employment Tribunal had erred in concluding that **Wippel v Peek & Cloppenburg GmbH & Co KG** [2005] IRLR 211 ECJ led to the conclusion that the Claimant and his full-time comparator were not employed on the same type of contract.

The case is remitted to the Tribunal to determine whether the part-time worker is engaged in the same, or broadly similar, work pursuant to Regulation 2(4)(a)(ii) and, if so, whether he has been subjected to unjustified less favourable treatment contrary to Regulation 5.

The following principles as to the proper approach to Regulation 2(3) for the purposes of Regulation 2(2) and 2(4) emerge from the case law[1]:

- Regulation 2(3) provides a comprehensive list of categories of different types of contract for the purposes of paragraphs 2(1), (2) and (4);
- The categories in Regulation 2(3) are broadly defined and, since the purpose of the Regulation is to provide a threshold to require a comparison of full and part-time workers to take place, the threshold is deliberately set not too high;
- A contract cannot be treated as being of a different type from another just because the terms and conditions that it lays down are different, nor because an employer chooses to treat workers of a particular type differently;

[1] **Matthews v Kent & Medway Towns Fire Authority** [2006] ICR 365 HL, **Wippel v Peek & Cloppenburg GmbH & Co KG** [2005] IRLR 211 ECJ; **O'Brien v Ministry of Justice** [2017] UKSC 46.

- Where a worker and his or her comparator are both employed under contracts that answer to the same description given in the same paragraph in Regulation 2(3), they are both to be regarded as employed under the same type of contract for the purposes of Regulation 2(4);
- In order to satisfy the requirements of Regulation 2(4)(a)(i), it is not necessary to go further than to find that both workers are employed under contracts that fit into one or other of the listed categories;
- The categories are designed to be mutually exclusive;
- The category in Regulation 2(3)(d)[2] is a residual category. It refers to a description of worker who is different from those mentioned in categories (a) to (c) and does not apply to a worker who falls into one of those categories. An example of a description of worker who would fall within category (d) has yet to be identified. A zero-hours contract is not, of itself, a type of contract.

[2] Formerly (f)

HER HONOUR JUDGE STACEY

1. This is an appeal against the Judgment of the Employment Tribunal at a Preliminary Hearing heard at Sheffield on 2 May 2014 before Employment Judge Little and members, Dr P C Langman and Mr K Smith. The Judgment and Reasons were sent to the parties on 5 June 2014.

2. The delay in these proceedings - it now being March 2018 - is explained by the appeal having initially been struck out for non-payment of fees. It was reinstated following the Supreme Court Judgment in **R (on the application of UNISON) v Lord Chancellor** [2017] UKSC 51. On its reinstatement, it was expedited by Her Honour Judge Eady QC at the sift stage, when the appeal was permitted to proceed to a Full Hearing on two matters: whether the Employment Tribunal had had regard to Regulation 2(3) of the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("the Regulations" or "the Part-time Workers Regulations") when considering whether the relevant contracts of employment were the same; and/or whether, in any event, the Employment Tribunal has provided adequate Reasons for its conclusions in this regard.

3. I shall continue to refer to the parties by their status below and refer to the Appellant as "the Claimant" and the Respondent to the appeal as "the Respondent."

4. The issue is whether the Employment Tribunal erred in its interpretation of paragraph 2(4)(a)(i) of the **Regulations** in considering whether the Claimant and his named comparator were employed under the same type of contract and in its conclusion in paragraphs 4 and 5 of its Judgment:

> **"4. The only comparator put forward by the claimant in respect of his complaint under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (Mark Leader) is not a comparable full time worker as defined by regulation 2(4)(a)(i) because Mr Leader is not employed under the same type of contract as the claimant.**
>
> **5. Accordingly the complaint brought under regulation 5 of the 2000 regulations (the only complaint brought under those regulations) must also fail and is struck out."**

5. The factual background is as follows. The Claimant was employed as an associate lecturer by the Respondent University and commenced employment on 30 January 2006. He brought claims for unfair dismissal, less favourable treatment under the **Part-time Workers Regulations**, and a claim of age discrimination. The age discrimination complaint was withdrawn and the unfair dismissal complaint was dismissed by the Tribunal since it was found that the contract of employment had not been terminated and there is no appeal from that part of the decision. The case came before the Employment Tribunal at a Preliminary Hearing and relevant to this appeal is the following paragraph of the Employment Tribunal's decision:

> **"3.4. Was the claimant's proposed comparator for the Part-Time Workers complaint an appropriate comparator as defined by Regulation 2(4)(a)(i) of the 2000 Regulations - were the claimant and his comparator employed under the same type of contract?"**

6. In order to undertake the comparative exercise, the Tribunal first needed to establish the nature of the Claimant's contract with the Respondent, and they found that the Claimant's employment relationship was governed by the contract of employment signed by him on 6 February 2006. There is no appeal from that finding which was entirely uncontroversial and the Employment Tribunal found as follows:

> **"4.1. On 6 February 2006 the claimant signed the contract of employment which is set out at pages 45-52 in the bundle. Although that contract does not immediately advertise itself as a zero hours contract - there is no warning to that effect on its face - the view of this Tribunal is quite clearly it was a zero hours contract and that much is plain from clause 6. Clause 6 deals with hours of work and provides:**
>
> > **"*Your hours of work will be as defined by the offer of work on the SHU 5a form. Your hours of work will vary according to the workload of the University's business. You therefore acknowledge that there may be periods when no work is available and the University has no obligation to provide you with any work or to provide a minimum number of hours in any day or week. However, the University will endeavour to allocate suitable work to you when it is available.***
> >
> > ***You agree to work for such hours each year which may be as few as zero hours per week as shall, in each case be notified to you in writing (via the SHU 5a form) by the University***

at least 1 month before the commencement of the academic year/next semester, provided that:

> ***6.1.1. If no such notification is provided to you it will be presumed that you will work zero hours during the next academic year/next semester***
>
> ***6.1.2. You may agree with your Director of School to accept a shorter period of notification in respect of any Semester***
>
> ***6.1.3. Notification of the hours you work in the first semester of your employment hereunder shall be attached to this Contract and shall be valid notwithstanding that it may have been provided to you within 1 month of the commencement of that Semester.*** **" "**

The paragraph goes on to deal with the provisions of clause 6.2 and the notice provisions, which are not necessary for the purposes of this Judgment. The contract provided that his responsibilities were to undertake a range of teaching and related duties determined by his manager from time to time including preparation of lectures/schemes of work/up to date relevant materials, marking, assignment and exam setting and marking and operation of quality procedures, all to the highest professional standards.

7. The Claimant had received over 30 SHU 5a forms since 2006, including two particular courses for which he had had consecutive appointments over some five years and the Employment Tribunal found that the SHU 5a form was, as described in clause 6 of the contract of employment, an offer of work.

8. Having identified the Claimant's contractual terms, the Employment Tribunal then considered whether he was employed under the same type of contract as his comparator; Mr Mark Leader, who is employed as a lecturer on a full-time contract.

9. In its conclusions concerning the comparability of the type of contract of the full-time worker, Mr Leader, with that of the Claimant, the Tribunal found as follows in paragraph 7, under the heading "*Does the Claimant have a Comparable Full-Time Worker?*":

> **"Regulation 2 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 defines comparable full-time worker. Regulation 2(4) provides:**
>
> > **"*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 …*" "**

The Tribunal Decision continues:

> **"We pause there because we are not required to consider the remaining aspects of the definition in terms of the same or broadly similar work. We have found that the claimant was employed under a zero hours contract and we have asked to see and now have seen the contract of Mr Leader, which at the material time was a contract which provided him with permanent employment as an academic lecturer as opposed to an associate lecturer. On the authority of the European Court of Justice's judgment in *Wippel v Peek & Cloppenburg GmbH* [2005] IRLR 211, we find that Mr Leader is not a comparable full time worker and in those circumstances, as there was no valid full time worker for the part time worker's complaint, we find that too must be dismissed."**

That was all that the Tribunal said about the matter.

10. In outline terms, in order to succeed in a claim of this type under the **Part-Time Workers Regulations** a Claimant must first establish that he or she is a part-time worker as defined and then identify an actual full-time worker comparator. She or he must then establish that they have been less favourably treated as regards either the terms of his or her contract or by being subjected to any other detriment, and satisfy the Tribunal that the identified less favourable treatment is on the grounds that the Claimant worker is part-time. If, and only if, all those elements are established, does the onus then shift to the employer to show that there is an objective justification for the less favourable treatment. If the employer cannot do so, the less favourable treatment complaint will be made out.

11. This case concerns just one aspect of one the matters identified: the comparability of the full-time worker. In order to be apt, the full-time comparator required under the **Part-Time Workers Regulations** must be comparable in four respects: they must (1) be employed by the

same employer with (2) the same contract type, (3) engaged in the same or broadly similar work, and finally, geographically by (4) being based at the same establishment. The only issue for determination at the Preliminary Hearing in this case was the question of whether the two workers - the Claimant and Mr Leader - were employed under the same type of contract.

12. Regulation 2, entitled "*Meaning of full-time worker, part-time worker and comparable full-time worker*", insofar as relevant for this case states in subparagraph (2) that:

> **"(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 contract, is not identifiable as a full-time worker.**
>
> **(3) For the purposes of paragraphs (1), (2) and (4), the following shall be regarded as being employed under different types of contract -**
>
> > **(a) employees employed under a contract that is not a contract of apprenticeship;**
> >
> > **(b) employees employed under a contract of apprenticeship;**
> >
> > **(c) workers who are not employees;**
> >
> > **(d) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that the workers of that description have a different type of contract."**

13. A full-time worker, set out in subparagraph (4), is stated to be as follows:

> **"(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, …"**

The Regulation goes on to deal with the same or broadly similar work issue and the establishment point mentioned above.

14. The **Regulations** are made pursuant to **European Framework Agreement 97/81** which contains the following definition in Clause 3:

"For the purpose of this agreement:

1. The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2. The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, …"

15. In addition to the CJEU authority of **Wippel**, cited by the Employment Tribunal, the two landmark UK cases are that of **Matthews v Kent & Medway Towns Fire Authority** in the Court of Appeal ([2005] ICR 84) and the House of Lords ([2006] ICR 365) concerning retained firefighters and their treatment *vis-à-vis* the whole-time firefighters, and the case of **O'Brien v Ministry of Justice** [2017] UKSC 46 concerning the issue of pension entitlement for fee-paid Judges. The parties had helpfully provided the Appeal Tribunal with **Sharma & Others v Manchester City Council** UKEAT/0561/07, for the sake of completeness, but although it also concerned lecturers' contracts of employment, it is not on point, and so I will not deal with that further.

16. The Employment Tribunal referred only to **Wippel** although it is agreed that the other authorities were before them at the hearing and did not explain why it led them to conclude that the claim must fail. It is submitted by the Claimant that it is problematic for the Employment Tribunal to have reached the conclusion that it did when the House of Lords interpretation of **Wippel** in **Matthews** was highly germane, and it constitutes an error of law for the Employment Tribunal to have failed either to take **Matthews** into account or followed it, or explained why it concluded that **Whippel** led to them to dismiss the claim. I am referred in particular to paragraph 37 and the opinion of Baroness Hale in particular.

17. The Respondent's argument is that although neither **Matthews** nor Regulation 2(3) has been mentioned, clearly the Tribunal had all the statutory provisions and the case law before it

and it would be nit-picking to expect the Employment Tribunal to recite each and every aspect and no error of law has been identified. But in any event the decision of the Tribunal is so obviously and plainly right, they would have come to the same conclusion and their judgment ought not to be interfered with or disturbed.

18. The following propositions are agreed to be distilled from the case law, most notably **Matthews**:

- Regulation 2(3) provides a comprehensive list of categories of different types of contract for the purposes of paragraphs 2(1), (2) and (4);
- The categories in Regulation 2(3) are broadly defined and, since the purpose of the Regulation is to provide a threshold to require a comparison of full and part-time workers to take place, the threshold is deliberately set not too high;
- A contract cannot be treated as being of a different type from another just because the terms and conditions that it lays down are different, nor because an employer chooses to treat workers of a particular type differently;
- Where a worker and his or her comparator are both employed under contracts that answer to the same description given in the same paragraph in Regulation 2(3), they are both to be regarded as employed under the same type of contract for the purposes of Regulation 2(4).
- In order to satisfy the requirements of Regulation 2(4)(a)(i), it is not necessary to go further than to find that both workers are employed under contracts that fit into one or other of the listed categories;
- The categories are designed to be mutually exclusive;

- The category in Regulation 2(3)(d)[3] is a residual category. It refers to a description of worker who is different from those mentioned in categories (a) to (c) and does not apply to a worker who falls into one of those categories;
- An example of a description of worker who would fall within category (d) has yet to be identified. A zero-hours contract is not, of itself, a type of contract.

19. Mr Grundy accepted these legal propositions and in doing so he conceded that **Matthews** had considered **Wippel** in detail, and distinguished it, Baroness Hale holding at paragraph 37 as follows:

> **"37. … Nor am I unduly troubled by the decision of the European Court of Justice in [*Wippel*]. The claim in that case, to be paid on the basis of the maximum number of hours the worker could have been asked to work, when she was under no obligation to do any work at all, was clearly outrageous. It is not surprising that the court found that her "work when asked and if you please" arrangement was not the same type of relationship as those with whom she wished to be compared. Furthermore, the court was concerned with an "employment relationship" under clause 3(2) of the framework agreement, whereas we are concerned with the express words of the 2000 Regulations. The Regulations should be read as going at least as far as the framework agreement goes. But it is open to them to go further, as is clear from the broader regulation-making power contained in section 19 of the 1999 Act."**

20. In this case the Claimant, unlike Ms Wippel, was not seeking to be paid a full-time salary irrespective of the hours he had worked and his claim was not "clearly outrageous". His zero-hours contract did not enable him to work only if he pleased, but if he accepted an offer in an SHU 5a form he was committed to providing a course for the academic year or whatever other length of the course, including all the work done in connection with the teaching including the preparation for the scheduled teaching, setting and marking of projects and assignments and related administration and various other matters. The facts in the Claimant's case were different to those in **Wippel** but in any event, **Matthews** found that the Regulations may go further than the Framework Directive and it is the Regulations that must be interpreted. The Tribunal therefore misdirected itself in concluding that it was bound by **Wippel** to reach

[3] Formerly (f)

the conclusion that the part-time work complaint must fail. Furthermore its decision was not **Meek**-compliant.

21. In applying the agreed legal principles to the facts as found by the Tribunal, it must follow that the Employment Tribunal erred in concluding that the type of contract that the comparator, Mr Leader, was engaged in was of a different in type to that of the Claimant. The Tribunal found the Claimant to be an employee employed under a contract of employment, just as was his comparator. The difference between them being that Mr Leader had what the Tribunal called "permanent employment as an academic lecturer as opposed to an associate lecturer". In his contract (pp74-80) Mr Leader is employed on a full-time post requiring him to work such hours as are reasonably necessary in order to fulfil his duties and responsibilities, whereas the Claimant's hours of work were as defined by the offers of work on the SHU 5a forms issued from time to time. The Tribunal fell into error by failing to look at the broad characteristics of both contracts and identifying that they were both contracts of employment. Both contracts were permanent in the sense that both employees had the protection of notice periods and had acquired statutory protection from unfair dismissal by dint of their length of service and such differences as there were, were not relevant to the type of contract under which they were engaged by reference to the categories in paragraph 2(3).

22. The categories in 2(3) are defined broadly in a way that allows for a wide variety of different terms and conditions within each category to enable a comparison to be made between full and part-time workers. If a part-time worker's hours of work were seen as a distinctive feature of dissimilarity compared to that of a full-time worker, it would defeat the purpose of the legislation. It cannot be that a zero-hours contract of itself constitutes a different type of contract for the purposes of Regulation 2, since the consequence would be that an employee on

a zero-hours contract would never be able to compare him or herself to a full-time worker, when the purpose of the Regulations is to enable comparisons to be made and for unjustified less favourable treatment on grounds of part-time worker status to be prohibited. It would be self-defeating.

23. The Tribunal misdirected itself in law and its decision in paragraphs 4 and 5 of its Judgment cannot stand and the appeal is allowed.

24. On the Tribunal's findings of fact, which are not in dispute, the Claimant and his comparator are both employees and fall within category (a) of Regulation 2(3) since they are both employed under a contract that is not a contract of apprenticeship. It follows that neither of them was employed under a contract of apprenticeship and neither fall into category (b), neither of them was a worker (as distinct from an employee) (category (c)) and neither was in the residual category (d).

25. In light of the Appeal Tribunal's conclusion the parties agree that this Appeal Tribunal should exercise its powers under section 35(1) of the **Employment Tribunals Act 1996** and substitute the Employment Tribunal's finding at paragraph 4 of its Judgment with a finding that the Claimant and Mr Leader were employed under the same type of contract for the purposes of Regulation 2(1), (2) and (4). Paragraph 5 of the Judgment is revoked.

26. The case will now be remitted back to the Tribunal for the Tribunal to decide the remaining issues in the claim. From the Employment Tribunal's Judgment and paragraphs 11 to 13 it appears to be conceded that the Claimant was a part-time worker pursuant to Regulation 2(2), but it perhaps needs to be clarified just in case it is a live issue. The next, or probably first

issue therefore is whether, in accordance with Regulation 2(4)(a)(ii) both workers were "*engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience*". If so, whether the Claimant was subjected to less favourable treatment and in what respects; if so, if it was on grounds of his part-time worker status and; if so, whether the Respondent can objectively justify any such less favourable treatment as may be found; and if not, what remedy is due to the Claimant.

27. Finally, by way of postscript and for the sake of completeness, it is noted that since this case was heard at first instance in 2014, section 27A of the **Employment Rights Act 1996** has been inserted by the **Small Business, Enterprise and Employment Act 2015**. Since 26 May 2015, any provision of a zero-hours contract which either prohibits the worker from doing work or performing services under another contract or under any other arrangement, or prohibits the worker from doing so without the employer's consent, is unenforceable against the worker. Had section 27A been in force at the material time, it was the clear view of the Appeal Tribunal and both parties that section 27A would have had no bearing or relevance to an interpretation of the categories of employment type available under Regulation 2(3) and would not have affected this decision.