



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr G Neiman and  
Ms L Keenan**

**v British Airways Plc**

**Heard at:** Watford

**On:** 9 July 2018

**Before:** Employment Judge Tuck

**Members:** Mrs J Smith  
Mrs G Blinks MBE

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr D Leach, Counsel.

## **JUDGMENT ON REMEDY**

1. Having found that the claimants were subjected to less favourable treatment than comparable full-time employees when undertaking overtime within the Respondent's Willing To Work, contrary to the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000:

1.1 Ms G Neiman is awarded the sum of £190, gross.

1.2 Ms L Keenan is awarded the sum of £1278, gross.

2. Additionally, each claimant is awarded the sum of £622.50 towards the expenses they incurred in attending the Employment Tribunal; no award is made in relation to any legal or other costs so incurred.

## **RECOMMENDATION.**

3. The Respondent shall, by **9 October 2018**, set out and publish to all staff who are eligible to volunteer under the Willing to Work Scheme, the terms

on which it will remunerate staff working under the said scheme, to ensure that it does not discriminate against part time workers.

## **REASONS.**

1. Having found, in a judgment sent to the parties on 2 January 2018, that the claimants were treated less favourably contrary to the Part Time Workers Regulations, the matter was listed today to consider remedy.
2. The ET was provided with statements and updated schedules of loss from the claimants, a submission document from the Respondent and a bundle consisting of 92 pages. We read such documents as we were referred to.

## **FACTS and SUBMISSIONS.**

3. The Respondent had a document, shared today with Ms Keenan and available to Mr Neiman, which indicated that she had completed four “willing to work shifts” since 2013. Ms Keenan very frankly said her recollection was having done more than that, but that she was willing to accept the evidence adduced by the Respondent and limit her claim for ‘back pay’. Mr Neiman agreed that he had no evidence to suggest that he had undertaken more than the one willing to work flight which the Respondent had evidence of.
4. The parties agreed that the information they collectively had was somewhat confusing, and that it was very difficult to make a precise calculation of the difference between the pay they received and that of a full-time employee, particularly in trying to take into account loss of pension contributions and annual leave which would otherwise have accrued.
5. Mr Leach said that the questions of pension schemes and quantification of losses had not been ventilated and that the question of overtime and annual leave was difficult as a matter of case law.
6. In relation to expenses, the claimants said that they had, between them incurred:
  - 6.1 £540 for 9 nights’ accommodation – four being required for the December Hearing, two for today’s hearing and three when they were seeing their solicitors.
  - 6.2 £95 for car hire in December when their flight was diverted to Cardiff and the only way they could get to Watford on time was to drive.
  - 6.3 £100 each for each return flight from France.
  - 6.4 £50 each per day for food while at the ET.

7. Mr Leach submitted that expenses had been incurred on the failed claims as well as this successful one, such that there should in principle be a 2/3 reduction, but that fundamentally no evidence had been adduced as to the costs incurred.
8. The ET told the parties that that it was minded, subject to any submissions the parties had to make, to make a recommendation. Mr Leach kindly drafted, at the Tribunal's request, a recommendation which it believed to be workable.

“The Respondent will, within the next 6 months, take steps to address the terms of the Willing to Work scheme so as to avoid less favourable treatment of part time workers.”

9. Mr Leach told the Tribunal that a meeting between BA and its recognised union will take place this week to discuss this matter; he said that no steps had been taken since our judgment was handed down in January 2018.
10. Mr Neiman submitted the correct recommendation would be as follows:

“The Respondent will pay any part time cabin crew who fly under the Willing to Work scheme the same way it pays full time crew operating on those same trips, from 9 July 2018.”

11. Mr Neiman for the claimants contended that in addition to the difference between the sums which the claimant's earned on willing to work shifts and the sums a full time member of staff was paid, they were also entitled to “damages”, including aggravated damages. Whilst acknowledging that injury to feelings could not be awarded, he contended that damages to represent the stress, personal illnesses and bullying behaviour he and Ms Keenan had experienced, before and during the December 2017 hearing should be compensated. Mr Neiman also highlighted that he and Ms Keenan had incurred expenses in litigating their claims beyond legal costs, namely travel, hotel and subsistence costs which they estimated to be £1000 each.
12. Mr Leach pointed out that regulation 8(11) does not permit an award for injury to feelings, and cited *Commissioner of the Metropolis v Shaw* [2012] IRLR 291 in support of the contention that aggravated damages are an aspect of an award for injury to feelings. Mr Leach said that as a matter of principle he accepted that expenses could be recoverable under the PTW regulations, but pointed out that there had been a number of unsuccessful claims, and certain expenses (eg meals) would have been incurred in any event.

#### **Law.**

13. Regulation 8 of the PTW Regulations, so far as is relevant, provides:

### **8 Complaints to employment tribunals etc**

(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).

..

(7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—

(a) making a declaration as to the rights of the complainant and the employer in relation to the matters 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.

(8) ...

(9) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances ... having regard to—

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 5, to the pro rata principle except where it is inappropriate to do so.

(10) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the infringement, and

(b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

(11) Compensation in respect of treating a worker in a manner which infringes the right conferred on him by regulation 5 shall not include compensation for injury to feelings.

(12) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

## **CONCLUSIONS ON THE ISSUES.**

### 'Damages'

14. The ET were sympathetic to the submissions of the claimants as to the award of damages, but noted that the PTW Regulations expressly state that compensation "shall not include compensation for injury to feelings". This was essentially what Mr Neiman was seeking, and it is simply outwith the jurisdiction of the Tribunal. In these circumstances the ET make no findings in relation to the factual matters the claimants set out in their statements about how they say the proceedings have impacted on them.

### 'Compensation'

15. In relation to the quantification of compensation payable to the Claimants for their willing to work flights undertaken, the ET considered it proportionate to take a relatively broad-brush approach.
16. The Tribunal considered that it was entirely appropriate to add to the allowances part time workers did not receive, when comparable full time workers did, a sum representing accrued annual leave. This does not involve the same considerations as under the Working Time Regulations, but is simply a question of whether full time staff are being treated more favourably than part time staff.
17. As to pensions, we had not been provided with a counter schedule from the Respondent, or any specific information about pensions. Mr Leach told us there was a final salary scheme whereas Mr Neiman stated that pension calculation would be impacted by the number of flights and duties undertaken. We had in mind that the sums at issue before us today were modest. We were satisfied, on the positive case the claimant's put forward to us, and on the very limited information we had, that it is appropriate to make an award to include a small element for pension loss. However, we do so without making any findings in relation to the specific terms of any pension scheme/s, and the tribunal recognise that this issue may be the subject of debate between the Respondent and its recognised union.
18. In relation to Mr Neiman therefore, in addition to the £158.90 - which the respondent identified as a difference between the payment he received for a W2W flight compared to the sum paid to a full-time crew member - it is appropriate to add a sum of £31.10 representing annual leave and pension.
19. Ms Keenan had calculated a sum set out in paragraph 4 of her schedule of £1278 inclusive of an element for accrued leave days and pension. The Respondent had a figure of £785.73 for 3 of Ms Keenan's flights, plus an

additional £303 for a fourth flight, not including any elements for leave /pension. The ET were prepared to accept the sum set out by Ms Keenan as the appropriate amount of compensation for the four trips she identified.

Expenses.

20. In relation to expenses, the ET accept that some claims were unsuccessful, but nevertheless the claimants incurred expenses in consequence of their rights under the PTW regulations having been infringed. The ET awarded hotels at £60 per night for 6 nights; giving a total of £180 each; half the £95 car hire incurred each, two return flights each at £200, and the £50 per day for four days (three in December and today) as sought, giving a total of £622.50 each.

Interest

21. The claimants sought interest on their losses, but were unable to identify when their W2W flights had been undertaken, and when they ought to have received the higher rates of pay. In these circumstances we decline to make an award of interest.

---

Employment Judge Tuck

Date: 1 August 2018.....

Sent to the parties on: 01.08.18.....

.....  
For the Tribunal Office