Case Number: 2200348/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr U M Nwakwu		**Westminster City Council**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 26 JUNE 2019

Introduction

1 The Claimant worked for the Respondents as an agency worker from September 2012 to June 2016. By a claim form presented on 4 March 2016 he brought complaints under the Equality Act 2010, together with claims under the Agency Worker Regulations 2010 ('AWR') and the Employment Rights Act 1996, Part II (unauthorised deductions from wages).

2 By a reserved judgment sent to the parties on 18 July 2017 following a five-day hearing, a fully-constituted Employment Tribunal ('ET') chaired by EJ Tayler dismissed all claims.

3 The Claimant appealed. Following a rule 3(10) hearing, four grounds of appeal were permitted to proceed. The Respondents conceded the appeal on those grounds and accordingly, on 17 September 2018, the EAT (HHJ Stacey, sitting alone) pronounced an Order in these terms:

> **THE TRIBUNAL ORDERS that the Appeal be allowed and that the matter be remitted for rehearing to a differently constituted Employment Tribunal of a judge sitting alone on the following issues:**
> 1. **Whether the Claimant's claim that the withdrawal of the availability of flexitime for agency workers in October 2015 constituted a breach of the Agency Worker Regulations 2010 (AWR) was out of time;**
> 2. **Whether the Claimant's claim for "flexi-leave" as a breach of AWR, was out of time … ;**
> 3. **Whether the Claimant's claim for one day's paid leave for Christmas in 2012 and also 2013 as a breach of AWR was out of time …;**
> 4. **The time limits issue to be determined both as to whether the claims had been brought within the primary time limit, and, if not, whether to extend time having regard to the factors set out in *British Coal Corporation v Keeble* [1997] IRLR 336;**
> 5. **If any of the claims are found to be in time, to consider and adjudicate upon any complaints as may be found to be in time, by reference to the issues identified in paragraph 8 of the EJ Baty PH together with any applicable remedy to which the Appellant may be entitled.**

4 The reference to the "EJ Baty PH" was to the document issued by that EJ following a preliminary hearing for case management conducted by him on 13 July 2016. His summary of the issues included this:

> **8.3 Are the terms which the Claimant maintains he was entitled to "relevant terms and conditions" for the purposes of AWR, Regulation 6? The Claimant relies on the following alleged "relevant terms and conditions":**
>
> **8.3.1 the right to take one day off a month after accruing enough hours through overtime;**
> **8.3.2 the Claimant was on a lower hourly rate than his comparators from late 2012 until the end of his engagement … on or around 30 June 2016;**
> **8.3.3 the provision of one day's special leave during the Christmas period.**

5 In her judgment, Judge Stacey referred to the complaint about withdrawal of "flexitime" as having been treated by the parties and the EAT at a preliminary hearing as comprising a complaint under AWR and, in the alternative, a complaint of unauthorised deductions from wages.

6 For clarity, I should make three points about the scope of the remitted case. First, a complaint of unauthorised deductions from wages based on the "removal of flexitime" (noted in EJ Baty's document, para 13) was explicitly rejected by the original ET (reasons, para 64), and it seems that there was no appeal against that part of its decision. But I treat the complaint about the withdrawal of the "flexi-leave" benefit as forming part of the AWR claim summarised by EJ Baty in his para 8.3.1. Second, the complaint about the hourly rate of pay (EJ Baty's para 8.3.2) was also rejected by the ET (Reasons, para 60) and there was no appeal against that rejection. Third, the pleaded Christmas leave claim was confined to 2012 and 2013 only.[1]

7 The remitted hearing came before me on 25 June this year with two days allocated. The Claimant appeared in person and the Respondents were represented by Mr A Ross, counsel. It was common ground before me that the issues for my decision were whether the Tribunals had jurisdiction to entertain the claims summarised by EJ Baty in his paras 8.3.1 and 8.3.3 and, if so, whether they had any merit.

8 Having heard the evidence and closing submissions I gave an oral decision on the afternoon of day one, dismissing the claims. The Claimant then asked for written reasons. These are my reasons.

9 In addition, the Respondents through Mr Ross presented an application for costs. I will deal with that aspect in a separate judgment with accompanying reasons.

[1] There was some suggestion by the Claimant that it extended to 2014. It did not.

The legal framework

10 By AWR, reg 5(1) it is provided that an agency worker has the right to the same "basic working and employment conditions" as he would have enjoyed had he been recruited directly by the hirer. Such conditions are, where the imaginary direct recruit would have been an employee (rather than a 'worker'), "the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer" (reg 5(2)(a)). It is common ground that the terms invoked by the Claimant, being concerned with pay and leave, are "relevant" (see reg 6).

11 By AWR, reg 18, complaints under the Regulations must be presented to the Tribunal before the end of the period of three months[2] beginning with the alleged infringement. Where an act or failure to act is part of a series of acts or failures to act, time runs from the last of them. Where a complaint is presented out of time the Tribunal retains a discretion to entertain the claim nonetheless, if it considers that it would be "just and equitable" to do so. The case-law derived from the corresponding and indistinguishable provisions of the Equality Act 2010[3] and their predecessors is applicable. The discretion is wide but to be used with restraint: its exercise is the exception, not the rule: *Robertson v Bexley Community Centre* [2003] IRLR 434 CA.

Oral evidence and documents

12 I heard oral evidence from the Claimant and, on behalf of the Respondents, Mr Simon Cohen, HR Business Partner. Both gave evidence by means of witness statements.

13 In addition I read the documents to which I was referred in the single-volume bundle.

14 I also had the benefit of skeleton arguments on both sides.

The facts

15 I start with the complaint about "flexi-leave" (EJ Baty's para 8.3.1). As Mr Cohen explained in evidence, at all relevant times the Respondents operated a flexible working hours policy. This enabled staff to work flexibly, subject to the requirement to be present during 'core' hours and to take break of at least half an hour in the middle of the day. Under the policy staff who worked over their allotted 144 hours per four-week period could carry forward up to 10 hours into the following period, any more being lost. Alternatively, those who had accumulated not less than seven hours 12 minutes by way of surplus could ask to take a day off as paid leave in lieu. This was called "flexi-leave". Responding to such a request involved managerial discretion: it might be granted or refused as appropriate. There was no 'right' to "flexi-leave."

[2] Plus any extension under the early conciliation provisions
[3] See s123

16 The same goes for flexible working. The policy documents shown to me make it clear that flexible working was and is not a right and that any request to work flexibly was and is subject to the proviso that the needs of the service come first.

17 The Claimant was not afforded the opportunity to take "flexi-leave" between September 2012 and June 2014. Thereafter, having raised the matter with the Respondents, he was able to do so.

18 On 21 October 2015 Ms Donna Harris, Team Leader of the team of which the Claimant was a member, informed the team that temporary/agency staff would no longer be eligible to receive "flexi-leave". Instead, excess hours, provided that they were duly logged, would be compensated as overtime. The announcement did not apply to the Respondents' directly-employed staff. As the first ET found (Reasons, para 64), the Claimant refused on principle to make a claim for overtime hours worked. That refusal was fatal to his unauthorised deductions from wages claim.

19 I turn to the Christmas leave claim (EJ Baty's para 8.3.3). It is common ground that the Claimant did not receive an extra day off over the Christmas/New Year holidays in 2012/13 and 2013/14. Mr Cohen told me that permanent staff of the Respondents did generally receive what he called a "discretionary" day off.

20 I have been shown no evidence of any *entitlement* to extra days off. A standard form statement of terms and conditions of employment included in the bundle contains no reference to any such right.

21 The Claimant contacted ACAS for the purposes of early conciliation on 8 January 2016 and a certificate was issued on 8 February 2016. As I have mentioned, his claim form was presented on 4 March 2016. On the face of it, only complaints about matters occurring on or after 9 October 2015 were presented in time.

22 The Claimant raised a complaint about equal treatment in early June 2014 and presented a formal grievance citing AWR in November 2015. In evidence he provides no explanation for the delay in litigating his complaints.

23 I accept Mr Cohen's unchallenged evidence that those responsible for managing the Claimant have since left the employment of the Respondents and/or associated local authorities and accordingly were not available to them as witnesses.

Secondary findings and conclusions

24 The "flexi-leave" claim must be considered by reference to two periods: September 2012 to June 2014 and 21 October 2015 to 30 June

2016. In my judgment it is not possible to treat acts or omissions in each as forming part of a "series of acts or failures to act". They were interrupted by a significant period about which no complaint is made. It would offend language and common sense to treat them as a continuum.

25 On this reasoning it becomes apparent that the 2012-2014 complaint is hopelessly out of time unless I exercise my discretion to extend time. In the context of a three-month limitation period, the period of delay some 16 months is inordinate. The Claimant on was enquiry as to his rights and, as I have noted, raised concerns informally and formally in 2014 and 2015. His failure to bring the claim in a timely fashion is not explained. Moreover, the consequence of his delay is plain. The Respondents are prejudiced in that they are left without the means of producing evidence. As I have noted, potentially relevant witnesses have moved on. No doubt relevant documents have been destroyed, lost or archived. Conversely, the prejudice to the Claimant is modest. This is not a complaint of discrimination and the monetary value of the claim is demonstrably minute. I do not, course, trivialise it but it is fair to say that it does not allege a particularly serious violation of his legal rights. These considerations all argue against the exercise of the discretion. In addition, and crucially, I am satisfied that it would be idle to exercise that discretion in this case given that, as well I will explain, I have reached the conclusion that there is no substance to the complaint. It would be idle to extend time to bring within the jurisdiction a failing case.

26 It is common ground that the second limb of the "flexi-leave" claim is in time.

27 Turning to the merits, I conclude that, on my primary findings of fact, the "flexi-leave" claim is unfounded. The Respondents' employed staff did not enjoy a "right" to a monthly day off as compensation for additional hours worked through flexitime. There was only ever a discretion for managers to grant that benefit on request. The contracts of the Respondents' employees did not ordinarily include terms providing for such a right. The language of AWR, reg 5(2)(a) is not fulfilled and the Claimant's claim for parity with employed colleagues under the Regulations is misplaced.

28 As for the Christmas leave claims, these are all the more out of time and, as I will shortly explain, without merit. My reasoning on time in relation to the older "flexi-leave" claim applies *a fortiori* here. The Tribunal is without jurisdiction.

29 Had they not failed on jurisdictional grounds, I would have found that the Christmas leave claims were untenable on their merits. On my primary findings, the Claimant's employed colleagues never enjoyed any right to special Christmas leave under their contracts. The granting of such leave was simply a matter for managerial discretion. Again, the language of AWR, reg5(2)(a) is not satisfied.

30 It follows that the surviving claims, sincere and heartfelt as they are, do not succeed. The proceedings are accordingly dismissed.

EMPLOYMENT JUDGE – Snelson

28th August 2019

Sent to the parties on 28/08/2019

For Office of the Tribunals