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EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Barrell**

Respondent: **The Commissioner of the Metropolis**

Heard at: **East London Hearing Centre**

On: **6, 7, 12, 13, 14 September,29 & 30 October, 30 November 2018 and 24 January 2019**

Before: **Employment Judge Jones**

Members: **Mr P Quinn**
Mr M Rowe

Representation

Claimant: In person accompanied by her Mr Barrell (Husband)

Respondent: Mr Nicholls (Counsel) accompanied by Ms N Dunn (Para Legal)

JUDGMENT and reasons having been given in open court on 24 January and judgment sent to the parties on 26 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Claim and issues

1. The Claimant brought a complaint of unlawful deductions of wages and of less favourable treatment on the grounds of being a part-time worker.

2. The Claimant is a communications officer for the Respondent and her complaint was that the Respondent's decision that she had been overpaid salary and its decision to make deductions from her salary in lieu of an overpayment was unlawful. She sought a judgment writing off the balance of £4,823 and for the Respondent to take full responsibility for gross negligence for having claimed it and making deductions towards it.

3. In its ET3 Response and Grounds of Resistance the Respondent defended these proceedings on the basis that the Claimant had been overpaid. Its case was that a pay audit revealed that the Claimant had been overpaid and that it was allowed to retain amounts adding up to the overpayment amount of £4,823. Its position changed during the course of the hearing, as set out below.

Evidence

4. The Tribunal heard from the Claimant and Phillip Brewster in support of her case. For the Respondent the Tribunal heard from Jackie Togher, Flexible Working Audit Team Manager; Sean Wilson, who had been centre manager at Central Communications Command at Hendon until he became a Superintendent and Deputy Borough Commander in March 2016; and Daniel Pickett, Strategic Reward Advisor, HR.

5. There was a bundle of documents running to just over 1700 pages and spread over 4 volumes. Additional evidence was produced during the hearing and at the resumed hearing days.

Findings of fact

6. This was an unusual case because it changed as the evidence unfolded. We set out the relevant findings of fact that relate to the situation at the end of the hearing in January.

7. We have not made findings of fact on all the other evidence we had before us because as the matter had changed considerably by the end of the hearing, we were no longer required to do so.

8. The Claimant began her employment with the Respondent on a full-time basis in 2000. She is a communications officer trained to use CAD, PNC and the Respondent's call handling system. She has completed all necessary training packages and can work both on dispatch floor and in first contact. The Claimant is married to a serving police officer of 25 years. She is also a special constable. She began working flexibly in 2003 when she returned to work after the birth of her first child.

9. The Claimant worked a flexible working roster consisting of a 24-hour shift pattern, including weekends and Bank Holidays. She would work less than full-time hours. The Claimant is entitled to shift allowances pro rata and premium payments for weekend hours worked i.e. time and a half for Saturdays and double time for Sundays.

10. MetCC has a Duties department which yearly generates a 52-weeks full time roster for each team. The roster is produced on an Excel spreadsheet which is uploaded onto TTV manually by TTV administrators. TTV is TotalView, the Respondent's duty planning and human resource management system, which records all types of leave, sickness, overtime, abstractions such as court attendance, activities and duty postings. We heard that it was only as good as the administrators who input the information on to it. There is no system of clocking in or off for police staff.

11. There is an Intraday person who would be the person you spoke to when you first come on shift. They would assign you to your post for the shift. The Intraday liaises with Team Duty officers, organises urgent updates on TTV and generally has a handle on what

is happening on the shift. TTV was not a shift logging system and so the fact that the Respondent relied so heavily of TTV in determining attendance at work caused problems in this case.

12. We find that the system of approving and administering flexible working applications within the Respondent has changed over the years. Initially, the application for flexible working and the pattern of hours the employee wished to work was submitted to and processed by their line manager. If approved, the line manager would inform the Duties section, which was the unit that dealt with administration of staff rosters. The Claimant described the process of applying for and being granted leave to work flexibly at that time. The Claimant would be given a full-time employee's roster and asked to fill in the shifts she could work. In 2007, Geoff Truss was the appointed flexible working officer at Bow station, he assisted all applications and prepare them for the flexible working panel by preparing a spreadsheet with the Claimant's preferred shift pattern shown which he would then present to the panel authorisation. Once approved, he would build a new roster in line with approved hours and notify HR who would notify Payroll of the change of hours. They would be responsible for working out pay once the brakes have been deducted and any adjustment to applicable allowances made.

13. In 2010, the Respondent introduced MetHR which replaced local HR managers. The system changed so that once a member of staff's change of working hours is approved, their line manager is responsible for notifying MetHR by raising a service request online with the updated information. MetHR would then pass the information on to payroll who would adjust the individual's pay accordingly.

14. In 2010, at other times and more recently, in 2017, the Respondent conducted audits of the Claimant's pay and concluded that they had overpaid her.

15. In the Respondent's ET3 it referred to the Claimant repaying the first overpayment at the rate of £30 per month. Later in the ET3 it referred to a repayment in the sum of £75 being deducted from the Claimant's wages. The Claimant referred in her witness statement to an amount of £75 being deducted each month from her salary. We asked the Respondent to give us information as to when those amounts changed, what sums they were applied to and what was outstanding before the Claimant was notified of the most recent overpayment amount.

16. On the sixth day of the final hearing in this matter, on 29 October, the Respondent brought to court a letter addressed to the Claimant from the Respondent's Directorate of legal services, which referred to the sum of £4,823.17 as the overpayment which had been identified by the Flexible Working Audit Group (FWAG) as a result of the most recent audit in February 2017. The letter stated that the Respondent would write off the £3,773.17 that was still owed and repay the Claimant the sum of £1,050 which it stated had already been deducted from her salary in respect of the overpayment.

17. We discussed the letter in the hearing and its possible implications. As the implications for the claim remained unclear, the Claimant stated that she wished to pursue her claim. The parties made their submissions and closed their cases. The Tribunal was due to meet in chambers to reach a decision on the claim on 30 November.

18. By letter dated 14 November the Respondent wrote to the Tribunal requesting that the matter be brought back to court as the situation regarding the overpayment had changed. After further correspondence on the matter between the Tribunal and the parties, the matter was restored to court on 30 November. The Tribunal considered that it was in keeping with the overriding objective to allow the parties to submit further evidence and make further submissions on the issues raised in the letters from the Respondent's legal services Directorate dated 14 and 21 November 2018. In those letters the Respondent stated that it was no longer seeking to claim an overpayment of wages from the Claimant in the sum of £4,823.17p. It also sought to repay the Claimant money which it considered had already been deducted from wages in respect of that debt. In the Respondent's initial letter to the Claimant on 29th October it had proposed to repay her the sum of £1,050. In the second letter dated 14 November 2018, the Respondent changed its position once more. It submitted that it had not in fact taken any deductions from her wages in respect of the overpayment of salary identified by the FWAG in 2017 but that it would honour the commitment already made to pay her the sum of £1,050 which would be subject to deductions. It proposed to write off the debt of £4,823.17.

19. On 30 November, in court, the Respondent applied for leave to withdraw statements made to Employment Judge Foxwell at the preliminary hearing on 26 February 2018 and in the ET3 response, that it had been deducting £75 per month from the Claimant's wages in respect of the 2017 overpayment. It was now the Respondent's case that none of the deductions taken from the Claimant's wages were ever applied to the 2017 FWAG overpayment.

20. At the resumed hearing on 30 November 2018, we heard live evidence from Sarah Royan, the respondent's solicitor who had initial conduct of the case and from Peter Reid, one of the respondent's senior payroll managers.

21. Unfortunately, that further evidence failed to clarify the position in respect of the payments the Claimant had already made towards overpayments, which overpayments those payments had been applied to, the amounts outstanding and the amounts that had by then been written off, if indeed they had been, as stated in the Respondent's letter dated 29 October 2018.

22. As matters were still not clear at the end of that day, we resumed on 24 January. On that day we had evidence from Ms Dunn from the Respondent's legal department and again from Mr Reid. Mr Reid submitted further evidence which we considered.

23. Ms Dunn's evidence was that she relied on the spreadsheet she received from Ms Greenacres of payroll when the letter dated 29 October 2018 was written. That spreadsheet shows an amalgamation of all the overpayments charged to the Claimant and the Claimant's payments of first £30 and then £75 applied.

24. Mr Reid's evidence was that the debts had not been amalgamated.

25. Although he was unable to provide copies of actual payslips to show where deductions were applied, he was able to give us screenshots of Epayfact for each relevant month. It was his clear evidence that the Respondent had not taken any money from the Claimant for the FWAG overpayment in the sum of £4,823.17. This provided the clarity that the Tribunal needed in order to be able to consider the claim and the Respondent's

more recent application to be able to withdraw earlier statements made to EJ Foxwell and in its ET3.

26. The Tribunal considered the following law in reaching its decision in this case.

Law

27. Section 13 of the Employment Rights Act 1996 (the ERA) states that an employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

28. Section 14 ERA sets out the exceptions to that rule. Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –

(a) An overpayment of wages, or

(b) An overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

29. The Claimant's part-time worker complaint comes under the Part-time workers (Prevention of Less Favourable Treatment) Regulations 2000.

30. Regulation 2(2) states that a worker is a part-time worker for the purposes 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.

31. Subsection (3) states that for the purposes of comparison under regulation 2, 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 workers of that description have a different type of contract.

32. Subsection (4) states that 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 on the same type of contract; and

ii. engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

(b) The full-time worker works or is based at the same establishment as the part-time worker or where there is no full-time working or based at that establishment who satisfies the requirements of subsection (a) above, works or is based at a different establishment and satisfies those requirements.

33. The regulations can also apply to a person who was previously full-time. Regulation 3 states that regulation 5 shall apply to a worker who was identifiable as a full-time worker in accordance with regulation 2(1) above and following a termination or variation of his contract, continues to work under a new or varied contract, whether of the same type or not, that requires him to work for a number of weekly hours that is lower than the number he was required to work immediately before the termination or variation.

34. Regulation 5 (1) states that a part-time worker has the right not to be treated by his employers less favourably than the employer treats a comparable worker –

(a) As regards the terms of his contract; or

(b) By being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

35. The right conferred under subsection (1) only applies if (a) the treatment is on the ground that the worker is part-time, and (b) the treatment is not justified on objective grounds.

36. In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

37. Regulation 8(2) states that 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). An employment tribunal shall not consider a complaint under this Regulation unless it is presented before the end of the period of 3 months beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act of failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.

38. Regulation 8(2A) confirms that regulation 8A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2).

39. Regulation 8(3) states that a tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

40. Regulation 8(4) states that for the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2) –

(a) Where a term in a contract is less favourable that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;

(b) Where an application relies of regulation 3 or 4 the less favourable treatment shall be treated as occurring on, and only on, in the cases on regulation 3, the first day on which the applicant worked under the new or varied contract and, in the case of regulation 4, the day on which the applicant returned; and

(c) A deliberate failure to act contrary to regulation 5 or7(2) shall be treated as done when it was decided on.

41. Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment.

42. Regulation 8(7) states that 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 purposes of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

43. Where a tribunal orders compensation under para (7)(b), the amount of the compensation awarded shall be such as the tribunal considered just and equitable in all the circumstances; taking into account the infringement to which the complaint relates and the relevant losses, which includes expenses and the loss of any benefit.

Applying Law to Facts

44. Having looked at the new documents presented to us by Ms Dunn and Mr Reid, the Tribunal found that when the Claimant agreed to repay an overpayment as she had done in relation to those claimed before 2017, there was a sort of amalgamation of the total outstanding amounts owed while at the same time, the repayments from the money deducted from her salary appeared to have been applied to the outstanding amounts in sequence as opposed to being paid against one total sum. For example, the Epayfact pay slips at page 194 in the bundle shows that payments of £30 or in the case of the payments of £75 at page 93 from Mr Reid's bundle today, are applied to two different outstanding amounts.

45. We find from those documents that the disputed FWAG sum of £4,823.17 appears in the Epayfact copy payslip dated 31 August 2017. However, from the documents

produced we can see that there are no deductions applied to it. We looked through the document and saw that it remained the same throughout. It has not reduced as would expect it to do if any money taken from the Claimant's salary had been applied to it.

46. It is therefore our finding that the Respondent have not applied any deductions taken from the Claimant's salary towards the 2017 FWAG overpayment of £4,823.17. The sums that have been taken from the Claimant's salary over the years have been paid towards reducing the earlier overpayment sums, which were not the subject of this litigation.

Decision on the complaint of unlawful deduction of wages

47. The Respondent confirmed today that it no longer claims the overpayment of £4,823.17p from Claimant.

48. The Respondent has withdrawn its overpayment claim that it made to the Claimant as a result of the FWAG investigation in 2017. There were earlier FWAG audits that resulted in overpayments claimed from the Claimant but this case did not concern those. Those were not withdrawn. The Claimant has paid them off or is in the process of doing so and they were not the subject of this litigation.

49. The Respondent has also asked to be allowed to withdraw the admission made to EJ Foxwell and in its Response that it was deducting £75 per month from the Claimant's wages in respect of the 2017 FWAG overpayment.

50. Having now seen the evidence that no such deduction was applied to the FWAG overpayment, the Tribunal grants the Respondent leave to withdraw the admission. There has never been and will not now be any deductions from the Claimant's wages in respect of the 2017 FWAG overpayment.

51. In the circumstances, there is no overpayment claim against the Claimant. Also, no money has been paid towards any overpayment.

52. The Tribunal cannot consider a complaint about an overpayment where no overpayment is claimed. More importantly, the Tribunal has no jurisdiction to even consider the Claimant's complaint about the stress that this has caused her or in relation to her complaint of negligence, where there is no overpayment claimed. That would be a matter for a different court. As the overpayment is now no longer claimed, we have no jurisdiction to consider the Claimant's complaint of unlawful deduction of wages.

53. The Tribunal made the following observations on this part of the claim, which were given to the parties in open court.

54. Having heard evidence in this case over a total of seven days - six days in September and on 30th November, we would make the following observations that may be useful in future.

55. The Respondent could consider the feasibility of putting in place a clocking-in or signing-in system or some other independent way of real time recording of when its civilian staff attend work. Also, members of staff should be involved in the process of determining when and where they were or whether they attended work in accordance with

agreed shift patterns on particular days rather than being presented with a concluded position at the end of an audit. If they are only asked at that point to present evidence that contradicts the employer's position then that is almost too late. At that point, sides have been drawn, and positions taken which may make it difficult to work out what actually happened.

56. Lastly, if there are any overpayments of wages then all options, including the opportunity to work overtime, should be explored with all employees, especially long-standing committed employees, regardless of whether they are working on a full-time or part-time basis, before seeking to make permitted deductions from their wages.

57. The Tribunal was reassured having heard Mr Reid's evidence today, that this matter may have been handled differently, had he been involved in the early part of the process. We were interested to hear the process that he outlined as to how disputes about these matters will be handled in the future.

58. As far as our involvement is concerned, the tribunal has no jurisdiction to consider the complaint of unlawful deduction of wages and it is therefore dismissed.

59. The Tribunal moved on to consider the complaint of less favourable treatment on the ground been a part-time or flexible worker.

Less favourable treatment on grounds of being a part-time worker

The Claimant complained that the Respondent treated her less favourably in two ways because of her status as a part-time worker:

60. *Firstly, paying full-time workers for 41 hours per week when requiring them to work only 40 hours per week in 2012 and not treating this as an overpayment of wages whereas part-time workers not been treated in this way.*

We make the following findings of fact in relation to this complaint

61. The Claimant initially worked on a full-time basis when she was employed by the Respondent as a communications officer in 2000. She began to work a flexible basis in 2003, when she returned to work after her first child was born. She works a 24 hour shift pattern which includes weekends and holidays.

62. As a flexible worker, the Claimant works less than full-time hours. The process was that she would write out the hours she proposed to work over a particular period; against full-time roster and submit this to be considered by the FWAG. Once her suggested roster was approved, she would work to it for the agreed period, usually 52 weeks or sometimes less if some time had passed between it being submitted and approved. At the end of the period she would submit another roster which would replace the old one, once approved.

63. There was some confusion about what actually changed in 2011 when a recommendation that the working week for police staff be reduced from 41 hours to 40 hours, was accepted and implemented. We find that in September 2011, it was proposed that new shift patterns be introduced which would effectively reduce the working week for police staff from 41 hours 40 hours a week as it was believed, among other things, that this would improve morale. Staff had expressed unhappiness about having

7 day shift runs, the amount of rest days they had following night duty and there were concerns over how many weekends people had off. It was intended that this pattern of working would address these issues.

64. We find it likely that this new arrangement started in January 2012.

65. Where staff had personal rosters, such as the Claimant and other members of staff who worked flexibly, they had to wait until their roster was due for renewal and then submit a roster aligned to the new core rosters of 40 hours per week before they could benefit from the change.

66. There was a suggestion that the additional hour was used by staff to attend work before their shift actually started and stay on at the end for a few minutes – both to handover and to log on to the system. It was recognised that all staff needed to be at work early so that they are prepared to start their work immediately at the start of their shift. They are answering and dealing with emergency 999 calls.

67. From the evidence, we found it likely that in practice, all police staff, whether working full-time or flexibly, would be at work well before their shift started so that they could conduct handover with the person finishing the shift before them and be ready, caught up and able to start immediately their shift starts. The practice of coming to work a little earlier also allows members of staff to log into the system. At the end of the shift the member of staff would spend some time handing over to the colleague who had arrived early to take over their shift. That means that everyone – whether working full-time or flexibly or part-time would spend an additional period of time at the start and end of their shifts handing over and preparing to start/end work.

68. This was how the Claimant worked when she worked full-time and how she continued to work after she became a flexible worker and it is highly likely that this is how they all worked. We find that the statement in the ET3 that it was only between 9 January 2012 and 20 January 2013 that full-time core staff were required to work an additional six minutes at the beginning and end of each shift has proven to be incorrect. Also, the statement that full-time employees worked and were paid for 41 hours per week has also proved to be incorrect.

69. We find that full-time staff were always paid for 35 hours per week. This was so whether their rosters were plotted against a 40 or a 41 hour week spreadsheet. When the contracted hours changed in 2012 – we found that there was no change in the pay they received for the hours they worked. There was no proof that their wages increased at that time or that there was any change when the core rosters went back to 41 hours.

70. We find that the contractual working week for police staff was returned to 41 hours the following year. There was a dispute between the parties as to when that happened. We find it likely that this happened in May 2013. However, we could not be certain of that as there was little evidence.

71. The Claimant expected that the FWAG calculated the roster according to a 40 hour week for six months but in light of our finding that it is likely that this went on for 18 months, it should have been calculating on this basis for a further 12 months.

72. As set out above, in order to advance a claim under the part-time worker regulations, we find that the Claimant has to rely on a comparator. She must submit that the Respondent treated her less favourably in comparison to how it treated a named comparable full-time worker. The Claimant did not refer to a particular full-time employee as part of her case.

73. As the Claimant used to work full time before becoming a flexible worker, it may have been possible to compare her situation as a flexible part-time worker to when she was full time. However, the Claimant did not compare herself to her previous arrangement when she worked full-time. That was not how she put her case. She was relying on the 40/41 hour change to the full-time workers contract in 2012/13 as her comparison and not a particular comparator. In order for us to assess a claim against her earlier contract, the Tribunal would have needed to examine her contract and that of her comparator to see whether there was less favourable treatment.

74. We also had to consider whether we had jurisdiction to deal with the claim as it was submitted by the Respondent that her claim had been issued outside of the statutory time limit. That time limit is referred to in Regulations 8(2) – 8(4) set out above.

Was the part-time claim issued in time? Does the Tribunal have jurisdiction to consider it?

75. Although this happened in 2012-2013 the Claimant only issued her claim in November 2017. This was a claim under the part-time workers (Prevention of Less Favourable Treatment) Regulations 2000 which, as set out above, stipulates that claims must be brought to the Tribunal within 3 months of the date that the less favourable treatment occurred. Even if one starts counting from the latest date of May 2013, it is clear the Claimant issued her complaint outside of that time limit. This claim was issued on 29 November 2017.

76. We considered whether there was a continuing act which would bring this complaint within time. The change ended in 2013 and the practice of plotting a roster over a spreadsheet of was done over 41 hours thereafter.

77. It is our judgment that there was no continuing state of affairs that could bring these allegations within the time limit set under the part-time worker Regulations.

78. We would therefore only have jurisdiction to consider her claim if we were satisfied that it was just and equitable to extend time.

79. The Tribunal does have a discretion to extend time if it is persuaded to do so by the Claimant and considers that it is just and equitable to extend time. it is not a wholly unfettered discretion that we have. The law is that time limits in the employment tribunal should be strictly enforced unless there are reasons to use our discretion to extend time.

80. We considered that we were not given a reason for delay in issuing proceedings if it was thought at the time that the change in contracted hours was unfair to flexible workers. If we were to extend time, we judge that the Respondent would most likely be prejudiced as both the HR officer involved in suggesting the change in rosters to 40 hours and the deputy OCU commander who made the decision to implement it no longer work for the Respondent. The Respondent is no longer is possession of documents explaining the rationale behind the change or what was envisaged in relation to part-time or flexible

workers. All we had in the hearing bundle were a few documents in which the change was proposed. The Respondent had no further documents on the issue to disclose or knowledgeable witnesses that it could call.

81. It is therefore our judgment that we do not have jurisdiction to hear this complaint.

82. It is also our judgment that even if we did have jurisdiction – the claim would fail as the Claimant was not treated less favourably than a full-time worker when the full-time workers contractual hours went to 40 hours as full-time workers were paid according to a 35 hour week whether they plotted their times against a 40 or 41 week roster. There was no evidence before us that their pay ever changed.

83. *Secondly, auditing the pay of part-time workers, including the Claimant, in or around February 2017, as part of the FWAG audit process and not doing so to full-time workers.*

84. We had evidence that full-time staff also had their pay records audited.

85. However, Ms Togher's evidence was when auditing full time staff's wages, she mostly checked their SDA and zone allowances. That would appear to have been the end of her enquiries. Her evidence was that full-time staff were shown to be paid correct pay and allowances. The only problems she remembered encountering with full-time staff was that sometimes their allowances were not right.

86. We find that generally, the pay records of full-time staff were not interrogated to the level that the Claimant's records were.

87. However, once again the Claimant failed to rely on an actual full-time comparator in this part of her claim as required by the Regulations. We were not able to scrutinise what had happened with a particular individual's audit as compared to the Claimant's, as the Regulations ask us to do.

88. It is our judgment that the fact of the audit was not done because the Claimant was working flexibly or on a part-time basis. Audits were done because of the Respondent's legitimate concerns that people were being paid incorrectly. In some instances, the early audits found that to be the case. However, it is likely that the audit was conducted differently depending on whether staff were employed full-time or part-time, given that the Respondent's experience was that the pay records of full-time staff were better kept and easier to cross check.

89. We find that if payroll and HR records are incomplete for those working flexibly so that a deeper audit is required where they were concerned; that is a creation of the Respondent. Employees are not responsible for creating those records. It is not the case that in every employment situation where there are part-time workers – the employer has to go behind the flexible working arrangements to interrogate the pay information to ensure that people are being paid correctly. If comprehensive records are kept and systems applied that lead to up-to-date information being on the system at any one time, then these problems should not arise again.

90. The claim fails because the Claimant issued her claim out of time, she failed to rely on a comparator and because she was incorrect and the full-time staff were also audited.

Judgment

91. The Tribunal has no jurisdiction to consider the complaint of unlawful deduction of wages as the Respondent no longer claims an overpayment from the Claimant and no longer seeks to make deductions from her wages in respect of the 2017 FWAG overpayment.

92. In our judgment, the Claimant's claims for consequential loss arising from unlawful deduction of wages also fails.

93. The Tribunal has no jurisdiction to consider the Claimant's complaint that she was treated less favourably than the Respondent treated a comparable full-time worker as the claims were brought out of time and the Claimant failed to rely on actual comparators as stipulated by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

94. Costs were agreed between the parties.

95. The claims are dismissed.

Employment Judge Jones
Date: 19 November 2019