Case Number: 2300720/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE HARGROVE**

WITH MEMBERS: **MRS V BLAKE &**
MR S GOODDEN

BETWEEN:

Claimant

MR O DUBE

AND

Respondent

LONDON UNITED BUSWAYS LIMITED

ON: **11 and 12 February 2020.**
Deliberations – 24 February 2020

APPEARANCES:

For the Claimant: **In Person**

For the Respondent: **Mr E Nuttman, Solicitor**

RESERVED JUDGMENT

The Unanimous Judgment of the Employment Tribunal is that:-

The Claimant's claims are not well founded.

REASONS

1. By a claim form received by the Tribunal on 26 February 2018 the Claimant claimed that he had been subjected to detriments in respect of pay in his employment as a spare bus driver for making an application for

flexible working, contrary to Sections 47E and 48(1) of the Employment Rights Act. Section 47E materially provides as follows:-

(i) An employee has the right not to be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the employee –

a) made or proposed to make an application under Section 80F …
b) brought proceedings against the employer under Section 80H or
d) alleged the existence of any circumstances which would constitute a ground for bringing such proceedings.

Section 48(1) provides an employee may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of Section 47E. Section 48(2) provides that on a complaint under sub-section 1, it is for the employer to show the ground on which any act or deliberate failure to act was done. This has the effect that the Claimant has to prove that there was an act done or a deliberate failure to act in relation to his pay and if he does so, the burden shifts to the employer to show that the ground for the act was not one which was in breach in Section 47E.

Section 80F permits a qualifying employee to apply to his employer for a change in his terms and conditions of employment if the changes relation to either the hours he is required to work, or the times when he is required to work, whereas between his home and a place of business of his employer he is required to work or such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations.

No regulations have been drawn to our attention during the course of this case.

2. At the hearing the following witnesses gave evidence:-

The Claimant gave evidence in his own case and called a fellow employee, Mr S Melmek. Both relied upon witness statements.

The Respondent represented by Mr E Nuttman, solicitor, called Mr Ray Clapson who dealt as General Manager with overall responsibility for the Respondent's Stamford Brook Garage with the Claimant's grievance raised in early June 2017. Next, the Respondent called Mr Gary Smith who was Operations Manager, the Stamford Brook Garage, but has since resigned from that position and is now also a bus driver for the Respondent. Most of the allegations upon which the Claimant relies are

made against him. Thirdly, the Respondent called Mr Andrew Evans, General Manager South, who dealt with the Claimant's appeal against the grievance decision of Mr Clapson.

3. Chronology

3.1 The Claimant commenced as a trainee bus driver on the 5 April 2004. After completing his training, he was on the spare rota for at least a year. As a spare driver, he covered for absent drivers on all the routes from the bus garage. He also did stand-by duties whereby he was given a time to start but not allocated any duty, covering for late drivers who failed to turn up or feel sick at work or in case of any unforeseen eventualities. The Claimant was on a guaranteed thirty-eight hours per week pay whether he worked those hours or not.

3.2 At some stage before 2011 he applied to go on the rota with a particular route. Under that system, he followed a drop-down scheduled rota working on a seven-day basis or any five days during that period. The Claimant was allocated to Route 10 and would know six months in advance what his rostered hours were. He also had the opportunity for voluntary rest day working paid at premium rates. In 2011 there was an informal arrangement between him and the then Operations Manager, Mr Waite, whereby he was granted cover for weekends but remained on the route 10 rota. This arrangement was because the Claimant had child-care responsibilities. His partner was a nurse who habitually worked weekend shifts.

3.3. In 2014 his circumstances changed because his partner had re-arranged her work pattern to work three nights weekdays and one day on weekends. He was advised by the allocations team that he should come off a fixed rota and work as a spare driver. As a rota driver on route 10 he was required on occasions to start a shift a 5.00am. Thus, making it difficult for the allocations team to roster him, in particular, because of his partner's night shifts on three nights per week, which meant that he could not start work until 6.45am and needed to finish by 7.30pm. His flexible working application form is at pages 26-27 of the bundle. He ticked the box indicating that he had at least one child under eighteen and that he was making the request to help with childcare, that he was working Monday to Fridays and had weekends off. He applied for a working pattern in the future of Mondays to Fridays between 6.45am and 7.30pm with weekends off.

3.4 On 28 May 2014 the staff manager at Stamford Brook gave confirmation that they were able to accommodate the application and specified a new working pattern Mondays to Fridays, and the hours

to begin from 14 June 2014 as a permanent change to his terms and conditions but the flexible working agreement was to be subject to review.

3.5 Under this new pattern, the Claimant still had the opportunity to work overtime above his guaranteed thirty-eight hours paid per week in the following circumstances:-

(i) Involuntary Overtime

This occurred when buses were held up on route unexpectedly after the Claimant had worked in excess of seven hours thirty-six minutes on any one day or days in the week. This was paid at the normal rate of pay. The Claimant was required to work this overtime subject to the maximum of ten hours per day under the regulations.

(ii) Longer Shifts

If he was allocated a longer shift route (usually but not always nine hours or more), he was entitled to overtime, again at the normal rate.

(iii) Spread-over Shifts

These occurred if the Claimant was working a journey with a break during the driving time. The Claimant would be paid for driving time and for the break time. In these circumstances, the Claimant could be paid for more than ten hours work in a day provided that he did not drive more than ten hours. This overtime was also paid at the basic rate.

(iv) Rest Day Working

This was available for any driver to work his rest day all days which could be any two days when the driver was not rostered to work in seven. In the Claimant's case, because of his flexible working arrangement it was available to him only at weekends.

The template pay and conditions agreed between the Respondent and the Trade Unions, and therefore applicable to the Claimant's working at page 59 defines the rate of pay for all voluntary overtime. Although the overtime pay was normal hours pay for the initial excess over seven hours and thirty-six minutes worked was payable at an enhanced rate for work in excess of eight hours sixteen minutes which varied as between Monday to Friday, Saturday, and Sundays/Bank Holidays.

In the case of rest day working, however, all hours worked were paid at an enhanced rate.

4. Summary of Claimant's Case

The essence of the Claimant's case is that there came a time after 2014 when he noticed a claimed reduction in his overtime opportunities as follows:-

(i) He was subjected to a rest day working ban and restricted working hours.

(ii) He suffered a detriment by reason of the ban.

(iii) They stopped offering him longer shifts to force him off flexible working.

(iv) He was treated less favourably then (hypothetical?) comparators who were working five days in respect of overtime opportunities.

In more detail, the Claimant claimed from mid-2015 he was no longer allocated rest day working. He claims that he would put his name forward in the work rest day book. In June or July 2016 he first approached the allocations team about his lack of rest day working and also being allocated short rather than long shifts. He then approached Mr Smith. The Claimant in his grievance dated the 21 June 2017 that it was on the 18 and 19 October 2016 that he spoke to Mr Smith and tape-recorded at least some of the conversations. We refused his late application to play the passages.

These were the terms for the refusal read out to the parties during the hearing

(a) The case management orders make clear that the Claimant was under an obligation to disclose evidence of the calls at an early stage of the proceedings. The case was originally listed for hearing starting on 2 August 2019 but that hearing did not go ahead because the Respondent's witness, Gary Smith, had refused to attend despite providing a witness statement and the Respondent made an application for a witness order which was granted. The issue of the telephone calls was not raised at that hearing. So, the application is made very late in the day and this is the second time that the hearing has been listed.

(b) If we allow the application, we have to allow the Respondent time to prepare and consider a transcript which would be lengthy. This hearing concerns events commencing over four years ago and would have to be postponed and relisted. Tribunal time at this Tribunal is very limited and relisting is unlikely to take place for some considerable time. If the Claimant was able to obtain access to this evidence, there is no reason why he could not have

done that long ago. The Claimant was cross-examined on the first day as to where his phone was, he asserted that he had lost the phone on a holiday in South Africa two years ago. Following cross-examination on the first day, on that night he claims that he was able to access the phone calls from his service provider via i-cloud thus produced the tape recordings on his new telephone at the start of the second day of the hearing.

(c) He had in the meantime heard evidence from Mr Smith who was cross-examined about the conversations. He took the view that the gist of the conversations as described at paragraph 12 of the Claimant's witness statement were not in dispute. The relevance of that finding is that it is not persuasive whether or not the Claimant was subjected to a detriment because he had made a flexible working application some three years before. In other words, we do not feel that the playing of the tape is likely to make a difference between the Claimant failing and succeeding. For each of these reasons, we refuse the Claimant's application to play the tapes. We accept that during the conversations Mr Smith did describe the opportunity to work rest days at weekends when rostered only to work Monday to Friday was a 'luxury' and that other drivers who worked the seven-day rotas, the preference to work overtime on rest days which they applied in the work day rest book. The Claimant also said that there was another driver who had a similar flexible working arrangement to his who was not restricted in the amount of overtime that he received. He agreed, however, that the other driver made himself available on Mondays to Fridays between 04:30 hours and 01:30 hours the following day.

Subsequently nine months later the Claimant raised a grievance in writing to Mr Clapson on the 21 June 2017. Mr Clapson had had an initial conversation with the Claimant in early June 2017 before the Claimant raised the grievance in writing. Mr Clapson responded in writing on the 30 June. He had spoken to Mr Smith and his account of the conversation with Mr Smith is at paragraph 16 of his witness statement. Mr Smith had expanded upon what had happened in 2016. He details this in paragraph 5 to 10 of his witness statement. He had received information from two supervisors, Kino and Abdie, during his usual Friday meeting with the trade union representatives that drivers were complaining that the Claimant was being favoured with many spread-over shifts on the rota. We will detail findings as to this part of the evidence in our conclusions.

In his grievance outcome, Mr Clapson set out a calculation of the pay that the Claimant had allegedly received weekly in the period week 50 (the last week in March 2017) and week 11 equating to

forty-six hours per week. This, he claimed, was based on figures he had received from payroll.

The Claimant disputed these figures in his letter of the 3 July. He asserted at the hearing that Mr Clapson had been involved in a cover-up and that the figures were deliberately false. The Claimant then wrote a letter to Fiona Taylor, the Respondent's Managing Director, on the 10 July 2017. It was referred to Mr Evans who had a meeting with the Claimant on 16 October 2017. This was treated as the Claimant's appeal against his original grievance. Mr Evans submitted an outcome letter on the 26 October at pages 41-42. Mr Evans recalculated Mr Clapson's figures and arrived at the lower figure of 41.6 hours of pay. This was apparently because the figure for week 52 had been omitted from the calculations. Mr Evans had also compiled the figure for the 14 weeks since the Claimant had raised his grievance (weeks 15-28), calculating that the Claimant had received 43.6 hours pay during that period.

The Claimant asserted at the hearing that he had not been offered any rest day working from May 2015 right up to the 26 October 2019.

5. Conclusions

5.1 The essential issues are whether the Claimant has proved that he was subjected to some reduction in the overtime opportunities such as to constitute a detriment to him. Next, we have to consider whether the Respondent has shown that if there was any reduction, it was not because he had made an application for flexible working back in April 2014.

5.2 We start with the Claimant's now assertion that he was subjected to an 'overtime ban' – meaning a rest day ban from mid-2015 onwards. We note that the Claimant did not make any reference to not being permitted to work rest days in his written grievance to Mr Clapson on the 21 June 2017. Nor did he say that he had raised it with Mr Smith before in October 2016 nor in the letter challenging Mr Clapson's calculations of 3 July 2017. We note that he did put in requests to work, designated as WRV, on his payslips from October 2014 and the end of May 2015, and did work many Saturdays in that period. From June 2015 to November 2016 (when a new payslip came in) there were no WRVs noted nor any rest day working. That indicates that he did not make any requests in that period, maybe there is an element of speculation because his wife was working weekends during this period. He was saying that there was a ban before Mr Smith arrived in September 2015. Mr Smith is alleged to have been the source of the ill-treatment of the Claimant. We conclude that

there was no ban as claimed by the Claimant as such on rest day working.

5.3 Allocation of Shifts

The Claimant alleges that he noticed that he was being given shorter shifts from the end of July 2016. An examination of the payslips show that his pay started to go down from March 2016, and from July 2016 he was getting up to three basic level shifts per week. We accepted the Respondent's evidence that prior to that time there had been a shortage of drivers and that by June to July 2016, the Respondent was close to establishment. Also, there had been a reduction in sickness absences. This meant that less longer shifts became available. In addition, new drivers started on a lower basic rate of pay than longer serving drivers, and it made financial sense to offer longer hours to the new drivers and to split longer shifts into two with new drivers being sent out with a driver trainer and on each of the driving shifts, there was a split. This too impacted on the availability of spread over shifts for the Claimant and others to be paid for down-time which was consequently reduced. This coincided with the complaint from drivers via the trade union in June/July 2016 that the Claimant was receiving preferential treatment for spread over shifts.

The Claimant did mention in his grievance letter of 21 June 2017 that another driver at the depot on flexible working hours Monday to Friday received more long shifts than he did. There is no hard evidence that this other driver did work more longer shifts than the Claimant did but even if he did, the likelihood is that since he made himself available to work twenty-one hours per day during the week, whereas the Claimant only offered twelve hours and forty-five minutes, between 6.45am and 7.30pm, that made it less likely that the allocations team could allocate longer shifts, some of which, for example, started at 5.00am.

We accept also that as a result of the complaint from drivers about the allocation of split shifts, Mr Smith approached the allocations team and told them to ensure that split shifts were allocated fairly across the drivers.

For each of these reasons, we find that any reduction in the Claimant's overtime opportunities were not because the Claimant had made an application for flexible working in 2014, but for totally unconnected operational reasons.

We do not decide whether the Claimant's claims were brought out of time. We would only have to decide that if there had been a continuing course of conduct constituting a detriment ending within

three months prior to his claim to the Tribunal. There was no act of detriment whether continuing up to the 26 October 2019 as claimed by the Claimant, or otherwise.

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Employment Judge Hargrove
Date: 24 February 2020

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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