EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR C OTOO-MENSAH		G4S SECURE SOLUTIONS (UK) LTD

Heard at: London Central

On: 5-6 December, 2020

Before: Employment Judge O Segal QC

Representations
For the Claimant: In person
For the Respondent: Mrs Pimenta, Solicitor

JUDGMENT

1. The Claimant succeeds in his claims for unfair dismissal and under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the **Regs**).

2. The Respondent is to pay the Claimant the sum of £11,100.

REASONS

1. The Claimant brings claims of unfair dismissal and that he was discriminated against on grounds of his part-time status, in being selected for redundancy in the summer of 2019.

2. The tribunal expresses its gratitude for the way in which the Claimant and Mrs Pimenta conducted the proceedings.

Evidence

3. There was an agreed bundle of 256 pages.

4. I had witness statements and heard live oral evidence from:

   4.1. The Claimant; and

   4.2. For the Respondent:

      4.2.1. Kristopher Downs (**KD**), at the time a Contract Manager;

      4.2.2. Kully Swali (**KS**), an Area Manager.

5. I also read a statement from Ms Jane Kline for the Respondent, who was unable to attend the tribunal in person; but after discussing it with the parties, it was agreed that her oral evidence was not relevant or necessary to adjudicate the claims.

6. The three witnesses from whom the tribunal heard oral evidence were, I find, all doing their best to assist the tribunal by giving honest and, so far as their recall went, accurate evidence.

Facts

7. There were, in truth, very few if any disputed primary facts. I am therefore able to set out the relevant facts fairly shortly.

8. The Claimant was employed as a Security Officer (**'SO'**) by the Respondent between November 2012 and 1 October 2019. His contract contained a standard mobility clause, entitling

9. Until January 2019, he worked full-time (42 hours a week) based at a building occupied by RBS at 250 Bishopsgate ('**250BG**'). At the time RBS also occupied a nearby building at 280 Bishopsgate ('**280BG**').

10. From 2017, the Claimant was also employed by a firm of solicitors, working Monday to Friday 9-5, and at least from that time worked only nights for the Respondent as his regular shift pattern.

11. Towards the end of 2018 the Claimant found that maintaining both these jobs, together with his family responsibilities, was very difficult and had caused him to be absent from work on occasions. He asked the Respondent if he could move to part-time hours and the Respondent agreed. He thereafter worked 24 hours a week, being two 12 hours night shifts at 250BG.

12. As part of that change in hours, two relevant documents were created, both signed by the parties.

12.1. The first noted that the Claimant was to be a 'Security Officer / ARO [Area Relief Officer], working at 250BG and 280BG.

12.2. The second confirmed that the Claimant's hours were changing from 42 to 24, but that otherwise there was no change to his contractual terms and conditions.

13. The Respondent only issues one sort of contract to those like the Claimant: a Security Officer contract. There is no ARO contract. However, the Respondent differentiates SO and ARO, both in external/internal advertising and more generally from a management perspective.

14. The differences between a SO and an ARO are elusive. Certainly the recruitment adverts I saw seem to identify the two roles as much the same. KD and KS confirmed that the Respondent employs full- and part-time SO's and full- and part-time ARO's. The qualifications, training, etc., are the same in both cases. The only difference they could point to is that, a SO would expect to have and would generally have a fixed pattern of work at particular premises (one or more); whereas an ARO would more often be expected to work their shifts at different premises irregularly.

15. However, I note:-

    15.1. First, that as the Respondent insisted, a SO (just as much as someone designated an ARO), by reason of the mobility clause in their contract, could be asked to work at different premises; and

    15.2. Secondly, that the Claimant, although designated by the Respondent an ARO, continued to work, for 9 months or so, exactly as he would have done had he been a 'part-time SO' – only doing the odd shift at 280BG by way of overtime, much as his full-time SO colleagues based at 250BG did.

16. At a point in time prior to the events with which this case is concerned, RBS had occupied a third building nearby, known as Premier Place. When they had ceased occupation of Premier Place, the Respondent had (reasonably) included in the poof of those at risk of redundancy all working at 250BG, 280BG and Premier Place.

17. In June 2019, the Respondent was told that RBS were leaving 280BG. This meant there would have to be redundancies (subject to redeployment).

18. The Respondent decided that the pool for those at risk of redundancy should comprise:

    18.1. The SO's working at 280BG; and

    18.2. All the ARO's working in some combination at 250BG and 280BG (full-time and part-time), regardless of whether – as was the case with the Claimant and one other employee – they worked almost exclusively at 250BG.

19. The Claimant was initially left off the list of those in the pool; but I accept KD's evidence that this was a simple mistake by which he had included another officer instead who did not work at 250BG or 280BG (as the relevant document confirmed).

20. That pool of employees was scored by KD, using a matrix agreed (though it seems not for this specific redundancy exercise) with the GMB. That included:

    20.1. A mark out of 10 for 'Location', which KD marked by calculating the distance from the employee's home to 250BG and awarding a score of 2, 5, 7 or 10 depending on whether the distance was, respectively, 0-10 miles, 10-15 miles,

15-20 miles, or 20+ miles. Neither KD nor KS was aware of the rationale for the inclusion of this criterion. KS speculated that it might reflect the potential need to secure attendance on site at short notice; but there was no evidence that this was in fact something which happened.

20.2. A mark, originally supposed to be out of 10 for 'Attendance', to be graded according to a mark scheme supplied. In fact, KD decided to give two marks, each out of 10, one for sickness absence (1-2 absences over the last 12 months gave a score of 7) and one for non-sickness absence (scored the same way).

21. Against those criteria (the two others, Experience/Skills and Disciplinary he scored 10, as did almost all those in the pool), the Claimant scored:

21.1. 2 for Location;

21.2. 7 and 7 for Attendance (the second of which scores was based in part, the Claimant told me, on an erroneous entry on his attendance record; however, the score would have been the same even if that matter had been corrected).

22. Thus the Claimant's total score was 36 out of 50.

23. The cut-off point turned out to be 42 out of 50.

24. There was a fair and thorough consultation process, save in one respect: that the Respondent did not provide each employee with their score sheet or ask them if they wanted to review it – which should have happened.

25. During that process the Claimant more than once made the point that he did not believe it was right for him to have been included in the pool while the SO's at 250BG were not. He did not ask to see his score-sheet.

26. During the consultation process and in particular at the second and third consultation meetings, the Respondent discussed the possibility of re-deploying the Claimant elsewhere. The Claimant was, predictably, only interested in a job working part-time at nights, but did not try to see whether that might be possible, by reference to the Respondent's vacancy list or otherwise. The Claimant said that he did not believe

there would have been an appropriate role for him, in terms of hours of work; he may be right; however, it remains the case he did not seek to confirm the position.

27. The Claimant was made redundant with effect from 1 October 2019 (with a balance of payment in lieu of notice of a further four weeks' pay).

28. The Claimant immediately set about trying to find work part-time nights, and on 7 October 2019 applied – ultimately successfully – for such a job as a Customer Service Assistance with TfL. The recruitment process was contracted, but he was confident of securing the role and was offered the job in early March 2020.

29. However, by reason of the Covid pandemic and the lockdown March to July 2020, the Claimant was not able to take up position. TfL assured him he would start employment after lockdown ended and the situation allowed, including writing in confident terms to him in May 2020. In the event, because of the well-known continued restrictions and the effect of those on public transport in London, the recruitment was put on further hold. In fact, at the end of November 2020, TfL wrote to him saying there was a 'recruitment freeze' ongoing, although when that was lifted they would write to him. Since then the Claimant has begun looking again for alternative opportunities, but has found (predictably) that there are few ir any appropriate vacancies.

30. I find as a fact that the Claimant has at no time acted unreasonably in failing properly to attempt to mitigate his loss of earnings.

The Law

31. Section 139 of the Employment Rights Act 1996 (**ERA**) provides that:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to— ...

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

32. Reg. 2 of the Regs provides that:

(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 neither for a fixed term nor a contract of apprenticeship;…

(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, 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 worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

33. Reg 5 provides that

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

…

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

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

34. For the purposes of (2)(a), if the principal or effective cause of the treatment complained of is that the worker works part-time, that is sufficient: Carl v University of Sheffield, EAT.

35. Reg 8 provides that:

(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—

...

(b) ordering the employer to pay compensation to the complainant; ...

(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 (subject to paragraph (8)) 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.

36. The material provisions of the ERA concerning unfair dismissal (ss. 98 and 123) were clearly understood by the parties and I had them well in mind.

Discussion

40. Given that there were no material disputed facts and that the relevant law was not in dispute, I do not consider it necessary to set out each party's submissions. Suffice to say that:

    40.1. The Respondent contended that the dismissal had been fair and that included the decision to put all ARO's into the pool, but to exclude the SO's based at 250BG because 250BG remained a client premises.

    40.2. The Claimant maintained there was no good reason for excluding the SO's based at 250BG from the pool if he were to be included. Moreover, he believed that he had been deliberately included in the pool precisely because the Respondent wished to reduce its part-time officers.

41. I start by considering s. 139 ERA. The Respondent accepted that the relevant part of the definition of redundancy is that at (1)(b)(ii). But if that is right (as it is), then there was no reason for the Claimant to have been included in the pool unless the *"the place where the employee was employed by the employer"* is understood to be both 250BG and 280BG.

42. That would have been a sensible, one might say the obvious, pool of those at risk of redundancy; and it would have been the equivalent of that used on the occasion when RBS left Premier Place. It does not seem to me fair to have included the Claimant in the pool, but not the SO's at 250BG.

43. By reference to the Regs:

    43.1. It was agreed that those SO's were 'comparable employees';

    43.2. The Claimant was obviously subjected to a detriment by comparison with those SO's by being included in the redundancy pool and then being made redundant.

    43.3. There was no evidence and no argument made to support an objective justification for treating the Claimant less favourably than those comparable employees.

44. That means that the Claimant's claim under the Regs must succeed if I find that that effective reason why he was treated differently to the comparable employees was because he was part-time. I do so find.

45. Where there was neither a difference in contractual terms (other than hours), nor any difference in practice in the way they worked, it would be quite wrong – given the protective purpose of the Regs and the underlying EU Directive – to find that the reason for treating the Claimant differently, being solely an internal designation as 'ARO', was not in reality because the Claimant had moved on to part-time hours. It is the classic case of what lawyers sometimes refer to as a "distinction without a difference".

46. I also find that the inclusion of the Location criterion was unreasonable (not really disputed by the Respondent). Had it not been included, the Claimant might well have been retained.

The chance that the Claimant would have been retained but for the unfairness and/or discrimination

47. If, as I have found, the Respondent had included the SO's based at 250BG in the pool; and further if Location had not been included as a criterion; it is not possible to know – as both parties agreed – whether the Claimant would have still been made redundant or been retained.

48. Effectively, the Respondent would have needed to retain about 30 FTE's out of about 41 FTE's.

49. Taking into account that the Claimant's absence record was less good than many others and that he could have done more to explore redeployment by the Respondent, I find that it would be just and equitable to award the Claimant 50% of his losses.

Remedy

50. I do not consider that there is any material difference in the approach to remedy under s. 123 EAR and Reg. 8.

51. The Claimant's net weekly earnings were about £300. He has been without that night work for 58 weeks. I consider it fair to assume – by way of compromise between the various possibilities – that the Claimant will secure replacement employment, either with TfL or elsewhere, by mid-March 2021, being a further 13 weeks.

52. That gives a loss of basic net earnings of £21,300.

53. There is a loss of employer's pension contributions of £568 for the same period; and a loss of statutory rights I value at £300.

54. Rounding up a little, that gives £22,200. Applying the 50% discount, that yields an award of **£11,100**.

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Employment Judge - Segal

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Date09/12/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

10/12/2020...

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FOR THE TRIBUNAL OFFICE