EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102659/19 (V)

Held on 8 January 2021

Employment Judge J M Hendry

Mrs S Crighton	**Claimant** **Represented by** **Ms. A. Stobart,** **Advocate**
Chief Constable of Police Service of Scotland	**Respondent** **Represented by** **Mr. K. Maguire,** **Advocate,** **Instructed by** **Ms. A. Jones,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Strike Out application and applications for deposit orders are refused.

REASONS

1. This case came before me on 8 January 2021 in relation to the respondent's application for strike out of the claims which failing for deposit orders.

2. The claims relate to the period when the claimant was a part-time officer with Police Scotland. Many of the core background facts are not in dispute. The claim relates to the way in which the claimant as a part time officer (she worked 39 hours per week rather than 40) was treated as opposed to the way in which Police Scotland treated full-time officers in relation to pay and pension rights. The respondents withdrew the application for strike out in relation to the claim for calculation of holiday entitlement based on indirect sex discrimination in good time prior to the hearing.
3. The history of the matter is that the respondent's agents wrote to the Tribunal on 27 August with an application for strike-out on the basis that the claims were misconceived and had no reasonable prospects of success. Employment Judge Hosie sought a response from the claimant's representatives and on 12 October 2020 the claimant lodged detailed comments. At this stage it is sufficient to note that the strike-out application was opposed. The present hearing was then arranged to take place by CVP.
4. Parties were represented at the hearing by Counsel, Ms. A. Stobart acting for the claimant and Mr. K. Maguire for the respondent. An inventory of productions was lodged for the purposes of the hearing. I would note that Counsel for both sides prepared a Note of their respective submission. Just prior to the hearing Mr Maguire also lodged a copy of the case of ***Hayward v. Camell Laird Shipbuilders Ltd*** to which he referred in the course of his oral submissions.
5. At the outset, Mr. Maguire asked me to note that for the purposes of this hearing only and taking the claim at its highest it was accepted that the claimant's comparator should be a full-time officer.

Background

6. Both parties made reference to a document called the Additional Hours Matrix (''AHM'' p158-159) which was a generic document prepared by Police Scotland and used by them. This document set out the basis on which part-time officers such as the claimant were to be paid.

7. As noted earlier the claimant worked 39 hours per week. A full-time officer was one that worked 40 hours per week. The AHM sets out the basis on which part-time officers will be treated and gives examples of how overtime work will be treated in contrast to full time officers.

8. There was also agreement between the parties as to the correct legal tests for strike-out applications and the making of Deposit Orders which I will not rehearse here.

Strike Out Application

9. The respondent sought strike out of the claims: (i) the claimant's equal pay claims in relation to the calculation of (a) pensionable pay and, (b) buy back of time off in lieu ("TOIL"), and ii) the claimant's claim for less favourable treatment on the grounds of part-time status. In the alternative, they made applications for deposit orders in relation to all the individual claims on the basis that they had little reasonable prospect of success in terms of rule 39(1).

10. I will set out the parties' competing arguments under the headings of the various claims. However, to understand the arguments it is important to bear in mind that Police Scotland divide the annual hours by 52 to get what they describe as weekly 'determined hours' both for full time officers (2080 hours per year) and for part time officers. In the claimant's case (she was classed as a apart time officer) they were 39 hours per week.

Equal pay

Pensionable pay

Respondent's position

11. Mr McGuire first of all referred to the AHM introduced in April 2019, which sets out how pensionable pay should be calculated for officers working part-time and was intended to ensure parity of treatment between part-time and full-time officers. He explained that the AHM distinguishes between (i) the position where a part-time officer's determined hours plus additional hours (i.e. hours worked over and above determined hours) worked in the relevant week (Monday to Sunday) have not exceeded 40 hours, and (ii) the position where a part-time officer's determined hours plus additional hours worked in the relevant week

(Monday to Sunday) have exceeded 40 hours per week. In the former case the officer will receive payment or TOIL at plain time and the hours worked will be pensionable. In the latter case (i.e. where determined hours plus additional hours worked exceed 40 hours per week) the normal rules of overtime apply depending on the officer's rank and the officer will receive payment or TOIL at time and a third and hours worked (over 40 hours per week) will not be pensionable.

12. Turning to The Police Pensions Circular 2007/4 (document 20) Mr McGuire noted that it was in the following terms:

> ''*From 1 July 2007 a part time constable's additional hours will be automatically pensionable. For this purpose additional hours are defined as the hours paid at plain time that a part time officer works over and above their determined hours and up to forty in a relevant week. This does not include any hours worked at an enhanced rate or those taken as time off in lieu' (ii) Since 1 July 2007 all hours paid at plain time have had pension automatically deducted at source; (iii) Additional hours up to FTE (full time equivalent) are payable at plain time (except for appropriate public holiday enhancements where applicable) and are pensionable in accordance with Circular 2007/4 (iv) Additional hours over FTE are treated as overtime and paid at enhanced rates. Enhanced rates are not pensionable in accordance with Annex 7 of the Determinations, the Police Pensions Regulations 1987 and Circular 2007/4;(v) Hours which attract specific compensation at enhanced rates, e.g. hours worked on a rest day, are also not pensionable, and; (vi) any hours worked by a full-time officer which attract enhanced rates are also not pensionable.''*

13. The claims, he said, related only to the period from April 2019 to September 2019 (document 13, the claimant's Further and Better Particulars (April 2020)). The claimant's position in relation to the operation of the AHM is made complex by virtue of the fact that her determined hours in the relevant period were 39 hours per week (i.e. only one hour less than a full-time officer). The claimant has calculated that a full-time officer contracted to work 40 hours per week will be paid for 2080 hours (40 x 52) annually at plain rate and all the hours will be pensionable. The claimant says she is being treated less favourably than a full-time officer because even if she works 2080 hours over 52 weeks, she does not

necessarily accrue pensionable service equal to that of her full-time colleagues. The respondent understands that this is because (on the claimant's version of events) in practice although her determined hours for the relevant period were 39 hours per week, because of the way her shifts are mandated she may have worked less than 40 hours per week in some weeks and more than 40 hours per week in other weeks. In the weeks when she works more than 40 hours, she will be paid at overtime rates for the hours above 40 hours and that pay will not be pensionable. This means that, unlike a full-time officer over a 52 week period she may not accrue 2080 hours of pensionable pay. The claimant's position is that the less favourable treatment could be remedied if pensionable hours for part-time officers were calculated on an annual (as opposed to a weekly) basis.

14. Mr McGuire then referred to Section 66 of the Equality Act 2010 ("the EqA") , the ''Sex equality clause'' The effect of section 66 of the EqA is that a sex equality clause is to be treated as being included in the terms and conditions under which employees (including police officers for the purposes of the EqA 2020) are employed. The effect of this is that any term in an employee's contract that is less favourable than that of a comparator of the opposite sex doing equal work to the employee is to be modified to ensure that it is no less favourable. Similarly, a term that contains a benefit in the contract of a comparator of the opposite sex is to be included in the employee's contract. The sex equality clause applies not only in respect of pay, but also other benefits and entitlements that are part of the contract of employment including contributions to pension schemes. Equal pay claims he suggested require the identification of a 'real' comparator (and not merely a hypothetical one) of the opposite sex employed contemporaneously or previously to the claimant. A part-time employee can use either a part-time or a full-time comparator of the opposite sex who receives, pro rata, better pay and benefits.

15. Under s.69 of the EqA 2010, an employer can escape liability for an otherwise valid equal pay claim if it can show that the difference in pay is because of a non-discriminatory 'material factor'. If (and only if) the material factor relied on by the employer is tainted by sex discrimination, the employer must go one step further and objectively justify the reason for the variation in pay. This would be the case if the factor adversely affects considerably more women than men.

16. It was accepted he said that the claimant has provided details of a male comparator (Mr Alun Harries, a former police sergeant). The respondent expressly reserved the right to re-consider its position on whether he was a valid comparator for the purposes of any future hearings. Section 66 EqA is concerned with the respective terms of a claimant's and her comparators terms of work. It is incumbent on a claimant in an equal pay claim to identify a term of her contract that is less favourable than a term of her comparator's contract. The claimant's claim is bound to fail at this initial stage. This is because the AHM treats part-time officers and full-time officers in the same way as regards the determination of pensionable hours of pay. Both part-time officers and full-time officers are able to accrue up to 40 pensionable hours per week. In this respect the claimant is treated no less favourably than her comparator.

17. Mr McGuire stressed that it should also be noted that the respondent does not, in any event, accept that the AHM, strictly speaking, has contractual effect. The AHM is an arrangement that has been reached as regards the payment of pensionable hours for part-time workers. On that basis, it cannot be said to form part of the claimant's terms and conditions of work.

18. Mr. McGuire suggested that the claimant appears to be claiming that she suffers less favourable treatment compared to her comparator because pensionable pay is calculated on a weekly basis (and not an annual basis). The claimant, he indicated, has provided no evidence that the decision to calculate pensionable hours on a weekly basis has resulted in her being treated less favourably than her comparator. Likewise she has provided no evidence that other female part-time officers suffer less favourable treatment as a result of the decision to calculate pensionable hours on a weekly basis. The claimant, he submitted, appears to assume that this is the case but cannot point to any evidence to substantiate her claim.

19. The claimant's position was, he submitted, clearly distinguishable from the position of the (women) claimants in the case of Chief Constable of ***West Midlands Police v Blackburn and another*** [2008] ICR 5051. In that case, special priority payments were introduced to reward police officers who worked rotating shifts a 24-hour period seven days a week in demanding and difficult operational roles. The claimants, in that case women police officers, were not

rostered for night time shifts because it was incompatible with their childcare responsibilities. The Employment Appeal Tribunal accepted that disparate impact might have been established from the fact that conferring a benefit on those working through the night will disadvantage some women, and had disadvantaged the claimants, by virtue of the fact they have childcare responsibilities (see paragraph 26). The position in the present case was ,he suggested, very different.

20. In conclusion, the respondent's position was that there was no basis whatsoever for asserting that the calculation of pensionable hours on a weekly basis will by itself cause disadvantage to female officers working part-time. There is no evidence whatsoever that the decision to calculate pensionable hours on a weekly basis has a disparate impact on women. The fact that women make up the majority of part-time workers does not even suggest (let alone establish) that the arrangements for the calculation of pensionable pay have a disparate impact on women. On the materials before the Tribunal, the claimant simply has no reasonable prospect of establishing that as a result of the way pensionable pay is calculated, she has suffered less favourable treatment compared to her comparator and/or that there has been a disparate impact on women. The claim has no reasonable prospects of success and should be struck out.

Claimant's Position

21. Counsel, Ms Stobart, for the claimant set out the claimant's position in general terms. She believes that the way in which pay is calculated as pensionable pay disadvantages her and other part time officers the majority of whom are female. The use of the word ''practices'' does not in Ms Stobart's submission cause any particular difficulty. Underlying the practice it can be assumed that there are terms or provisions of an employment contract. The respondent makes reference to its own pay practices as set out in the Additional Hours Matrix. Those pay practices are informed by the 2007 Guidance in the bundle. Those pay practices and how they were arrived at are at the crux of the dispute between the respondent and the claimant.

22. The claimant's position is that the AHM provides that the Chief Constable agrees with officers their determined hours over a 'normal period of duty' which is 12 months. In the case of a full time officer a 'normal period of duty' is 2080 hours

over the year. A part time officer like the claimant is one who works less than 2080 hours over the year. In the present case the determined hours for the claimant are 2028 or 39 hours per week. The claimant's position is that she should reach full time equivalent hours when she works the same amount of hours as a full time equivalent namely 2080. The respondent has chosen to divide the 'determined hours' of a police constable by 52. The effect of this is to create an artificial average number of hours that is then capped at 40 hours for the purposes of pensionable pay. This, she continued, created an artificial concept as police constables do not work average weekly hours – the standard VSA shift pattern over 5 weeks is 200 hours: week 1 - 36 hours, week 2 - 49 hours, week 3 - 45 hours, week 4 - 40 hours, week 5 - 30 hours. It was unclear to the claimant where in the regulations the respondent says that the 'normal period of duty' or the 'determined hours' of a police officer agreed annually must be divided by 52.

23. The claimant was, she submitted, offering to prove that the pay practice of looking at an artificial weekly number of hours (that the respondent deems to be 'determined hours') and only allowing additional hours up to the artificial 'determined hours' to count towards pensionable pay is less favourable to her (and other part-time colleagues) than to her full-time comparator. The respondent states that part-time officers and full time officers are able to accrue up to 40 pensionable hours per week. That is not correct. The claimant is told that her determined hours weekly are 39 hours. They are ''deemed'' hours and do not reflect what is actually worked. If, for example, she is rostered to work 30 hours and is asked to work a further 5 hours then in total that week she works 35 hours. She is deemed to have worked 39 hours so only the first 1 hour of the additional hours will be treated as pensionable and the other 4 hours will not. If on the other hand she is rostered to work 47 hours but works an extra 3. She is deemed to have worked 39 hours and only one of the extra hours is pensionable.

24. It was apparent Counsel submitted that a full time officer is not treated in this way as the system is designed in such a way that he automatically gets the full 2080 pensionable hours and reckonable service or 200 hours over the 5 week rostered VSA. Ms Stobart gave examples referring to the AHM. A full time officer in week 1 is rostered to work 36 hours – all 36 hours are pensionable. The claimant in week 1 is rostered to work 33 hours plus 3 – 36 hours. Only 34 hours are

pensionable and the other 2 are not. The AHM provides similar examples and shows the unfairness and arbitrary nature of the weekly hours. In the AHM example the part time officer has been told her determined hours are 30 (another way of expressing that is that she is 0.75 FTE).

25. In the first example the officer gets 30 rostered hours as pensionable. She is asked to work an additional 12 hours. She gets 10 of the additional hours as pensionable. The cap of 40 is then placed on her ability to earn pensionable hours and so the last 2 are not pensionable.

26. In example 2 she still has determined hours of 30 but is rostered to work 24 hours. Those 24 are pensionable. She is told to work a further 14 hours so in total works 38 hours. You would think that all those hours would be pensionable but they are not. The cap of 40 relates to the determined hours of 30 and so the fiction is that she has worked those 30 hours and so only 10 extra hours are allowed to be pensionable. The additional 4 hours are not pensionable.

27. In conclusion the exemplar has worked 80 hours over 2 weeks but only 74 hours are pensionable. By contrast the roster works so that the full time officer achieves full pension over the year. The claimant is offering to prove that she has to work proportionately more hours than her full time colleague before she is credited with the same reckonable service and pension due to the system put in place by the respondent. The pay practice is she claimed stacked against the part-time officer/women.

28. Turning to the terms at issue the respondent's position is that it is incumbent on a claimant in an equal pay claim to identify a term of her contract that is less favourable than a term of her comparator's contract. The respondent she suggested points to a term of the contract in the Additional Hours Matrix but then goes on to say that the AHM has no contractual effect. The claimant notes the terms of the AHM but Ms Stobart submitted that whether it is contractual is a matter in dispute and cannot be determined at this stage. The claimant was relying on the pay practices of the respondent which are arguably a term of the contract. The pay practice is that part time officers pensionable hours are capped at 40 and based on a deemed number of weekly hours which disadvantages the part time officer. By contrast full time officers are not subject

to any cap as they automatically get the full pensionable hours over the rostered year.

29. The less favourable treatment she suggested was obvious. Pensionable hours for a part time officer are valuable as it increases the value of her pension and decreases the amount of time she needs to work to achieve a full pension (only for those part time officers who are close to full time).The part time officer loses reckonable hours that she has worked because of the weekly calculations and payroll practices. The disadvantage of not having your hours up to FTE (over the year) classified as pensionable was that a part time female officer loses out on pensionable hours.

30. The respondent was she said fully aware of the disadvantage caused to the claimant of losing out on pensionable pay as they calculated the amount of extra time that the claimant would have to work to get the same pension had she not been credited with the additional hours – her retirement date has moved from October 2022 to April 2021 (when her FTE hours over 2028 hours were credited as pensionable in the resolution arrived at previously) and then moved forward to 31 January 2021 when all 2080 hour were credited (but she could only get that if she worked full time). The disadvantage is set out in the claimant's Further and Better Particulars at page 75 of the bundle.

31. In relation to the submission that the claimant has provided no evidence that the decision to calculate pensionable hours on a weekly basis has resulted in her being treated less favourably than her comparator Counsel pointed to the provided example of the effect of less favourable treatment. In any event claimant is offering to prove the less favourable treatment and as such it is at the hearing that the tribunal will be able to determine whether she has proved her case or not. The respondent has failed to provide a material factor defence and as such the claimant only needs to show less favourable treatment and does not need to show disparate impact (although the claimant believes that she has done that).

32. The respondent she said goes on to say that the claimant has not proved that other female part-time officers suffer less favourable treatment. Again that is a matter for the hearing and for the claimant to show. The respondent has already accepted that p/t officers are predominantly female and as such if the claimant

is able to show part-time officers are treated less favourably due to the operation of the weekly determined hours and the vast majority of the part-time officers are women, then, it goes without saying, that the pay practices of the respondent will have a disparate impact on women.

33. In conclusion Counsel submitted that the respondent has failed to show that the claimant has 'no reasonable prospects of success' or 'little reasonable prospects of success' and these tests not being met the application must be rejected.

Buy Back of TOIL

34. Mr. McGuire then addressed the claims made relating to the manner in which TOIL was treated. An officer (part-time or full-time) elects to take TOIL and cannot be obliged to do so. The amount of TOIL in hours reflects the relevant rate of pay for the overtime worked. TOIL is, however, required to be used within a period of 3 months and if not used, the entitlement is lost. The respondent buys out unused TOIL at plain rates. The buy out for unused TOIL is not pensionable. This applies to part-time officers as well as full-time officers. The claimant asserts that overtime worked which is taken as TOIL but is later bought out is not treated as pensionable pay, she could be worse off than full-time officers over the course of the year in relation to pensionable hours. This is because TOIL taken by full-time officers would relate to hours worked over and above 2080 and would not be pensionable. On the other hand, a part-time officer could miss out on pensionable hours up to 40 hours per week – in the claimant's case this would be 1 hour because she works 39 determined hours per week which were taken as TOIL but then paid at plain time.

35. This part of the claim has, he argued, no reasonable prospects of success. The submissions made in relation to pensionable pay are equally applicable to this part of the claim. The condition relied upon by the claimant is that unused TOIL is bought back as non-pensionable pay. This condition is identical for the claimant and her comparator. The claimant is paid exactly the same for unused TOIL as her comparator. In such circumstances this part of the claim has no reasonable prospect of success.

36. The respondent's position was that looking at matters (i.e. whether or not the claimant has been treated less favourably) from an indirect discrimination point of

view does nothing to assist the claimant. There is no evidence that the condition relied upon has resulted in the claimant being treated less favourably than her comparator a full time officer. Even if that could be established, there was no evidence that the condition relied upon has a disparate impact on women officers. This part of the claim has she submitted no prospect of success and should be struck out.

37. The claimant's response was that she was offering to prove that she and other part-time officers are treated less favourably compared with her full-time comparator. Ms Stobart referred to a document 'Guidance for Police Authorities (p106|) drawn up in 2007 in response to the Part -Time Workers (Prevention of Less Favourable Treatment) Regulations. At page 110 'Summary of New Arrangements' it makes clear the new arrangements for how 'additional hours' worked by part-time officers should be treated. At para 2.2 a part time officer's additional hours will be automatically pensionable (hours worked at plain time up to 40 hours). There is then a clause that for part time officers the pensionable hours will not include any hours worked at an enhanced rate or those taken as time off in lieu. Ms Stobart's position was that it is clear that the new arrangements were designed for part time officers. They do not affect full time officers because none of their TOIL hours are pensionable so they do not lose out on that pensionable element of the TOIL buy back.

38. The claimant's position will be that part time officers are treated less favourably than full time officers as yet again only the part time officer loses out on pensionable pay when TOIL is bought back. It cannot therefore be said that the full time and part time officers are treated the same if the outcome of the treatment means the part time officer loses out. It was clear according to Ms Stobart that part time officers are treated less favourably than full time male comparators. It is also clear that part time officers are predominantly female and that there is therefore a disparate impact on women. She observed that in respect of this claim no material factor defence has been pled.

Less Favourable Treatment on the grounds of Part Time Status

39. Mr McGuire reminded the Tribunal that The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) (the "PTWR")

allow part-time workers to challenge less favourable treatment on the ground of their part-time status if it cannot be objectively justified. The PTWR define both part-time and full-time workers. A part-time worker is defined as a person who is paid wholly or in part by reference to the time they work, and who is not identifiable as a full-time worker having regard to the employer's custom and practice in relation to workers employed under the same type of contract (reg. 2(2)). A full-time worker is defined a person who is paid wholly or in part by reference to the time they work, and who is identifiable as a full-time worker having regard to the employer's custom and practice (reg. 2(1)). In the present case, it is accepted that the claimant falls within the definition of a part-time worker for the purposes of the PTWR.

40. In order to establish less favourable treatment under the PTWR, a part-time worker must identify an appropriate full-time worker as a comparator. The comparator must be: (i) employed by the same employer, (ii) employed under the same type of contract, (iii) 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 (iv) working or based at the same establishment as the part-time worker or, where there is no such worker who satisfies the three requirements listed immediately above, working or based at a different establishment and satisfying those requirements (reg. 2(4)). Furthermore, claimants under the PTWR must identify an actual (and not just a hypothetical) full-time comparator in the same employment engaged on the same or broadly similar work. For the purposes of identifying a comparator, the PTWR set out four categories of workers (regulation 2(3)). Only workers falling within the same category can be regarded as being employed under the same type of contract.

41. It was accepted for the purposes of this hearing (but not for other purposes) that the claimant had identified an appropriate full-time comparator. A part-time worker has the right not to be treated less favourably than the employer treats a comparable full-time worker either as regards (i) the terms of their contract, or (ii) by being subjected to any other detriment by any act, or deliberate failure to act, by their employer (reg. 5). This applies only where the less favourable treatment is on the ground of the worker's part-time status and the treatment is not justified on objective grounds.

42. In general terms, he said, an Employment Tribunal has to analyse four issues in a claim under the PTWR: (i) what is the treatment complained of (ii) is that treatment less favourable than that of a comparable full-time worker (iii) is the less favourable treatment on the ground that the worker was a part-time worker (iv) if so, is the treatment justified on objective grounds? The concepts of less favourable treatment and detriment under the PTWR are interpreted in the same way as they are under the EqA 2010 for the purposes of discrimination claims. The Tribunal is required to ask whether a reasonable person would take the view that the part-time worker has been disadvantaged in some way. This means that, when looking at whether a part-time worker's contract was less favourable than a full-time worker's contract, the Tribunal should take a term-by-term approach rather than look at the contract as a package (similar to the approach is taken in equal pay cases). In determining whether a worker has been treated less favourably than a full-time comparator, the pro rata principle must be applied unless it is inappropriate (reg. 5(3)). This principle means that, where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive not less than the proportion of that pay or other benefit that the number of their weekly hours bears to the number of weekly hours of the full-time comparator (reg. 1(2)).

43. The claimant's position appears to be that she has been treated less favourably because her paid annual leave entitlement has not been adjusted to take into account additional hours worked up to full-time equivalent. The claimant says this is in contrast with the position of full-time officers who are "credited" with all the full-time equivalent hours they work for the purposes of determining the amount of paid annual leave they are entitled to. This part of the claimant's claim has no reasonable prospects of success. The claimant's position completely ignores the pro rata principle expressly set out in the PTWR (reg. 5(3)). The calculation of holiday entitlement for part-time officers and full-time officers is identical taking into consideration the pro rata principle. The claimant's holiday entitlement is based on her determined hours. Likewise the holiday entitlement of full-time officers is based on determined hours. The claimant is not therefore being treated less favourably than a comparable full-time officer. This is clearly not a situation where it would not be appropriate to apply the pro rata principle (in

any event, such an argument has not been made by the claimant). If the claimant's argument was correct it would mean that she would be entitled the same amount of paid holiday as a full-time worker despite the fact that (by her choice) she works part-time hours. This part of the claim should be struck out.

44. If the Tribunal does not strike out the claims then he submitted the claimant should be ordered to pay a deposit to be allowed to continue with these aspects of the claimant's claim on the basis that they have little reasonable prospect of success. The claimant is in full-time employment with the respondent and has the financial means to comply with a deposit order.

45. Ms Stobart then set out the claimant's position. She addressed the argument that the claimant and the full time officer's calculation of holiday entitlement was identical taking into account the pro rata principle. In her view that statement did not bear scrutiny and was, it is she submitted, wrong. The claimant works shifts that are set by the respondent. They bear no resemblance to the deemed 39 hours per week that is said to be her 'determined hours'. The respondent has recognised the unfair treatment meted out to part time officers when they recognised that additional hours worked by part time officers should have been pensionable rather than merely the 'determined hours'. The same principle applies to holiday pay. If full time officers are paid a certain amount per hour holiday pay then the part time officer should be paid that same amount pro rata up to FTE.

46. In simple terms the treatment complained of is that when the claimant is asked to work longer hours up to FTE then she should be entitled to the same benefits and pay on a pro rata basis as the full time comparator. If the claimant was asked to work 36 hours only 33 hours are taken into account for annual leave pay and entitlement whereas her full time comparator who is asked to work 36 hours on the same shift gets the full 36 hours taken into account. That principle has been recognised by the respondent (although the remedy it is argued has not been correctly implemented by imposing a cap) when it comes to pensionable hours and it is unclear why that principle is not now recognised when it comes to holiday pay, especially as that principle has been recognised by the AHM drawn up by the respondent. The claimant will show that the reason that the part time officers are not paid pro rata the same as the full time officers is because they are part

time and the respondent is relying on the method of paying part time officers in the determinations. The respondent has not shown that the claimant has 'no reasonable prospects of success' or 'little reasonable prospects of success'. In conclusion it is submitted that the respondent has failed to show either that the claimant has 'no reasonable prospects' or little reasonable prospects and their application for strike out/deposit order should be dismissed.

Discussion and decision

47. It was accepted that in determining an application the Tribunal was required to take a two-stage process. Firstly, the Tribunal was required to consider whether any of the grounds set out in Rule 37(1)(a) had been established (whether the case had no reasonable prospect of success) and secondly, to then consider whether to exercise its discretion to strike-out (***Hassan v. Tesco Stores Ltd*** UKEAT/0098/16). The test for making a Deposit Order under Rule 39(1) of the Employment Tribunal Rules was a less rigorous test than the "no reasonable prospect of success test" for strike out. It applied the test of ''little reasonable prospect of success''. The Tribunal had a greater leeway when considering an application under Rule 39(1) than it did for an application under Rule 37(1).

48. It was also common ground that the legal test for the strike out (particularly in discrimination claims) is high (***Ezsias v North Glamorgan NHS Trust*** [2007], ***Tayside Public Transport Company Ltd (t/a Travel Dundee) v Reilly*** [2012] IRLR 755 (CS) and ***Anyanwu and another v South Bank Students' Union and South Bank University*** [2001] IRLR 305). However, a claim can be struck out in appropriate circumstances (***Ahir v British Airways Plc*** [2017] EWCA Civ 1392). At face value these claims do not appear to revolve around disputed facts but on closer enquiry the impact of the pay practices on part time officers are disputed.

49. The respondent's general approach was to argue that as a matter of logic as the treatment of full time and part time officers was the same in the application of the rules then no question of discriminatory treatment could arise. The claimant's position was that the effects or consequences of the apparent unequal treatment must be considered more widely as they give rise in practice to unfairness.

50. The first matter to address is the equal pay and TOIL claims as the arguments are essentially the same but before doing there are some undisputed background matters that need to be referred to. The Police Pension Scheme (p119-125) altered the rule that only a part time officers determined hours were pensionable providing that a part time officer need to have the same entitlements on a pro rata basis as a full time officer(p158-159). Matters moved on and the Scottish Government issued a determination under the Police Service of Scotland Regulations. (Annex 5 is produced(p128-134)) The ADM appears on the face of the document to be an intended codification of the new practices. It sets out the method by which additional hours worked by part time officers are treated. It refers to the PSoS Regulations 2013 but does not refer to other Guidance or Circulars which may have played a part in its construction. It gives worked examples which both parties referred to. Part time officers such as the claimant get TOIL or paid at plain time up to 40 hours per week (the hours of a full time officer) and thereafter overtime. It provides (p158-159): *"The additional hours worked up to the 40 hour threshold should be compensated at plain time for the purposes of for the purposes of pay, leave, allowances and pension"*

51. Mr Maguire took the position that reference by the claimant to employment "practices" was simply insufficient. He referred to the case of ***Hayward v. Cammell Laird Shipbuilders Ltd***. It was in his view clear that the legislation required the Employment Tribunal look at the "term or terms under which the claimant was employed". Reference to practices was insufficient as the Tribunal had to carry out a comparative exercise of comparing the claimant' claims against those of a comparator. The law on this matter was he suggested clear that the word 'term' means a distinct recognisable provision which can then be compared from the point of view of the benefits it confers with the corresponding provision in another's contract. The question for any Tribunal determining the matter would be whether the term of the women's contract was less favourable to that of the man's.

52. The submission forcefully made by Mr. McGuire that the comparison must be term to term must be correct but the word term arguably must be seen in a wider sense in relation to its effect. The word term was given such a wider meaning by

the House of Lords in ***Cammell Laird*** and although considering the 'whole package' of remuneration in the contract is impermissible the Tribunal must focus on a distinct provision or part of the contract that has sufficient content to allow comparison. In principle it must be arguable that although a term appears even handed it will have a disparate impact on the disadvantaged group which here is the part time officers. As noted earlier it appears that the fact of any disparate impact existing is disputed and that is a matter that requires to be determined after hearing evidence. The irony of the situation is that respondent argues that the way they treat full time and part time officers (guided by their own policies reflected in the AHM) does not constitute contractual terms nor does it reflect underlying identifiable contractual terms (in other words they act without a contractual legal basis). They appear from the pleadings to be joined in this position by the claimant who does not accept that the respondent has a contractual basis for the system of pay practices.

53. It should be noted that the claimant has, as Mr McGuire noted made her claim as an indirect discrimination claim (page 76) as well as (in the alternative) a claim using the equality clause. The case of ***Cammell Laird*** related to a claim under the Equal Pay Act 1970 and it is arguable that the comparison of term against term is not applicable to a claim under Section 19 of the Equality Act where a wider comparison of the impact of a PCP can be assessed and I am reluctant to exclude the possibility of such an argument at this stage especially given the reluctance of both to tie the pay practices to particular contractual terms.

54. In addition, the respondents here are aware from the pleadings of the unfairness that is said to exist through the application of their policies or 'practices' (which unfairness they deny). This matter is not one of fair notice, and to be fair this is not what was argued, but more a technical matter although an important matter for any claim for equal pay. It seems to the Tribunal a short step from saying this is how an employer acts in practice to saying that this must either constitute or reflect a contractual term. Since the case of **Autoclenz v Belcher & Ors [2011] UKSC 41** the Tribunal is used to considering the 'reality' of what makes up a contract and such an exercise would also require a factual enquiry. I have no doubt that the respondent's HR staff drafted the AHM in accordance with their understanding of the contractual position and that even if this is not the case the

approach there may have become an accepted term. There is no doubt that a Tribunal after hearing evidence would have to identify such a terms before the claimant could be successful.

55. If the claimant truly believes that the practices cannot be reduced to a contractual term or terms then I struggle to see how the sort of exercise envisaged in ***Cammell Laird*** can take place in relation to the term by term comparison. I will not strike out the claim under section 66 EqA as it may be that in the course of evidence a contractual term emerges which engaged this section. To do so would in any event lead to little or no saving in time or expense in my view.

56. I also note that the respondents do not seek to justify the way in which they act in practice with reference to the contract (whatever that may amount to). I understand that they say there is no difference in treatment but if the purpose of the AHM and other recent changes were to equalise as far as possible the terms of part time officers with their full time colleagues then the case seems to boil down to whether they have succeeded in that aim.

57. The conclusion that I have reached in relation to these particular claims (Equal Pay and TOIL) is that the application for strike out does not reach the requisite high threshold required for success. It does not reach the standard required of the first test which is to have no reasonable prospects of success. Even if it had I would have taken the view that for public policy grounds there it would be inappropriate to strike out the claims given their importance to the claimant and to other part time officers. Separately, I hold that the lower test which would require me to consider whether the claim has little reasonable prospects of success is also not met despite my comments about the current state of the pleadings in relation to what are the terms of the claimant's contract that are to be evaluated against those of her comparator.

58. Turning finally to the claim advanced under the PTWR the divergence of parties seems to relate to the application of the *pro rata* principle. While it is apparent that the respondents do not want a situation where part time workers achieve an advantage over their full time colleagues (as required by Regulation 1(2)) it is not clear to me why the respondent's reject the more general principle that the same number of hours worked should be treated differently. If a part time worker is in effect working full time hours why do the same benefits in relation to pensionable

pay, holidays etc not flow from that? The principle should arguably have the effect that the closer to full time hours a part time officer works the narrower the differences should be unless in some way there is a justification for the remaining differential. I therefore reject the application for strike out in relation to this claim as it has not met the high test required. The claimant's position appears arguable and calls for evidence of the practical effect of the respondent's practices on her and on other part time workers. I also reject the contention that it can be said at this stage that the claims have little prospects of success. Even if I had held that the first part of the test for strike out had been engaged I would not have done so given the important issues raised by the claim which would have wider significance.

Employment Judge **J M Hendry**

Dated **17th of March 2021**

Date sent to parties **19th of March 2021**