Appeal No. EA-2020-SCO-000093-SH
(Previously UKEATS/0003/21/SH)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 21st July 2021
Judgment handed down on 27th August 2021

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

FORTH VALLEY HEALTH BOARD — APPELLANT

JAMES CAMPBELL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RHIDIAN DAVIES (Solicitor) NHS Central Legal Office, Anderson House, Breadalbane Street , Edinburgh EH6 5JR.
For the respondent	JAMES CAMPBELL (The Appellant in Person)

A

SUMMARY

TOPIC NUMBER(S): 22 – PART TIME WORKERS

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The Claimant brought a claim under Regulation 5 of the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations, 2000** ("the Regulations"). His claim was that he, as a part-time worker, he did not receive a paid break of 15 minutes during certain shifts worked by him for the Respondent. He sought to compare himself with a full-time worker who did receive such breaks. The Tribunal found that his claim of less favourable treatment had been established and awarded him compensation of £965. On an appeal by the Respondent:

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Held: The Tribunal had erred in concluding that the difference in treatment between the Claimant and the full time comparator was "on the ground" of the Claimant's part-time status. It was an agreed fact before the Tribunal that whether or not a shift included a break depended on the length of the shift in question. The Tribunal had made further findings in fact which were consistent with that agreed position. The Tribunal had made no finding in fact of any causal link between shift length and part-time status.

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In these circumstances, there was no basis in law on which the Tribunal could properly have come to the view that the difference in treatment between the Claimant and his full time comparator was "on the ground" that he was a part-time worker, far less that his part-time status was the *sole* ground for such difference in treatment (per **McMenemy v. Capita Business Services Limited** [2007] IRLR 400). The agreed and proven facts were wholly destructive of any such conclusion.

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Appeal allowed and Order substituted dismissing the claim.

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THE HONOURABLE LORD FAIRLEY

Introduction

1. This is an appeal from a Judgment dated 26 November 2020 of a full Employment Tribunal chaired by Employment Judge Young. I will refer to the parties, as the Tribunal did, as the Claimant and the Respondent.

2. The Claimant brought a claim under Regulation 5 of the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations, 2000** ("the Regulations"). His claim was that he, as a part-time worker, he did not receive a paid break of 15 minutes during certain shifts worked by him for the Respondent. He sought to compare himself with a full-time worker who did receive such breaks. The Tribunal found that his claim of less favourable treatment had been established and awarded him compensation of £965. The Respondent appeals against that decision. It contends that the Tribunal incorrectly applied Regulation 5(2)(a) in considering whether or not the detrimental treatment of the Claimant was "on the ground" that he was a part-time worker.

Facts

3. Before the Tribunal, the parties tendered a document describe as a "Statement of Agreed Facts". Oddly, whilst the Tribunal acknowledged having received that document (Reasons, para. 4), it did not set out the agreed facts within the section of its Reasons entitled "Findings in Fact". In the Hearing before me, however, it was not disputed that the Statement of Agreed Facts was what it bore to be, and was presented to the Tribunal on that basis. The following summary is

accordingly drawn from those agreed facts, as supplemented by such further findings in fact as were recorded by the Tribunal in its Reasons:

(i) The Appellant is a Phlebotomist. He worked for the Respondent in that capacity between 2 April 2018 and 27 July 2020.

(ii) Having regard to the custom and practice of the Respondent, a "full-time" worker worked 37.5 hours per week. The Appellant did not work 37.5 hours per week and was therefore a part-time worker for the purposes of the Regulations. In common with other full-time and part-time workers, he worked shifts.

(iii) At the time to which this claim relates, the Respondent allowed a "complimentary" paid break of 15 minutes during certain shifts. The threshold for entitlement to the paid break was a shift length of six hours. Workers whose shift length was at least six hours received the break. Those who worked fewer than six hours in a shift were not entitled to the paid break. Whether or not a shift included a paid break depended upon the length of the shift[1].

(iv) The Appellant was contracted to work for an average of 16 hours per week on a 6 week rota. Within that rota, the Appellant and his colleagues worked shift patterns of different lengths. On weekdays, the Appellant would work four hour shifts (between 0730 and 1130 hrs) without a break. When he worked at weekends, he would work a six hour shift, during which he would receive a paid break. Other colleagues who worked a six hour weekend shift also received that break.

[1] Statement of Agreed Facts, paragraph 6

(v) Certain other part-time employees of the Respondent (MR and GC) also received a 15 minute paid break during their shifts with the Respondent, provided that the length of their shift exceeded 6 hours. In the case of GC, a 15 minute break was also allowed when she worked a 4 hour shift on a Friday, and this was known to the Respondent.

(vi) The Appellant's full time comparator (MM) worked shifts that were 8 hours long. He received the 15 minute paid break[2]. The reason for those 15 minute paid breaks being allowed was that MM's shifts lasted 8 hours[3].

The Tribunal's Reasons

4. The Tribunal rejected a submission made by the Respondent in terms of Regulation5(2)(a) that the reason (or "ground") for the Appellant not being given the paid break when he worked 4 hour shifts was not his status as a part-time worker, but the length of the shift in question. At paragraph 50 of its Reasons, it stated:

> **"The Tribunal consider this submission circular and not well-founded. It seemed to undermine the purpose of the Regulations namely to protect part-time workers from less favourable treatment. A part-time worker by definition was going to work less (*sic*) hours than a full time comparator. It may be that within the part-time working regime different workers would work different shifts of varying length but they were all part-time workers. It seemed to the Tribunal that a distinction could be made on length of shift to provide objective justification under Regulation 5(2)(b) as to why there was less favourable treatment rather than indicating that part-time working was not the reason for the less favourable treatment. The less favourable treatment only arose because the claimant in this case worked less (*sic*) hours than the full time comparator. Certainly the length of that shift might become important as to whether or not a break was being granted but it did seem to the Tribunal that was a matter of "objective justification" rather than an assertion that the reason for the less favourable treatment had nothing to do with the claimant being a part-time worker."**

[2] Statement of Agreed facts, paragraphs 10 and 11
[3] Statement of Agreed Facts, paragraph 12

5. At paragraph 51, the Tribunal further concluded that the treatment of the Claimant was not justified on objective grounds (Regulation 5(2)(b)) before returning, at paragraph 52 to the test in Regulation 5(2)(a):

> **"In any event, even if the length of the shift of four hours was the reason for denying a complimentary break to those who worked four hour shifts and not because of part-time working that was undermined by the finding that the respondent was aware that one of the part-time workers (GC) was allowed a complimentary break on a Friday when she worked a four-hour shift. So it could not be said that the defining characteristic was because a worker was on a four-hour shift. That reason having disappeared the only other reason for the less favourable treatment could be that the claimant was a part-time worker. That was the sole reason."**

6. On that analysis, the Tribunal concluded that the claim under Regulation 5 succeeded.

Submissions

7. For the Respondent (and Appellant), Mr Davies submitted that the Tribunal had erred in its application of Regulation 5(2)(a). Contrary to the clear guidance of the EAT in **Gibson v. Scottish Ambulance Service** EATS 0052/04, and the Inner House of the Court of Session in **McMenemy v. Capita Business Services Limited** [2007] IRLR 400, the Tribunal had erroneously applied "but for" causation to the question of whether the detrimental treatment of the Claimant was "on the ground" that he was a part-time worker. Had the Tribunal correctly applied **Gibson** and **McMenemy**, it would first have inquired into the employer's intention in treating the part-time worker in the way that he did and, having done so, would have concluded that the statutory test was met only if the *sole* ground for the less favourable treatment was that he was a part time worker (**McMenemy** at paragraphs [6] and [14]). Having regard to the agreed facts and the further findings in fact made by the Tribunal, and applying **McMenemy**, there was no basis on which the Tribunal could properly have concluded that the test in Regulation 5(2)(a)

was met. Rather, the only possible conclusion was that the claim failed, because the denial of paid breaks was not "on the ground" of part-time worker status but rather was because of the length of the particular shift.

8. Mr Campbell, who appeared in person in this appeal as he had done before the Tribunal, submitted that the Tribunal had not erred in law. It had correctly applied **McMenemy**. It was clear from its conclusions that it had rejected the evidence of the Respondent's witness about the reason for the detrimental treatment being shift length. It had also clearly rejected such of the agreed facts as bore upon that point. In particular, he submitted that the Tribunal had clearly rejected the agreed fact numbered 6 in the Statement of Agreed Facts that whether or not a shift included entitlement to a paid break depended upon the length of the shift. Although recorded within the section of its Reasons entitled "Findings in Fact" the Tribunal had also plainly rejected the evidence on that matter from the Respondent's witness (at para. 12 of its Reasons). The Tribunal had correctly looked to see what was the reason for the difference in treatment as between the Claimant and his full-time comparator and had been entitled to conclude that the sole reason was the Claimant's part-time status, particularly where the Tribunal had found that another part-time employee (GC) received a break during a four hour shift worked on Fridays. The fact that other part-time employees received the break when working shifts of six hours or more was irrelevant where the Claimant could point to a full-time comparator (MM) who received the breaks.

Analysis and Decision

9. So far as material, Regulation 5 of the Regulations states:

5.— Less favourable treatment of part-time workers

(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–

(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.

(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.

10. In **McMenemy**, the claimant was a part time worker who worked only on Tuesdays, Wednesdays and Thursdays. He claimed that he had been treated less favourably than full-time comparators because he did not receive a day off *in lieu* when there was a Monday holiday. Having concluded that there was less favourable treatment than the full time comparator, Lord Nimmo-Smith, delivering the Opinion of the Court stated (at paragraph [14]:

"The next question is whether this less favourable treatment was solely because the appellant was a part-time worker. This, as we have discussed, requires examination of the respondents' intention: did they intend to treat him less favourably for the sole reason that he was a part-time worker? It is clear to us that the Employment Tribunal and the Employment Appeal Tribunal gave the correct answer to this question. On examination of the facts, the reason why the appellant received less favourable treatment than did a comparable full-time worker was through the accident of his having agreed with the respondents that he would not work for them on Mondays or Tuesdays. It is at this point that it becomes legitimate to consider hypothetical situations, in order to test the true intention of the respondents. It is clear on the evidence that, in accordance with the respondents' policy on public holidays, if a full-time member of the appellant's team worked a fixed shift from Tuesday to Saturday, he would not receive the benefit of statutory holidays which fell on Mondays. Likewise, if the appellant, or any other part-time member of his team, worked on Mondays, they would receive the benefit of statutory Monday holidays in exactly the same way as full-time employees would do. We can therefore see no reason to fault the reasoning of the Employment Tribunal or the Employment Appeal Tribunal, especially the latter, in the passages quoted above. This is sufficient to dispose of the appeal."

11. In this case, agreed fact number 6 from the Statement of Agreed Facts is in the following clear and unequivocal terms:

> **"Whether or not a shift includes a break of the type complained about by the Claimant (a complimentary break) depends on the shift length"**

The Tribunal could not properly have rejected that fact given that it was a matter of agreement. The evidence led on behalf of the Respondent in relation to that matter was also clearly recorded by the Tribunal in paragraph 12 of its Reasons where it made what were apparently findings in fact that:

> **"Those who worked a four-hour shift were not entitled to the 'complimentary break'... The cut off…for any break entitlement was six hours. If a Phlebotomist (part time or full time) worked for that period then there (*sic*) would be granted a 15 minute complimentary break."**

Those findings were entirely consistent with the agreed fact at paragraph 6 of the Statement of Agreed Facts quoted above.

12. Applying the same approach as the Court in **McMenemy** and testing the true intention of the Respondent by reference to hypothetical situations, it is quite clear on the facts of this case that if a worker (whether full-time or part-time) worked four shifts each of six hours duration, (s)he would receive the break in each shift, but if (s)he worked six shifts, each of four hours duration (s)he would not. The reason (or "ground") for the Claimant, on some shifts, receiving less favourable treatment than his full-time comparator (MM) was, in each case, the length of the shift in question rather than the total hours worked. As a matter of fact, the Claimant did sometimes receive the break, but only when he was working a shift of six hours or more in duration.

13. At paragraph 50 of its Reasons, the Tribunal fell into error by conflating the two different issues of total hours worked on the one hand and shift length on the other. The Tribunal was, of course correct to note that a part-time worker would inevitably work fewer hours than a full time

comparator. That is inherent in the concept of "part-time" work. Even applying "but for" causation, however, it is hard to see how the Tribunal was able to reach the conclusion that the week-day shift pattern worked by the Claimant was in any way related to his part-time status. Nothing in its findings in fact or in the agreed facts justified such an inference. That absence of evidence alone meant that the Tribunal could not properly conclude that there was, in the case of the Claimant, any causal connection between his part-time status and the length of his shifts. On the contrary, the Tribunal had before it evidence – which it appears to have accepted – of both the Claimant and other part-time workers regularly working shifts in excess of six hours in duration such as to entitle them to the break.

14. In any event, and having regard to the facts as agreed and found by the Tribunal, there was no basis in law on which the Tribunal could properly have come to the view that the difference in treatment between the Claimant and his full time comparator was "on the ground" that he was a part-time worker, far less that his part-time status was the *sole* ground for such difference in treatment (per **McMenemy**). The agreed and proven facts were wholly destructive of any such conclusion. The apparently anomalous position of GC being given a break during Friday four hour shifts could not alter the agreed fact that whether or not a shift included a paid break depended upon the shift length.

Disposal

15. In these circumstances, and since the only conclusion that the Tribunal could properly have reached on the agreed and proven facts was that the detrimental treatment of the Claimant was not "on the ground" that he was a part-time worker in terms of Regulation 5(2)(a), I will set aside the Judgment of the Tribunal and substitute instead an Order dismissing the claim.