



EMPLOYMENT TRIBUNALS

Claimant: (1) David Balogun
(2) Adigun Sunmola
(3) Betty Olatise
(4) Raphael Ifezulike
(5) Yakubu Sani

Respondent: London Borough of Hammersmith and Fulham Council

Heard at: Central London Employment Tribunal (in person)

On: 5 July 2021 & 12 & 15 November 2021

Before: Employment Judge Brown
Members: Ms J Cameron
Ms G Gillman

Appearances:

For the Claimant: **In Person – Mr Sunmola spoke on behalf of the Claimants**

For the Respondent: **Mr S Harding, Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Respondent did not treat the Claimants, as part time workers, less favourably than comparable full-time workers.

REASONS

Background

1. By claim forms presented on 15 May 2020, the Claimants bring complaints of less favourable treatment of them as part time workers.
2. The Final Hearing originally started on 5 July 2021. On that day, the Claimants confirmed that they compare themselves with 3 full-time comparators: Olumuyiwa Emmanuel Adek'unle, Adetokunbo Adegoke and Asif Sharif.

3. They confirmed that their case is that these comparators were paid at an enhanced rate for working weekend hours, even though the comparators had not worked 36 hours' normal working hours. The Claimants say that the comparators are paid overtime for working at the weekend even when they have been on annual leave, or on days of "in lieu" the preceding week and therefore have not "worked" for 36 hours, rather than being on paid leave, for those 36 hours. The Claimants are contracted to work at the weekends. They do not receive an enhanced rate for working at the weekend. At the resumed Final Hearing on 12 November 2021, the Claimants said that their case is that they should be paid an enhanced rate for working at the weekend, whether they are working overtime or not. They also said that they were told by Mary Lamont, Head of HR, in an email on 4 December 2018, that, as weekend workers, they could not be paid an enhanced rate, even for overtime work worked at the weekend.
4. On 5 July 2021 the Claimants were unable to give particulars of their claims and the Respondent was therefore not in a position to respond to them. On that day, the Tribunal ordered that the Respondent provide pay slips and records of overtime claimed by the Claimants' 3 comparators in the period December 2018 – June 2020. The Respondents provided those documents by 7 July 2021. At a further PHC on 7 July 2021, Ms Caller, then Solicitor for the Claimants, confirmed that the Claimants' claim for less favourable treatment related only to the period December 2018 - June 2020.
5. In preparation for the resumed final hearing on 12 November 2021, the Claimants had circled, on the rotas provided for the comparators, every occasion on which each comparator was paid at an enhanced rate for working weekend hours, even though they had not worked 36 hours' normal working hours.
6. The Respondent had also served a witness statement, from Ms A Henry, Head of Estate Services, explaining, from records, the comparators' working pattern on the occasions highlighted by the Claimants.
7. The Tribunal heard evidence from Mr Sunmola for the Claimants. It heard evidence from Ms A Henry, Head of Estate Services and Mr D Rogers, Head of People Operations, for the Respondents. There were a number of bundles of documents. These were: (a) the original trial bundle [B1]; (b) the CMD bundle of September 2021, v3 [B2]; (c) Aylene Henry appendices [SB]; (d) Witness statement bundle from the original trial; (e) Claimants' updated bundle for the September CMD [C1]; (f) Claimants' bundle of 10 November 2021 [C2].
8. The parties submitted written skeleton arguments and made oral submissions. The Tribunal reserved its decision.

Findings of Fact

9. The 1st, 3rd, 4th and 5th Claimants commenced employment with the Respondent on 18 May 2013, while the 2nd Claimant commenced employment on 22 June 2013. They are all employed as Estate Support and Security Officers.
10. The Claimants are each contracted by the Respondent to work 15.2 hours, solely at the weekend. Mr Sunmola is contracted to work 3.30pm – 11.30pm, unsociable

hours, at the weekend, for which he receives an unsociable hours allowance (shift allowance), Bundle B1 p298. The other Claimants are contracted to work between 8am and 4pm and do not receive any unsociable hours allowance, Bundle B1 pp344, 362, 421.

11. Mr Balogun's contract, which mirrors the contractual terms of the other Claimants who work 8am – 4pm, provides,

"HOURS OF WORK

You will work from 8:00am to 4:00pm, Saturday and Sunday (inclusive of a 1 hour rest break which will be scheduled as per your team rota). You are also required to work an additional 4.2 hours per month to attend team meetings/events which will be held Monday to Friday.

The Council's standard office hours are 7.30am to 7.30pm, Monday to Friday however you may be required to vary your working pattern according to the needs of the service.

....

OVERTIME

The Council is committed to minimising the need for staff to work overtime. Where possible flexi leave or TOIL (time off in lieu) will be taken where the employee has worked several hours in excess of their contractual working week. However, if for operational reasons, overtime working is necessary to maintain essential service provision, and the taking of flexi leave and time off in lieu is not conducive to the smooth running of the service, then overtime payments can be considered. Overtime payments can only be made once the employee has worked in excess of a 36 hour week. Overtime must be authorised in advance by your head of division.." p298-299.

12. The Respondent's Terms and Conditions Handbook provides, p242,

"Normal workplace hours of business

Normal workplace opening hours are 7.30am to 7.30pm Monday – Friday."

13. It also provides,

"Overtime

We may pay overtime when it is authorized in advance, if you work:

- Hours in excess of 36 hours per week, which are outside of the standard hours of business ie 7.30am to 7.30pm, and
- Where it is not possible for you to take time off in lieu for service reasons."

Allowances

Weekend work

You may be eligible for an additional payment if you are required to work on Saturday or Sunday; in which case, your line manager will advise you or your exact entitlements.”

14. The NJC Green Book provides,

“(b) Saturday and Sunday Working

Employees who are required to work on Saturday and / or Sunday as part of their normal working week are entitled to an enhancement

Saturday Time and a half

Sunday Time and a half – basic pay above point 11*

Double time – basic pay at or below point **

15. The Respondent’s Pay Guidance provides that employees’ terms and conditions of employment will be “in accordance with the collective agreement(s) specific in your contract These are supplemented by local collective agreements reached with the Trades Unions recognized by the Council.”

16. Mr Sunmola told the Tribunal that, under the Respondent’s old standard contracts, before 2013, employees were paid Saturday and Sunday enhancements for working those days. He said that the Respondent’s terms and conditions were then changed so that, under the Respondent’s new contracts, employees were not paid Saturday and Sunday enhancements solely for working on these days, but were only paid Saturday and Sunday enhancements if they were working overtime on those days.

17. On 4 December 2018, Mary Lamont, Head of Human Resources, sent an email to Mr Sharif and Mr Adekunle saying,

“.. we looked at the overtime codes in SAP together and subject to your overall approval I have agreed the following :

Mon-Fri – 36 hour workers

Any OT – x 1 – fkat rate

Sat – x 1.5 (time and a half)

Sun – x2 (double time)

BH – x2 (double time)

Sat-Sun (15 hours workers)

Any additional hours worked over 15hours up to 36 for cover Mon to Fri x additional hours at flat rate

Any O/T hours (hours worked over 36 hours) – Overtime flat rate x 1

BH – x 2 (double time)

18. This appeared to state that Saturday and Sunday workers (“Sat-Sun (15 hours workers)”) would only ever be paid for overtime at the rate of x1 (“Any O/T hours (hours worked over 36 hours) – Overtime flat rate x 1”) , no matter when the overtime was worked. The exception to this was bank holidays, when they would be paid double time.

19. However, on 28 June 2019 Fiona Darby, Assistant Director of Place Services, wrote an email to all the Claimants and Mary Lamont and Ms A Henry, saying "Council's position:
- There is no breach of contract arising out of the claims made by the weekend staff
 - Weekend staff are not being treated unfairly
 - The Council's payment of overtime is lawful because both full time and part time employees get paid an overtime rate once they have worked over 36 hours in a week
 - There is no obligation on an employer to pay a part-time employee an overtime rate until they have worked the same number of hours as their full-time counterpart
 - Additionally, there is no legal obligation for employers to offer increased pay for working unsocial hours
 - The Council pays overtime premiums to the weekend staff when they have worked more than the contractual hours of full-time employees
 - The contacts of employment were negotiated by the trade unions and agreed and signed by the employees.
20. The Respondent's individual employees are responsible for submitting their claims for payment for overtime through the Respondent's IBC system for managers to approve. The staff members enter a code showing the rate at which they are claiming for any additional hours that they work.
21. Ms Henry confirmed in evidence that Ms Darby's email set out the Respondent's practice in relation to paying part-time employees. She told the Tribunal that, when weekend staff apply for payments for overtime, using the Respondent's electronic system, they are able to select the option to be paid overtime for Saturday and Sunday at the enhanced rates of x 1.5 and x 2 in the event that they have worked overtime on those days.
22. Mr Sunmola confirmed to the Tribunal that, when the Claimants, as weekend workers, are making claims for overtime, the option to claim enhanced payments for weekend overtime is available to them on the Respondent's electronic menu.
23. He said that, however, none of the Claimants had done so, because of Mary Lamont's email.
24. The Tribunal noted that Fiona Darby's email postdated Mary Lamont's email and was sent to Mary Lamont as well as to the Claimants.
25. Mr Sunmola also told the Tribunal that Fiona Darby had said that HR would look into the matter further and that Ms Darby would provide an update, but that this had never happened. Bundle C2, p22. However, the Tribunal noted that the Claimants themselves had produced an email at C2 Bundle p23, dated 19 July 2019 in which Ms Darby had, in fact, provided an update to the Claimants.
26. It was not in dispute that Mr Sharif was contracted to work as an Estate Support and Security Supervisor at all relevant times, B1 p587.
27. Mr Sharif's job description states,

“Service cover will require the Support and Security Supervisor to work on site two weekends in three for which they will receive standard pay enhancements. The Supervisor will also receive a 10 % uplift for being available to give advice and support at all times the service operates (carry and keep on a mobile phone up from 8:00 am to 11:30 pm 7 days a week). Following the “weekend on” the Supervisor will have two days off during the week – Mon and Tues.

36 hour working week

10% uplift

Enhancements for weekends worked.” Appendix 1 [SB 1].)

28. Mr Sharif’s job description also provides, “Employees directly supervised (if any): Estate Support and Security Officers (weekend Team).

29. The Tribunal noted that Mr Sharif is therefore the Claimants’ supervisor.

30. On the rotas provided by the Respondent, the Claimants highlighted occasions on which their comparators claimed and were paid overtime for working at weekends when they had not been shown on the rota as working in the previous week.

31. Mr Sharif’s hours did not appear on the rota at all unless he was needed to cover staff absence at short notice. The Claimants therefore did not highlight occasions on which he had worked at the weekends when he had not worked 36 hours the following week.

32. The Claimants identified the following occasions on which Mr Adekunle was paid enhanced rates for working on the weekend, even though he was not shown on the rotas as having worked 36 hours in the preceding week: (a) 8th/9th/10th April 2019, (September bundle page 100) (b) 8th August 2019, (C1 September bundle page 101) (c) 12th/13th December 2019 (C1 September bundle page 102) and (d) 1st June 2020. (September bundle page 104.)

33. Ms Henry told the Tribunal that she had checked the Respondent’s records and had found the following: (a) on 8th/9th/10th April 2019 the Respondent’s records showed Mr Adekunle as being on annual leave. Ms Henry produced an email, p SB11 showing him requesting leave on these dates (b). 8th August 2019. Ms Henry was not able to say what Mr Adekunle was doing on this day (c) On 12th/13th December 2019 the Respondent’s records showed that Mr Adekunle was at work, overseeing the training of a new member of staff. Both names were recorded on the relevant rota [SB 22] (d) On 1st June 2020 Mr Adekunle was recorded as having a day off in lieu (see [SB 23].

34. The Claimants identified the following occasions on which Mr Adegoke was paid enhanced rates for working on the weekend, even though he was not shown on the rotas as having worked 36 hours in the preceding week: (a) 21 April 2019 and 27 April 2019, [C1 September bundle at 100]; (b) 15th August 2019, [C1 September bundle at 101] (c) 22nd/23rd August 2019 [September bundle at 101] (d) 25th June 2020. [September bundle at 104].

35. Ms Henry showed the Respondent's records to the Tribunal, which recorded that Mr Adegoke was on annual leave on 17 and 18 April 2019 [SB 27], and was paid enhanced weekend rates on 21 April 2019. She said that the Respondent's records showed that Mr Adegoke was on annual leave on 15 August 2019 and 22nd/23rd August 2019. She also produced evidence that, on 25 June 2020, Mr Adegoke had a day off in lieu, [SB 24].
36. The Claimants did not dispute that the comparators were on annual leave, or taking days off in lieu, on the dates the Claimants had identified. Mr Sunmola made clear that the Claimant's argument was that the comparators had not "worked" 36 hours when they had been on annual leave, or time off in lieu, during these 36 hours.
37. Mr Sunmola quoted Guidance on the ACAS website, at <https://www.acas.org.uk/the-maximum-hours-an-employee-can-work>, which stated,
- "Working hours do not include:
- breaks when no work is done, such as lunch breaks
 - travelling that's outside of normal working hours and not requested by the employer
 - unpaid overtime the employee has volunteered for, such as staying late to finish something off
 - paid or unpaid holiday
 - travel to and from work (if the employee has a fixed place of work)
- <https://www.gov.uk/maximum-weekly-working-hours/calculating-your-working-hours>
- What counts as work
- A working week includes:
- job-related training
 - Time spent travelling if you travel as part of your job, eg sales rep
 - Working lunches, eg business lunches
 - Time spent working abroad
 - paid overtime
 - unpaid overtime you're asked to do
 - time spent on call at the workplace
 - any time that is treated as 'working time' under a contract
 - travel between home and work at the start and end of the working day (if you don't have a fixed place of work)
- What doesn't count as work
- A working week doesn't include:
- Time you spend on call away from the workplace
 - Breaks when no work is done, eg lunch breaks
 - travelling outside of normal working hours
 - Unpaid overtime you've volunteered for, eg staying late to finish something off
 - paid or unpaid holiday
 - Travel to and from work (if you have a fixed place of work)
38. The hyperlink which Mr Sunmola provided showed that this Guidance was in relation to the calculation of working hours in a week for the purposes of the

Working Time Regulations 1998 and calculation of the 48 hour maximum working week.

39. Mr Sunmola agreed that the Guidance referred to the 48 hour working week under the Working Time Regulations.
40. Ms Henry told the Tribunal that the Respondent treats all employees as having worked for payroll purposes when they are on annual leave or having time off in lieu. She said that this practice is very widespread, as far as she is aware, amongst employers.
41. Mr Sunmola confirmed to the Tribunal that none of the Claimants had ever worked 36 hours in a week and then overtime as well, so as to entitle them to claim payments for overtime work.

Relevant Law

42. Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides,

“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.

.....

(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.”

43. By *Reg 2(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”.

44. By *Reg 8(6) Part-Time Workers Regulations 2000*, “Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment.” In deciding whether part-time worker status was “the ground”, it is sufficient that it is an effective cause of the treatment; it need not be the only cause, *Sharma v Manchester City Council* [2008] IRLR 336, para [51] and *Carl v University of Sheffield* [2009] IRLR 616, paras [25], [28], [42].
45. The employer has the burden of proof to justify any less favourable treatment done on the ground that the worker is a part-time worker, *Ministry of Justice v O’Brien* [2013] ICR 499.

Discussion and Decision

46. The Tribunal decided that Mr Sharif was not engaged in the same or broadly similar work as the Claimants. He was the Claimants’ supervisor. As a supervisor, he had responsibility for supervising the Claimants. The Claimants had no supervisory responsibilities. Mr Sharif was also required to be “available to give advice and support at all times the service operates (carry and keep on a mobile phone up from 8:00 am to 11:30 pm 7 days a week)”. The Claimants did not have this onerous responsibility either.
47. Mr Sharif, as a supervisor, was therefore not an appropriate comparator in the Claimants’ claims.
48. It was not in dispute that Msrs Adegoke and Adekunle were engaged in the same or broadly similar work to the Claimants. However, the Tribunal decided that the Claimants had not shown that the Respondent treated the Claimants, part time workers, less favourably than these comparable full time workers regarding payment for Saturday and Sunday work. In fact, the Tribunal found that the Respondent requires all employees, both part time and full time, to work 36 hours before being paid an enhanced rate for working at the weekend.
49. The email dated 28 June 2019 from Fiona Darby, Assistant Director of Place Services, to the Claimants, confirmed that “The Council pays overtime premiums to the weekend staff when they have worked more than the contractual hours of full-time employees.”
50. The Tribunal found that the Respondent would pay the Claimants enhanced overtime weekend rates if they had worked 36 normal hours in the relevant week before the weekend work. Ms Henry confirmed this in evidence. Mr Sumola, who represented the Claimants, also agreed that the code for enhanced weekend rates was available to the part time workers, to claim an enhanced weekend rate

when they were working overtime at the weekend, rather than their normal working hours.

51. The Claimants contend that the Respondent does not, in fact, treat the full time employees in this way because they pay full time workers overtime for working at weekends when these full time comparators have been on annual leave/time off in lieu during the preceding 36 hour working week.
52. The Tribunal did not accept the Claimants' contention that annual leave should not be counted as part of 36 hours worked by the full time employees, when they claim overtime. The ACAS Guidance produced by the Claimants related to the calculation of the 48 hour maximum working week for the purposes of the *Working Time Regulations 1998*, which were not relevant to this case.
53. The Tribunal accepted the Respondent's evidence that treating annual leave/time off in lieu as part of the working week, for the purposes of qualifying for overtime thereafter, was standard practice and was objectively justified. The Tribunal observed that, if time off in lieu did not count towards calculation of work done in a 36 hour working week, there would be no credit given to the employee for having done the additional work, for which time off has been given. The Tribunal accepted that it was therefore appropriate for the Respondent to treat annual leave/time off in lieu as time during which employees are working, for the purposes of paying overtime beyond those hours.
54. In any event, the Respondent treats all paid annual leave and time off in lieu, for full time and part time workers, as days during which the employees have worked, when paying for overtime worked beyond those hours. There is no less favourable treatment of the part time employees in this regard.
55. The terms of the Claimants' contracts are therefore not less favourable than those of the comparable full time workers.
56. The Tribunal rejected the Claimants' contention that they had not claimed for overtime at the enhanced weekend rate because of Mary Lamont's email. The Tribunal found that Ms Lamont's email was superseded by Ms Darby's email. The Claimants have never worked 36 hours a week, so as to be entitled to overtime weekend rates, so they were never subjected to any detriment arising out of Ms Lamont's email. Insofar as Ms Lamont's email suggested that weekend workers would be paid less for overtime at the weekends, compared to full time workers, so that their contractual terms were less favourable, that was rectified by Ms Darby in July 2019. Any claim in respect of less favourable contract terms was out of time when the Claimants presented their claims on 15 May 2020.
57. The Claimants made clear at this hearing that they are claiming in respect of less favourable pay in respect of their normal working hours at the weekend, not in respect of overtime they worked at the weekend. Insofar as the Claimants make any claim in respect of less favourable payment of overtime rates at the weekend, the Claimants' claims would appear to be barred by *Reg 5(4) Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000*.
(4) *A part-time worker paid at a lower rate for overtime worked by him in a*

period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.”

58. Full time workers are contractually required to work 36 hours in order to claim overtime and the Claimants have never worked more than 36 hours, so as to entitle them to claim overtime.
59. The Respondent did not treat the Claimants less favourably than comparable full time workers.

Employment Judge Brown

Dated: 15 November 2021

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Sent to the parties on:

16/11/2021

For the Tribunal: