EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110583/2019 and 4110774/2019 (V)

Held via Cloud Video Platform (CVP) on 18 and 19 August 2020

Employment Judge A Jones
Mrs E Farrell
Ms L Hutchison

Mr D Mitchell	**First Claimant** **Represented by:** **Ms A Bowman - Solicitor**
Mr M Palmer	**Second Claimant** **Represented by:** **Ms A Bowman - Solicitor**
South Lanarkshire Council	**Respondent** **Represented by:** **Mr S O'Neill - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. The respondent was in breach of Regulation 12 of the Working Time Regulations 1998 by failing to make arrangements for the claimants to have a statutory rest break during their shifts. The Tribunal makes a declaration to that effect. Further, the Tribunal makes an award of compensation to Mr Mitchell of £4835.44 and Mr Palmer of £2933.16
2. The respondent was in breach of the Part time Workers (Prevent of Less Favourable Treatment) Regulations 2000 in respect of Mr Mitchell and makes an award in that regard in the sum of £1841.16.

3. The respondent was not in breach of the Part time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in respect of Mr Palmer.

REASONS

Introduction

1. The claimants are both employed by South Lanarkshire Council as Community Service Supervisors and brought claims under Regulation 12 of the Working Time Regulations 1998 ('WTR') and Regulation 5(1) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR'). The WTR claims arise out of the failure of the respondent to provide the claimants with a rest break during shifts of six hours or more. The respondent withdrew its defence to the claims under the WTR on 8 January 2020 therefore the only issue for the Tribunal to determine in terms of the WTR claims was that of remedy. The respondent continued to defend the claims brought under the PTWR.

2. Various interlocutory hearings had taken place in this case and the final hearing took place remotely by way of the Cloud Video Platform.

3. The claimants were both represented by Ms Bowman, solicitor and the respondents were represented by Mr O'Neill, solicitor. Mr O'Neill was instructed by Ms Robertson from the respondent's HR department. The Tribunal heard evidence from both claimants and Ms Booth who is an Operations Manager for the respondent within Justice Services. Witnesses gave evidence by way of written witness statements. An agreed bundle of productions was lodged by the parties which included an agreed list of issues and schedules of loss.

Preliminary Matter

4. Ms Bowman, on behalf of the claimants raised a preliminary matter in relation to the content of the respondent's witness statement. Reference was made in

that statement to 'mediation'. The claimants were of the view that this referred to a confidential process. Whilst initially the respondent's position was that the reference in the statement was admissible, during the proceedings and before the respondent's witness gave evidence, Mr O'Neill indicated that his instructions were that the reference to mediation in Ms Booth's statement should be redacted. On that basis, the Tribunal disregarded this aspect of Ms Booth's statement.

Issues to be determined

5. The Tribunal was therefore required to determine the following issues:

a. In terms of the WTR claims, was it just and equitable to make an award of compensation to either or both claimants and if so, what amount was just and equitable to award?

b. In terms of the PTWR claims, the respondent conceded in submissions that the claimants were both part time workers and that their named comparators were comparable full-time workers in terms of the PTWR. This narrowed the issues to be determined in relation to the PTWR claims to:

- was either claimant treated less favourably than their named comparator?
- if so, was that treatment on the ground that the claimant was a part time worker? and if so
- was the treatment justified on objective grounds?

c. If claims of less favourable treatment on the ground of the claimants' part time worker status were established and not justified by the respondent, was it just and equitable to award either claimant compensation, and if so, what compensation should be awarded.

Findings in fact

6. Having heard evidence and considered the documentation, the Tribunal makes the following findings in fact:

7. Mr Mitchell has been employed as a Community Service Supervisor by the respondent working one shift a week on a Saturday between 8.30am and 4.30pm since December 2006.

8. Mr Mitchell works elsewhere under a separate contract of employment with the respondent during the week in the Land Services Department.

9. Mr Mitchell's duties are to supervise those who have been sentenced to Community Payback Orders by the criminal courts and those who have elected to take Fiscal Work Orders as an alternative to prosecution. The clients, as they are called, require constant supervision during the hours they are with Mr Mitchell. The clients tend to be younger people and first-time offenders.

10. The respondent employs 21 people in this role, and these employees are employed on various hours from 8 to 40 hours.

11. Mr Mitchell is the only person employed in this role who is employed on 8 hours a week.

12. Mr Mitchell has been a shop steward for Unite the Union for around 18 years.

13. The clients are permitted an hour for lunch and will either bring their own food or purchase something during their break. This lunch break counts towards the client's payback orders and they require to be supervised throughout this time.

14. Mr Palmer has been employed in the same role as Mr Mitchell since June 2018. He works 32 hours a week.

15. A full time Community Service Supervisor works 35 hours a week.

16. Both claimants were employed following offer letters which were sent to them and which were included in the documents before the Tribunal. There was no

reference in either letter to rest breaks to which either claimant might be entitled.

17. A review was undertaken by the respondent in 2017 of the service in which the claimants were employed, which highlighted that a number of those in the role of Community Service Supervisor were not working their full contractual hours, but were paid for these hours.

18. The understanding of those individuals who were not required to work their full contractual hours but were paid for their full contractual hours, was that they were being paid for additional hours to compensate them for not getting a rest period during their shifts. This was commonly referred to amongst those affected as ‘compensatory rest pay’.

19. It was not until this review was being carried out that Mr Mitchell became aware that colleagues were receiving ‘compensatory rest pay’ of up to an hour per shift.

20. This practice was not a formal policy of the respondent, but had been in existence since the commencement of Mr Mitchell’s employment in the role.

21. The respondent decided that with effect from May 2018, any new employee recruited to the role of Community Payback Supervisor, would be required to work their full contractual hours and would not be entitled to compensatory rest pay.

22. The respondent did not take any steps at this stage to make arrangements for employees to have a rest break in accordance with the statutory requirements. No arrangements were made by the respondent to allow either claimant a rest break until March 2020.

23. From March 2020, the respondent made arrangements with an external agency, SACRO, to provide cover for those in the claimants’ positions of 20 minutes in an 8 hour shift to allow them to take a break from their duties. This break is paid.

24. The respondent has been in negotiations with the relevant trade unions with a view to harmonising rota arrangements for all staff in this role for some time. These negotiations were, at the time of the final hearing, still ongoing.

25. When Mr Palmer was offered employment in his role, he was advised that there were ongoing discussions in relation to rotas but that he would be employed on the basis of being required to work his full contractual hours.

26. Mr Mitchell raised a grievance in writing on 9 August 2018, titled 'Equal Pay Claim', complaining that male and female colleagues doing the same job as him had been being paid an extra hour per shift 'compensatory rest meaning reduced hours'.

27. The respondent responded to Mr Mitchell by letter dated 17 August 2018, indicating that after discussion with the personnel department that he 'would need to seek legal representation to submit an equal pay claim against the council and there is a statutory process that would be followed to examine your claim. While we acknowledge the issue of break times we are seeking to resolve this currently across the service'. The respondent incorrectly categorised the claimant's grievance as an equal pay grievance. The respondent did not otherwise progress the claimant's grievance about break times.

28. Mr Mitchell then lodged a further grievance on 4 February 2019, complaining about breaches of the Working Time Regulations and that his colleagues received a payment of 1 hour for compensatory rest which he did not receive.

29. Mr Mitchell did not receive any response to this grievance.

30. Mr Palmer lodged a grievance around November 2018 about the failure to give him a rest break or compensatory rest pay and a grievance hearing took place on 7 December 2018. He was unhappy at the outcome of that grievance and an appeal was heard by Ms Booth. In the appeal outcome letter, dated 7 January 2019, Ms Booth stated 'I have given consideration as to whether it would be appropriate to transfer your shift pattern to that of the existing staff, which includes the paid lunch break and a 4.30pm finish. However, given the

service has made a decision to change the existing shift pattern and working hours, it would not be appropriate to revert you to a working pattern that will be changed in the near future." An alternative shift pattern was offered to Mr Palmer (which did not address his concerns), but this was not accepted by him.

31. The claimants then lodged claims at the Employment Tribunal in September 2019.

32. The respondent's management was aware from 2017 at the latest that a number of staff in the same role as that of the claimants were not able to take rest breaks during their shifts.

33. Paid rest breaks of 20 minutes were introduced for staff in March 2020.

Witnesses

34. The Tribunal found all witnesses it heard from to be credible. While Ms Booth was a credible witness and sought to answer questions as honestly as she could, it was apparent that as she had only been in the role for two and half years, she had limited knowledge of how the shift arrangements concerning the claimants and their colleagues had developed. Although she gave some evidence about discussions she had in the context of the grievance of Mr Palmer which she had dealt with, this evidence was vague and was not supported by any contemporaneous notes or statements from those individuals. The Tribunal noted that there were a number of employees of the respondent, in particular a Mr Singh and a Mrs Santosh-Deid who were likely to have more detailed knowledge of the rota arrangements of the claimants. It was not clear to the Tribunal why these individuals had not been called by the respondent to give evidence.

Submissions

35. Both Ms Bowman and Mr O'Neill helpfully provided written submissions to the Tribunal.

36. Ms Bowman referred to a number of authorities. In particular, she referred to the case of Sharma v Manchester City Council 2008 IRLR 336 as authority for the proposition that part time status of a claimant need not be the sole reason for any less favourable treatment. In relation to the issue of objective justification, she referred to O'Brien v Ministry of Justice 2013 IRLR 315 and in particular suggested that this was authority for the proposition that cost of itself cannot constitute justification. She also made reference to the case of Hendrickson Europe Ltd v Pipe 2003 WL 1822905 in relation to the steps a Tribunal is required to follow when considering the question of less favourable treatment.

37. Ms Bowman also confirmed, in answer to a question from the Tribunal, that while her primary position was that the less favourable treatment about which the claimants were complaining was the effective lower hourly rate of pay which the claimants received in comparison to their full time comparators, her alternative position was that the benefit of paid time during which the comparators were not required to work was also less favourable treatment. No objection was taken to this alternative position by the respondent.

38. Ms Bowman invited the Tribunal to take into account the unresolved grievances lodged by both claimants when determining what compensation might be just and equitable and in the case of Mr Mitchell, in particular the failure of the respondent to deal with his second grievance at all. Ms Bowman referred to the schedules of loss which had been lodged by both claimants, which calculated their losses by reference to the notional difference in hourly rate which the claimants received in comparison to their comparators, when their respective hourly rates were calculated by reference to their actual hours worked.

39. Ms Bowman made reference to the case of Grange v Abellio London 2017 IRLR 108 as authority for the proposition that if an employer put in place working arrangements which did not meet the statutory requirements for a rest break, a breach would arise and it was not necessary for an employer to actually refuse to allow an employee to take a rest break. She invited the Tribunal to accept that in the case of Mr Mitchell, the breach had been ongoing

for 14 years and that therefore the breach was offensive and of significant degree.

40. While Ms Bowman accepted that authorities did not support the award of injury to feelings for a breach of the WTR, she made reference to Grange and invited the Tribunal to make an award of discomfort and distress on the basis of the claimants' evidence of their frustration at not be able to take breaks and that their evidence in this regard was not challenged.

41. Mr O'Neill for the respondent, submitted in relation to the PTWR claims that while Ms Booth in evidence had accepted that it was the view of the claimants and their colleagues that their colleagues believed that the reason for the reduced hours was to compensate workers for not receiving a rest break, there was no record of this practice having been agreed by the respondent. The Tribunal was invited to accept Ms Booth's opinion that the reason for the treatment of the claimants was not their part time status.

42. In terms of the WTR claims, Mr O'Neill confirmed the respondent's concession that there had been a breach of the requirement to provide a rest break, but invited the Tribunal to make a nil award of compensation and submitted that that this was not a flagrant breach where a rest break was repeatedly requested and refused. As an alternative, any award should be restricted to the low hundreds of pounds.

43. In relation to the PTWR claims, the respondent conceded that certain of the claimants' colleagues work fewer hours than they are paid. In relation to Mr Palmer, Mr O'Neill invited the Tribunal to bear in mind that he was made aware of the difference between his shifts before he commenced in his role.

44. Mr O'Neill made reference to McMenemy v Capita Business Services [2007] CSIH 25 as authority for the proposition that any less favourable treatment must be solely because of the part time status of the claimant.

45. The Tribunal was invited to accept that the reason why Mr Palmer was not paid for more hours than he actually worked, was because he was employed after a management decision that new recruits would work different rotas

following concerns raised as to inappropriate rota planning. In Mr Mitchell's case, the reason was said to be the fact that he works a single shift which is less likely to cause difficulty in fitting into a rota than colleagues working more hours. On that basis, the reason for any less favourable treatment has not been shown to be due solely to part-time status and therefore the treatment complained of did not need to be shown to be justified on objective grounds.

46. Mr O'Neill indicated that if objective justification was required then this was that 'to allow the claimants to work fewer hours than contracted to do work would be to introduce working practices which is inefficient or ineffective'.

47. If objective justification was required in relation to Mr Palmer, then the respondent pursued a legitimate aim, concerning the respondent addressing inefficient and inappropriate work practice that had not been agreed to by management.

48. Mr O'Neill submitted that if the Tribunal were not with him on this, then any compensation should be limited to losses for a period of 3 months prior to the claim.

Discussion and decision

Working Time Regulations claims

49. Regulation 12 states that where a worker's daily working time is more than six hours, he is entitled to a rest break.

50. Regulation 12(3) states that subject to the provisions of any applicable collective agreement or workforce agreement, the rest break should be an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

51. Regulation 30 allows a worker to present a complaint to an employment tribunal where his employer has refused to permit him to exercise his right to a rest break.

52. Regulation 30 (3) states that where an employment tribunal finds a complaint well-founded, the tribunal –

(a) Shall make a declaration to that effect, and

(b) May make an award of compensation to be paid by the employer to the worker.

53. Regulation 30(4) goes on to state that the amount of compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to –

(a) The employer's default in refusing to permit the worker to exercise his right, and

(b) Any loss sustained by the worker which is attributable to the matters complained of.

54. In the present cases, the breach of Regulation 12 is admitted. Therefore, the Tribunal makes a declaration to that effect. When considering whether any compensation should be awarded to either claimant, the Tribunal considered the claimants' circumstances separately, noting that their length of service in their roles and therefore their experience of the treatment complained of was quite different.

55. In the first instance the Tribunal noted that there were conflicting decisions of the EAT on the approach to be taken to rights to rest under the WTR. In Miles v Linkage Community Trust Ltd [2008] IRLR 602, the EAT held that a refusal of a rest break had to be a distinct act in response to a worker's attempt to exercise his or her right. In the present case, while the respondent had conceded that Regulation 12 had been breached, and did not put forward any arguments as to limit the time period over which a breach had occurred, the Tribunal still found it necessary to consider this position when considering the question of compensation.

56. In the Scottish Ambulance Service v Truslove UKEATS/0028/11 Lady Smith, in considering when time starts to run for a claim of a breach of the entitlement to daily rest, found that time ran from the date on which the rest was not afforded. In so doing, she rejected the suggestion that the employee was required to expressly request daily rest.

57. In Grange v Abellio London Ltd, a case concerning whether the employer had actually refused the claimant a rest break, the EAT was invited to follow the decision in Miles. However, Her Honour Judge Eady preferred the approach taken by Lady Smith in Truslove. In particular at paragraph 47, stating "That entitlement will be 'refused' by the employer if it puts into place working arrangements that fail to allow the taking of 20 minute rest breaks".

58. In the present case, the Tribunal prefers the approach taken in Grange. On that basis, the Tribunal approached the question of the period over which the breach had occurred as commencing when their employment commenced.

59. In the case of Mr Mitchell, the breach had been continuous through his employment until March 2020. This covered a period of around thirteen and a half years. In Mr Palmer's case, the relevant period was less than two years. That said, in relation to Mr Mitchell, the breach related to one shift per week, whereas in Mr Palmer's case, he worked 32 hours a week, or around four shifts a week.

60. The Tribunal also took into account that Mr Mitchell raised a grievance in relation to these matters in 2018, albeit the grievance was entitled 'Equal Pay claim'. The Tribunal had difficulty in understanding why Mr Mitchell's complaint was not dealt with at that time. It was clear from the response to the grievance by the respondent which acknowledged that the shift system was under review, that the respondent realised that the grievance was not an equal pay claim, at least in its entirety. Further the Tribunal was extremely surprised that there was no evidence to suggest that Mr Mitchell was ever contacted by the respondent about the second grievance he raised in 2019.

61. While it appeared to be suggested in submissions by the respondent that Mr Mitchell's trade union would have spoken to him about the approach the respondent was taking, there was no evidence led by the respondent in this regard. There was no correspondence to suggest that either of Mr Mitchell's grievances were treated in an appropriate manner which would be expected of a local authority. It was also suggested that Mr Mitchell ought to have raised the matter earlier given that he was a shop steward and therefore ought to

have known that he was entitled to a rest break. The Tribunal was not impressed by this suggestion. Indeed, the Tribunal would have expected the fact that the claimant was a shop steward would mean that the respondent would address any grievance raised by him in accordance with procedures and timeously.

62. The Tribunal also noted that Mr Palmer had raised a grievance but that this did not result in him receiving a rest break. The Tribunal accepted that the respondent dealt with Mr Palmer's grievance appropriately, although it did find it difficult to understand why, when the respondent ought to have been aware of the breach of the WTR, it did not take steps to address the breach.

63. The Tribunal also took into account the nature of the work the claimants carried out. This was not desk based or office work where the claimants could leave their workstations without consequence. The claimants were responsible for supervising individuals in respect of whom orders had been made by virtue of their involvement in the Criminal Justice system. The clients had to be supervised at all times. We took into account the unchallenged evidence that Mr Palmer said that he did not eat lunch during his shifts and felt frustrated and that Mr Mitchell felt forgotten about by the respondent.

64. The Tribunal concluded that an award of injury to feelings could not be made in the circumstances. The case of Santos Gomes v Higher Level Care 2018 ICR 1571, while having received criticism, is binding on this Tribunal.

65. However, the Tribunal did conclude that an award in respect of discomfort and distress could be made on the basis that the circumstances were similar to those in Grange. The Tribunal had no doubt that being unable to leave a workplace, which was according to the claimants mainly outdoors in parks and gardens, would at the very least cause the claimants discomfort. The claimants were not allowed an uninterrupted period away from their workplace and were required to supervise clients for 8 hours, which in the Tribunal's view would inevitably cause discomfort and a degree of distress.

66. The Tribunal noted that there was no financial loss caused to the claimants as a result of the breach. However, the claimants now receive a break for

which they are paid. The Tribunal therefore concluded that it would be just and equitable to make an award to each claimant on the basis that they system which is now in place had been in place throughout their employment.

67. In relation to Mr Mitchell, this can be calculated on the basis that he worked 692 shifts during that period and a 20-min break would result in gross pay of £4.83 per shift, a gross amount of £3335.44

68. In relation to Mr Palmer, this can be calculated as having worked 452 shifts at £4.83, a gross amount of £2183.16.

69. In addition, for the reasons outlined above, in particular the length of default, the failure of the respondent to address the matter when it was brought to their attention (which must have been 2017 at the latest) and the likely impact of the breach, the Tribunal makes an award in respect of discomfort and distress.

70. In the case of Mr Mitchell of £1500, and in the case of Mr Palmer £750.

Part time worker claims

71. The respondent accepted that both claimants were part time workers for the purposes of Regulation 2 of the PTWR. The respondent also accepted in submissions that the Mr Gartshore and Mr Saunders were comparable full-time workers.

72. In the first instance, it is necessary to identify the treatment complained of. Although the claimants' claims were mainly focussed on the difference in hourly rate of pay which arose as a result of the comparators working less hours than the hours they were paid for, it was clarified in submissions that there was an alternative position. The alternative position, to which no objection was made by the respondent, was that the claimants were required to work their full contractual hours, whereas the comparators were not required to work their full contractual hours, but were still paid for those hours. As was referred to a number of times in evidence by the claimants and Ms Booth, the comparators received 'compensatory rest pay'.

73. It appeared to the Tribunal that this was the correct way of looking at the comparison. The comparators did not in fact receive a higher hourly rate of pay, but were paid for hours which they were not required to work. While the financial benefit would remain the same, the claims were argued in terms of Regulation 5 (1)(a) of PTWR, in which the less favourable treatment has to relate to the terms of the contract. The comparators' contracts did not state that they were paid a higher hourly rate of pay, rather there was term implied into the contracts that the comparators did not have to work their full contractual hours.

74. While the Tribunal accepted that this was not an express term in the contracts of the comparators, it was a practice which had been in existence for a number of years. It had been incorporated into their contracts by virtue of custom and practice. The respondent gave evidence about the negotiations with the trade unions to introduce new rota arrangements which would be applicable to all staff employed in the same role. The Tribunal heard that these negotiations were ongoing.

Was the treatment less favourable?

75. Ms Booth accepted in her evidence that she could understand why the claimants would be aggrieved at the difference in treatment. In any event, the Tribunal concluded that it was clear that this treatment was less favourable when comparing the treatment of the claimants with that of their named comparators.

What was the reason for the treatment?

76. The Tribunal then went on to consider the reason for the treatment.

77. Regulation 5(2)(a) makes clear that there will only be less favourable treatment for the purposes of the PTWR if the treatment is on the ground that the worker is a part-time worker.

78. Regulation 8(6) states that it is for the employer to identity the ground for the less favourable treatment.

79. McMenemy, to which reference was made by the respondent, makes clear that for a breach of the PTWR to occur the reason for the less favourable treatment must be the sole reason for the treatment. While the EAT in England and Wales have found that the treatment need not be the sole reason (see for instance Sharma v Manchester City Council), the decision of the Court of Session in McMenemy is binding on this Tribunal. In any event the different approach in Scotland and England was of no significance in these cases.

80. The respondent's position in relation to Mr Mitchell is that the reason for the treatment is 'likely due to the fact that he works a single shift which is less likely to cause difficulty in fitting into a rota than colleagues working more hours.'

81. In relation to Mr Palmer, the reason is said to be that he was employed after a management decision that new recruits would work different rotas following concerns raised as to inappropriate rota planning.

82. Addressing the case of Mr Palmer first, the Tribunal accepted the reason put forward by the respondent for the treatment as being accurate. By the time Mr Palmer came to be employed, the respondent was aware of the issue concerning the rotas and that some staff were being paid for more hours than they worked. It was therefore a conscious decision taken by the respondent that all staff employed thereafter would be required to work their full hours. The Tribunal accepted the respondent's evidence that Mr Palmer was made aware of the situation and that the rotas were under review when he was employed. While the position in relation to Mr Palmer may be unfair (as conceded by Ms Booth), the Tribunal concluded that the sole reason for that unfairness was not Mr Palmer's part time worker status.

83. The position concerning Mr Mitchell was rather different. It was clear from the evidence of the respondent and submissions, that the respondent did not in fact know why Mr Mitchell was treated in the manner he was. The respondent's submissions were based on a hypothetical reason which was put forward in evidence by Ms Booth, who was not employed at the time the less favourable treatment commenced. It is therefore difficult for the

respondent to put forward a reason for the treatment, when their position appears to be that they did not know that there was differential treatment until the time of a review of the rotas in 2017 and only became aware that Mr Mitchell was treated less favourably after he brought it to their attention.

84. While in some circumstances, an ex post facto reason could be a valid reason which was not the claimant's part time status, the Tribunal could not accept that in the present case, the reason put forward by the respondent was a valid or genuine reason. There was simply no evidence to support the position advanced by the respondent.

85. The Tribunal preferred the reason put forward by Mr Mitchell himself, which was that as he only worked one shift of 8 hours, he was effectively forgotten about. Those responsible for arranging the rotas (and therefore for the disparity in requirements for working full contractual hours), appear to have given no thought to the position of Mr Mitchell as he only worked one shift. Indeed, the hypothetical reason for the treatment put forward by the respondent gives support to the Tribunal's conclusions in this regard. The fact that the claimant was the only person employed in the role who worked only one shift is the likely explanation as to why he was not afforded the 'compensatory rest pay' his named comparators received.

86. The Tribunal was therefore satisfied that the respondent could not put forward a cogent reason as to why Mr Mitchell was treated less favourably. Moreover, the Tribunal concluded on the basis of the evidence before it, including the evidence of Ms Booth, that the sole reason for the less favourable treatment was the claimant's part time status. He was the only employee working 8 hours a week, and while his hours may well fit neatly into one shift, it is the fact that he only worked on a part time basis which meant that no thought was given to him being included in the preferential treatment arrangements.

87. Having established less favourable treatment on the basis of Mr Mitchell's part time status, the Tribunal went on to consider whether that treatment was justified. The respondent's position was that the treatment was justified on the basis that to allow Mr Mitchell to work fewer hours than contracted to work

would introduce working practices which were inefficient or otherwise ineffective.

88. The Tribunal did not accept that this amounted to objective justification. The Tribunal was mindful that in considering whether less favourable treatment was objectively justified, it was necessary to consider, three matters. Was the treatment to achieve a legitimate business objective, was it necessary to achieve that objective, and was it an appropriate way of achieving that objective?

89. The Tribunal accepted that ensuring that working practices were efficient and or effective was a legitimate aim. However, the Tribunal did not accept that the less favourable treatment was necessary to achieve that objective. The practices were already in existence and had been in existence for some years. While the respondent's management, having discovered the practices when conducting a review could reasonably come to a view that the practices were not efficient, this did not require that Mr Mitchell be excluded from the practices. Mr Mitchell was being denied a benefit received by his full-time colleagues. He had been denied that benefit for a number of years before the difference in treatment was discovered by him. To continue to deny him that benefit without exploring whether there was a way in which he would not be treated less favourably than his full-time colleagues, was not a proportionate way of achieving that aim.

90. The Tribunal therefore found that the treatment was not objectively justified.

91. The Tribunal then went on to consider remedy for Mr Mitchell. The Tribunal accepted that compensation could not include an award for injury to feelings. The Tribunal also recognised that Mr Mitchell had not actually suffered any financial loss as a result of the treatment. However, the Tribunal accepted on the basis of the evidence before it, that had a similar practice been applied to his hours as had been applied to those of his comparators, he would have likely been entitled to at least thirty minutes 'compensatory rest pay' for each shift he worked. The Tribunal could not accept the respondent's submission that any compensation be limited to the period of three months prior to the

lodging of Mr Mitchell's claim. No authority was produced to substantiate this argument.

92. Regulation 8(9) states that the amount of compensation awarded is what the tribunal considers just and equitable in all the circumstances, having regard to the infringement to which the complaint relates and any loss attributable.

93. The Tribunal therefore concluded that it would have been just and equitable to make an award of compensation to Mr Mitchell of the equivalent of thirty minutes' gross pay for each shift he worked, which is calculated as 715 shifts at £7.24 per shift giving a total award of £5176.60. However, the Tribunal was also mindful that it had awarded Mr Mitchell compensation in relation to the failure of the respondent to provide him with a 20 minute break in terms of the WTR. The Tribunal concluded that to award the full amount of £5176.60 would be to effectively compensate Mr Mitchell for a paid break of 50 minutes per shift. Therefore, the Tribunal concluded that it would be just and equitable to make an award of £1841.16 to Mr Mitchell in relation to his claim under the PTWR (being £5176.60 minus £3335.44).

Employment Judge: Amanda Jones
Date of Judgment: 09 September 2020
Entered in register: 11 September 2020
and copied to parties