



THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr W Augustine

Data Cars Limited

DECISION ON APPLICATION FOR RECONSIDERATION OF JUDGMENT ON CLAIM UNDER PART TIME WORKER REGULATIONS

1. I refer to my Judgment dated 18 January 2022 in which I dismissed the claimant's claim under regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 that he had been treated less favourably than a comparable full-time worker. I have considered carefully the Claimant's application for reconsideration dated 13 February 2022 together with the comments of the Respondent dated 14 February 2022 and the Claimant's further representations dated 17 February 2022.
2. The submissions made by the Claimant are very lengthy. It is hard to discern within them the legal issues he wishes to raise because he has also sought extensively both to reiterate evidence that he has provided earlier to the tribunal and to introduce new evidence. I have done my best to identify the key legal points and respond to them.
3. First I have noted with interest the Claimant's comments upon the recent Court of Appeal decision in **Smith v Pimlico Plumbers Limited** [2022] EWCA Civ 70. I note the court's conclusion that where an employer had wrongly classified a worker as self-employed, the worker should be able to claim

payment for unpaid leave taken from the start of his employment.

4. I agree that in the present claim, the Claimant was also wrongly classified as self-employed. However it is important to remember that the **Smith** case concerned the right to take paid annual leave. It was not a claim for detriment or unfavourable treatment. Therefore the issue of causation (and the requirement to examine the intentions of the employer) was of less relevance.

5. I accept that the Part Time Worker Regulations 2000 should be interpreted in accordance with the aims and objectives of the Council Directive 97/81/EC concerning the Framework Agreement on Part-Time Work.

6. This states at Clause 4:

7. 'Principle of non-discrimination

*1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely **because** they work part time unless different treatment is justified on objective grounds.*

2. Where appropriate, the principle of pro rata temporis shall apply'

8. I have emphasised the word 'because'.

9. The wording is very similar to that found in Regulation 5 of the Part Time Worker Regulations. It has not been argued that the Regulations fail to implement the Directive properly.

10. This brings us to the heart of the Claimant's case. He argues that because he was wrongly classified as self-employed, his claim for less favourable treatment under the Part Time Worker Regulations should succeed. He draws on European law and especially the provisions of the Directive to support that argument.

11. I have accepted that the Claimant was charged a circuit fee because he was treated as self-employed. I have also accepted that he met the definition of a part-time worker (although reading his application one might be forgiven for thinking that I

had found against him on this point, given his extensive submissions on the appropriate comparator).

12. In addition I found that the imposition of the circuit fee amounted to less favourable treatment once the 'pro rata' principle had been applied.
13. However as the case law makes clear it is then necessary to consider *why* the employee had been treated less favourably. It is this final part of the test that I have found was not met.
14. This is tacitly acknowledged by the Claimant where he says that there was less favourable treatment as a part time worker '*all because R had wrongly categorised me as self-employed*'.
15. If the less favourable treatment arose *because* of his classification as a self-employed person, it is hard to see how such treatment can be *on the ground* that he was a part time worker.
16. I have considered the Claimant's argument that his claim is not about an action (the charging of the circuit fee) but about a failure to act (the failure to introduce a reduced circuit fee). Even if the claim of unfavourable treatment is categorised as a failure to introduce a reduced circuit fee for part time workers, I would not have found that this was *because* the worker was working fewer hours.
17. I accept that this meant that a driver working fewer hours would be contributing a greater proportion of their earnings to the payment of the circuit fee. I do not accept however that such a result is inconsistent with the aims of the Directive. It will be necessary for all part time workers to consider whether the economics of the arrangement make it worth their while to accept part time work. That does not automatically lead to a finding of unfavourable treatment.
18. The Claimant points out that the tribunal held that he was in fact both a worker and an employee. He describes his categorisation as a self-employed person as 'unlawful'. He argues that the Respondent should not be able to rely upon its own unlawful conduct to avoid liability under the Part Time Worker Regulations 2000.

19. The tribunal's finding that the Claimant was in law a worker/employee of the Respondent has led to him succeeding in relation to a number of his statutory claims, such as those for national minimum wage, holiday pay and notice pay.
20. Nevertheless this claim arises under a different set of regulations and requires the Claimant to demonstrate that he was subjected to a detriment *because* of his part time status. Unlike his claims for NMW and holiday pay, he does not succeed on this point simply by establishing that he had been misclassified.
21. It is worth noting that Regulation 5 is worded in a similar way to section 13 of the Equality Act, ie the provision relating to direct discrimination. As I understand the Claimant's argument, he is really saying that the provision is indirectly discriminatory: the charging of the circuit fee, although applied to all drivers, has a particular disadvantage for those who are working fewer hours. Such an argument is more akin to a claim under section 19 of the Equality Act 2010, but the 2000 Regulations are not structured in that way. Like a claim for direct discrimination the Claimant must show that the less favourable treatment was 'because of' his part time status and the claim does not automatically succeed because he was treated as self-employed.
22. I conclude that there is no basis for reconsidering my earlier judgment on the claim under the Part-time Worker Regulations.
23. Finally I refuse the application for reconsideration of my decision not to permit the Claimant to bring a claim for race discrimination, over four years since he lodged his claim and after all evidence in relation to the Claimant's other claims had concluded. It would not be in the interests of justice to permit the amendment. It would require the listing of an additional hearing and the introduction of a substantial amount of additional evidence. It has not been raised previously. It is important that litigation does not continue endlessly. There is a need for finality at some point. That point has now been reached.

24. I therefore refuse the application for reconsideration on the grounds that there is no prospect of the decision being varied or revoked.

Employment Judge Siddall
Date: 2 March 2022.