EMPLOYMENT TRIBUNALS

Claimants: 1. Mr M Sidat
2. Mr A Sidat

Respondent: Royal Mail Group Limited

Heard at: Leeds **On:** 1, 6, 8, 9 and 13 March 2023

Before: Employment Judge Jones
Mr G Harker
Mr J Howarth

REPRESENTATION:

Claimants: The first claimant
Respondent: Mr A Serr, counsel

JUDGMENT

The claims for less favourable treatment of part-time workers are dismissed.

REASONS

1. The findings of the Tribunal are unanimous.

Introduction

2. These are claims under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the regulations). They concern a change to the claimants' rota whereby they had to work Monday, Wednesday, Thursday and Friday as opposed to Tuesday, Wednesday, Thursday and Friday; the change was to substitute Mondays for Tuesdays. The complaint is that full-time workers did not have to change their shifts in this way.

3. The case has been subject to four preliminary hearings and has generated much correspondence.

The Issues

4. It was accepted that there were 30 comparators, all but one of whom were full-time workers with whom comparisons could be made under the regulations. That left the following issues for the Tribunal to resolve:

4.1 Was Mr Ring an appropriate full-time comparator?

4.2 Were the claimants subject to a detriment by way of any act or deliberate failure to act of the respondent with respect to removing the Tuesday from the four-day working week and substituting it with Monday?

4.2 If so, was that detriment less favourable treatment than the respondent treated a comparable full-time worker?

4.3 If so, was the treatment on the ground the claimants were part-time workers?

4.4 Is so, was the treatment not justified on objective grounds?

The Evidence

5. The first claimant gave evidence. The respondent called Mr Simon Rickaby, Productions Control Manager and Ms Julia Armstrong, Plant Manager.

6. The respondent had served a witness statement from Mr Joshua Marsden, Early Shift Lead Manager. Mr Serr decided it was unnecessary to call him to give evidence. The claimants were concerned about this. The tribunal explained it was for the respondent to decide which witnesses it called. The claimants could seek permission to call Mr Marsden themselves having closed their case but under the rules of evidence, if they called him, they would have had to accept his evidence as contained in his witness statement. They would not be allowed to challenge it in cross examination. That course would not have assisted their case, because they did not accept much of what Mr Marsden was saying. They made no application to call Mr Marsden.

7. The parties produced a bundle of documents running to 327 pages. Some further documents were produced during the hearing. A number were in response to concerns the tribunal had expressed at the commencement of the hearing about a failure in the witness statements and documents to focus upon the full-time comparators, who they were and what they did. The nature of such a case, like equal pay and fixed-time worker cases, necessitated identification of actual rather than hypothetical comparators. The respondent produced two additional tables of the workers of the early shift, before and after the reorganisation. The claimants prepared a handwritten list of the full-time and part-time workers with respect to the duties they undertook after the reorganisation and a second list with their proposals for how the shifts should have had the hours allocated which would have retained all part-time workers on the Tuesday shift. The tribunal allowed the parties to adduce these documents because both wished the case to proceed and did not wish for the case to be postponed.

8. In an email sent after the third day of the hearing, the first claimant requested the respondent to produce documents which had been alluded to in his cross examination of Mr Rickaby. Alternatively, he invited the tribunal to make an order

that the respondent produce those documents. A number of documents had been mentioned in cross examination. Applications for disclosure made part way through a hearing must be evaluated by reference to the overriding objective and are not accepted as a matter of course. That is because the evidence in the witness statements has been prepared on the documents disclosed. The admission of additional documents part way through a hearing causes delay and risks derailing the timetable and conclusion of the case. On the morning of the fourth day of the hearing the tribunal informed the claimants that any application for documents would have to be in writing and specify which documents were requested and to what issue they were relevant. An application which simply refers to all documents mentioned by the witness was not sufficient to enable the tribunal to rule on it, nor inform the respondent what it was required to find and disclose. No such written application was received.

9. Cross examining witnesses is usually unfamiliar to unrepresented parties. It is the duty of the tribunal to assist, insofar as it is necessary, to put their case. The tribunal attempted to clarify the questions which the claimant wished to make. The first claimant raised an objection that the Employment Judge was not allowing him to develop his points and so the tribunal gave the first claimant a number of opportunities to question the witness without assistance. This led to difficulties; over five minutes of discursive comment from the first claimant with disobliging, unjustified accusations or argument to which the witnesses could not discern a question or reply. The tribunal reverted to requiring the questions to be put clearly, preventing intimidation and interruption of the witnesses and explaining the questions when necessary.

10. Because of the need to ensure the claim was managed proportionately to the issues the tribunal ruled that a number of questions the first claimant tried to put were irrelevant or inappropriate. The claimant expressed concern that he had not been allowed sufficient time to cross-examine Mr Rickaby, having revised his initial time estimate that all three witnesses would be questioned within one day, to a request of one day for each witness. The first claimant did not accept that he had been allowed 1½ days to question Mr Rickaby, from 12:05pm on the second day to 4.30pm on the third.

11. It was not appropriate or necessary to allow one day for the cross examination of Ms Armstrong. She had dealt with the appeal to the grievance. It was Mr Rickaby, not Ms Armstrong, who had devised the rotas about which objection was taken.

Application for a remote or hybrid hearing

12. By email sent to the Tribunal after the second day of the hearing, the claimant made an application to convert the hearing from attended to remote. The Employment Judge ruled that it was too late to convert the hearing for the next date, the following morning, but the application in respect of the remaining two days would be considered by the tribunal on the morning of the third day of the hearing.

13. The first claimant then asked the tribunal to convert the hearing, although it was not entirely clear which preference he had in respect of an entirely remote hearing, a hybrid hearing or a hearing which facilitated live streaming of the proceedings to his family and friends who he said wished to observe them. The first

claimant said it was for the tribunal to decide which option was best but, whatever option the tribunal chose, he did not want it to cause any delay to the conclusion of the case.

14. The respondent had applied for the hearing to be conducted remotely or by way of a hybrid hearing in January 2023 but the claimants had opposed that application. Employment Judge Davies had refused the application and ordered that the hearing should be attended. The change of heart of the claimants had arisen following their experience of a remote hearing in the Employment Appeal Tribunal on the afternoon of 28 February 2023.

15. Given that an order had been made in respect of the form the proceedings would take by Judge Davies, it was necessary that this tribunal consider whether there had been a material change in circumstances to vary the previous order. We were not satisfied there had been. The claimants' new attitude to video hearings was not a satisfactory reason to change course. The management of evidence of witnesses, parties attending from a variety of different online sources and consideration of documentation, some of which was only in hardcopy form militated against converting the hearing to a remote one and was of a very different nature to a remote hearing on appeal of an issue under rule 3(10) where only the claimants and judge attended and considered a point of law.

16. Furthermore, having regard to section 85A of the Courts Act 2003 and the Remote Observation and Recording (Courts and Tribunals) Regulations 2022, the tribunal considered that it was not permissible to provide live streaming of the proceedings to the public under section 85A(3)(a) because the premises were not authorised for that purpose by the Lord Chancellor under section 85A(2) and to have facilitated access to the public under section 85A(3)(b) would have occasioned further administrative delay whereby the Tribunal would have to identify the persons who wished to observe, satisfy itself that the relevant statutory criteria had been met for the purpose of providing the direction to enable remote observation and ensure the administration had resources to facilitate and monitor the proceedings. Given that this was a public hearing and any individual could attend, having regard to all these matters it was not in the interests of justice to provide remote access.

The Law

17. By regulation 5 of the PTW(LFT)R

> *(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.*
>
> *(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.*

18. By regulation1:

> *"pro rata 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 or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker;*

19. By regulation 8(6):

> *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.*

20. There is conflicting authority at the level of the EAT as to whether the reason for the treatment must be solely on the ground of the worker's part-time status[1], one of two or more reasons[2] or that it should be an effective and significant ground[3]. The Inner Court of Session, which is not binding authority in England and Wales but highly persuasive having equivalent status of the Court of Appeal, ruled the test was 'solely' on the ground of part-time status[4]. It has not been necessary to confront these points, because on our findings we were satisfied that the reasons were not in any way because of the part-time status of the claimants. The question of whether something is on the grounds of part-time status is not a but for test, but a reason why test[5].

The background/facts

21. The claimants commenced employment with the respondent in 1995 and 1996 respectively. Albeit there is a dispute as to the precise start dates, they are not material to the issues in this case. The claimants worked at the Yorkshire Distribution Centre (YDC). The job title, in the terms and conditions provided, was 'postman'.

22. In July 2021 the respondent undertook a national restructure of its delivery centres and offices. This addressed a change in business focus from letters to parcels. It fell under the auspices of the Key Principles Framework Agreement – The Pathway to Change 2001, an approach which had been agreed nationally between the respondent and the recognised trade union, the CWU. Every regional delivery or distribution centre undertook an assessment to realign duties to deliver the service most efficiently.

23. At the YDC this assessment was undertaken by Mr Rickaby and the local trade union representatives of the CWU. It was called the resourcing realignment process. Pursuant to national collective agreements, no change in duties could take place before an agreement had been made between the respondent and the CWU locally.

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[1] *Gibson v Scottish Ambulance Service EATS 0052/04. Engel v Ministry of Justice [2017] ICR 277*
[2] *Sharma v Manchester City Council [2008] ICR 623*
[3] *Ministry of Justice v Blackford [2018] IRLR 688.*
[4] *McMenemy v Capita Business Services [2007] IRLR] 400.*
[5] *McMenemy v Capita Business Services [2007] IRLR] 400, Gibson v Scottish Ambulance Service EATS 0052/04.*

24. The analysis over the previous year revealed that there was less activity in processing parcels on a Tuesday. This was explicable by reason of the 48-hour tracking of mail returns. Saturday is only a half day, on mornings and so there would be a drop off in such activity on the Tuesday, which would then pick up later in the day.

25. Mr Rickaby said that there was a requirement for 239 hours on the early shift in the YDC. In the reformulated rotas which he and the trade union representatives produced, there was a reduction in the number of working hours of 96. These were to take effect on 26 July 2021.

26. Two proposed duty sets were drawn up and presented to the membership of the CWU to vote upon. The union recommended the first and that was approved by ballot. Both claimants are members of the union.

27. The consequence to the claimants of that selection was that their weekly work routine changed, from 28 hours over the weekdays Tuesday, Wednesday, Thursday and Friday, to the same number of hours on Monday, Wednesday Thursday and Friday. Tuesday was no longer a working day for them. Monday became one.

28. The claimants submitted a grievance about this. It was not upheld at the first informal stage or at the formal grievance considered by Mr Marsden or the appeal considered by Ms Armstrong. Their views are not determinative of the issues we have to consider. The parties know what they were and so we need not include them in these reasons.

Analysis

29. The first question we must decide is whether the claimants were subjected to a detriment. For the purpose of the Equality Act 2010 (EqA) that has been held to mean something which a reasonable worker might consider to be a disadvantage but would not extend to an unjustified sense of grievance[6].

30. Mr Serr submitted it had a narrower meaning for the regulations. He said the regulations were made to implement a different European Directive which was to achieve parity of treatment in working conditions focussing on such things as pay, holidays, pensions and other entitlements which are quantifiable in financial terms and can be subject to the pro rata principle, a feature which he says is fundamental to their application. He drew attention to the Guidance of the Department for Business, Energy and Industrial Strategy which provides a list to which the regulations apply. These have a similarity to the entitlements identified in the Agency Workers Regulations 2010. Both legislative provisions exclude any compensatory claim for injury to feelings. He says that reflects the intention to circumscribe the rights intended between full-time and part-time workers.

31. The term detriment is not defined in the regulations nor been considered in any appellate authority. We have concluded it has the same meaning as in the EqA and not the narrower definition as contended for. Firstly, it would be reasonable to infer that the legislature intended that a term it used in other provisions governing

[6] *Ministry of Defence v Jeremiah [1980] QB 87, Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*.

workers' rights to have the same meaning unless expressly stated otherwise. Secondly, contractual terms are addressed in regulation 5(1)(a). A part-time worker has the right not to be treated less favourably than a full-time worker as regards the terms of his contract. That is likely to relate to the rights to which Mr Serr refers and which are included in the list in the Guidance of BEIS. The language of regulation 5(2)(b) extends the protection of a part-time worker beyond that. It prevents less favourable treatment for being subject to any other detriment by an act or deliberate failure to act of his employer. The language of this provision extends the protection beyond contractual rights. Thirdly, the pro rata principle is not determinative of all questions about less favourable treatment. Regulation 5(3), which requires consideration of the pro rata principle, specifically anticipates that there may be circumstances in which the pro rata principle will be 'inapplicable'. If Mr Serr were correct that detriment were restricted to rights to which the pro rata principle could be applied, regulation 5(3) would not have contained this exception. Fourthly, although no compensation may be recoverable for a detriment which does not lead to financial disadvantage by way of injury to feelings, the complainant may nevertheless receive a declaration as to his rights and a recommendation that the employer take such reasonable steps to obviate or reduce the disadvantage, under regulation 8(7). These orders may be valuable to a claimant who has suffered no financial loss. The fact such a claimant cannot also receive compensation for injury to feelings is not a sound basis to limit the meaning of detriment as proposed. Sixthly in *Hendrickson Europe Ltd v Pipe EAT 0272/02* the EAT held that to apply pressure to a part-time worker to become full-time to avoid being selected for redundancy fell within the term detriment. This does not fall within the categories in the BEIS Guidance.

32. Deciding whether there was a detriment and, if so, what it was, is not straightforward. The claimants said it was a variety of things. The first claimant said that it was unfair that full-timers could work on a Tuesday and he could not, that was unfair and therefore a detriment. He said that the terms of his contract had been unilaterally changed and that by reneging on the agreement for his part-time hours that was manifestly unfair and a detriment. In the course of his evidence the first claimant said by working on a Monday rather than a Tuesday, he no longer had three days off consecutively which included the weekend. The third day off was now between two working days. At the preliminary hearing before Employment Judge O'Neill, the disadvantage was identified as being removed from the Tuesday which was the quietest day as well as the breach of contract. No reference was made to the loss of three consecutive days then, nor in the claimants' closing written submission.

33. During the grievance and appeal the claimants did not say that they had any particular reasons why they could not work the Monday rather than the Tuesday. They were aggrieved that the change was imposed upon them because a similar imposition had not applied to the majority of early shift workers who continued to work on Tuesdays who were full-timers.

34. Mr Serr pointed out that the claimants had been offered the opportunity of working Wednesdays to Saturdays in the grievance process with the consequence they would have three uninterrupted rest days on Sundays to Tuesday. That was unattractive to the first claimant because he had children, one of school age and he wished to spend time with his family when they were available at the weekend. He also said that one of his children had a disability and that he assisted in the care of

his children. He did not suggest that there is anything particular about Monday rather than Tuesday which required his time out of work.

35. The proposition of the claimants, that it is a detriment if a full-timer can do it but a part-timer cannot, is not sound. The legislation requires a part-time worker not to be treated less favourably than a full-timer by being subject to any detriment by any act or deliberate failure to act of the employer. Less favourable treatment and detriment are separate considerations. Workers may be required to do many different things, but the difference of itself does not constitute a detriment. If the claimants were correct, there would be no need to include the term detriment at all, but the legislation could simply have prohibited different treatment of full-timers and part-timers.

36. The claimants identified no problem, difficulty, personal commitment or other constraint in working on a Monday rather than a Tuesday, of itself. That is clear from what was said in the grievance and appeal hearings, the witness statement and cross examination. An analysis of the work by reference to difficulty on one day as opposed to another was never raised in the evidence. There was considerable cross examination about whether the demand for work on a Tuesday had really reduced to the extent it was a quieter day, or the extent of that, but no suggestion that translated into an easy ride for those lucky enough to draw Tuesday as a working day.

37. In those circumstances the requirement to work on Monday rather than a Tuesday, of itself, would not be a detriment. A reasonable worker would not consider it disadvantageous to work on one weekday rather than another, unless he or she had particular reasons to prefer the one to the other.

38. One issue which had significant prominence in the case argued by the first claimant was the alleged breach of contract by the respondent in imposing this change. We would accept that a contractual breach could constitute a detriment. It is therefore necessary to consider whether there has been a contractual breach, even though the claim for damages for breach of contract is not one we can consider because the employment relationship has not terminated, which resulted in that particular claim being struck out.

39. The principal disadvantage the claimants advanced was the breach of contract. This was the complaint identified in the claim form and one of the two matters raised at the preliminary hearing. There was a variation to the contractual terms when their hours reduced from 41½ to 28. There are two letters concerning this. The first is dated 15 June 2006 from the RDC manager to the first claimant. She stated, "*as you are aware the solution we have discussed reduces your hours to 28 hours a week with the following attendance times… Monday – no attendance, Tuesday – 06.00 to 14.00, Wednesday – 06.00 – 14.00, Thursday 06.00 – 14.00, Friday 06.00 – 10 00."* The first claimant signed the letter to signify his agreement. Ms Hawksley stated there may be some adjustments around Bank holiday leave due to Monday becoming a non-working day and she stated the arrangement would be reviewed after one month. The other letter, dated 31 July 2006 from Mr Zhou, of CSA Reward and Recognition People and Organisational Development Services to the first claimant, was headed *Variation to Contract of Employment.* It stated that with effect from 20 June 2006 the first claimant's terms and conditions were to be varied due to a temporary change from full-time to part-time hours. He stated his leave would be calculated on a pro rata basis.

40. Although we have not seen a similar written agreement with respect to the second claimant, we accept his position was the same. The claimants argue that this variation precluded the respondent from changing the working days as a substitute Monday for Tuesday on 26 July 2021.

41. In reply, the respondent draws attention to paragraph 9 of the Statement of Terms and Conditions of Employment, Standard Contract, which the first claimant had signed on 11 July 1996. That states, "*The Royal Mail has the responsibility of providing a public service. This puts a special obligation on all employees to play their part in maintaining the kind of service which the public has a right to expect. For this reason, it is a condition of your employment that you are liable to work overtime and to attend at varying times on weekdays, Sundays and Post Office, Bank and Public Holidays as the needs of the service demand*".

42. For the first claimant to be correct, the variation which stipulated the days of the working week had supplanted paragraph 9 of the Standard Contract he had signed in 1996. We do not accept that. It is clear that the original Terms and Conditions continued to apply in respect of the broad range of entitlements and obligations which both parties would objectively have considered to bind them. There is nothing in the letter of Ms Hawksley to suggest that any particular part of the Terms and Conditions had been removed. Construing a letter of variation and the Standard Contracts together, we are satisfied that the common intention of the parties was that the pattern of 28 hours of work on Tuesdays to Fridays was to commence on 20 June 2006, but there was no guarantee it was set in stone. It would still be subject to paragraph 9 as the needs of the service demanded. It would have been a peculiar arrangement if by facilitating reduced hours the respondent had precluded itself from including the flexibility required to meet its service demand. There is nothing in writing or verbally to suggest that it would have been understood, objectively, that this agreement would place the claimants in a special position in that respect compared to other workers. We reject the suggestion that the respondent was in breach of contract upon implementing the changes with respect to the claimants in July 2021. Their working days were being altered to meet service demand, in accordance with paragraph 9. Their working hours remained the same.

43. The first claimant accused Ms Armstrong of having tampered with the evidence by misquoting paragraph 9 of the contract in her witness statement. That omits the words "*on weekdays, Sundays and Post Office, Bank and Public holidays"* but reads "*are liable to work overtime and attend at varying times as the needs of the service demands"*. Ms Armstrong agreed that her witness statement did not fully reflect the contents of paragraph 9 but rejected the accusation of tampering with evidence or flouting the law. In the context of the dispute in this case, the words which had been omitted made no difference at all to what we had to decide. It was clearly an error, but not one designed to mislead or misrepresent what the contract said.

44. Given that there was no contractual breach in varying the day of the week on which the claimants worked to service demand, the accusation that there was a detriment in breaching this agreement fails.

45. That leaves one remaining disadvantage. By not being allowed to work on the Tuesdays the claimants were deprived of three continuous days off, which included the weekend. Their work pattern became one of two consecutive days off

rather than three, with the other day off sandwiched between two working days. Given that the claimants had arranged their lives with this working pattern since June 2006, for 15 years, the disruption to their routine to that extent could be regarded as a disadvantage to a reasonable worker. It is not a particularly serious detriment, in the absence of any particular commitments on the substituted workday, but it is sufficient.

46. The claimants say that there was no need to remove their Tuesday from the rota because there was enough work for all full-timers and part-timers on the Tuesday. It was not clear whether they disputed that there was any less work on a Tuesday, which the first claimant challenged in cross examination, or whether it was accepted that Tuesday was the quietest day, but not as quiet as the respondent was suggesting. We concluded the claimants' argument was the latter, because the first claimant accepted that Tuesday was a quiet day in cross examination.

47. 30 comparators were identified; 15 at the preliminary hearing before Employment Judge O'Neill on 28 June 2022 and 15 in further particulars provided on 30 June 2022 by the claimants pursuant to an order of Judge O'Neill. The handwritten documents provided by the claimants on the second day of the hearing illustrated which of the rotas the workers had been undertaking, although not all their comparators were included such as Mr Hogg. Mr Bentley was later mentioned as having been accidentally omitted. The written list provided by the respondent included all comparators and others but, unlike the claimants' list, did not identify to which duty rosters the workers were allocated. This made the analysis difficult because the information about comparators was incomplete. Mr Serr submitted that all full-timers but Mr Ring had worked 5 days, but his were compressed into 4 days. In fact three other workers had compressed hours, those in duty E2. Whilst this oversight was understandable, it reflected the shortcomings in the evidence.

48. There are 15 sets of duty rotas which were designed by Mr Rigby and the CWU which were approved by a vote of the membership and took effect on 26 July 2021. 18 of the full-time comparators were placed on Duty E1. They started at 6 am. All had their hours reduced to finish at 11am. Most had previously finished at 2pm and a number at 4pm so they saw a reduction of their working shift on a Tuesday of 3 or 5 hours. The first claimant initially suggested this was simply to give effect to a national agreement to reduce full-time working from 38 hours to 37 hours. That would account for 1 hour of the 3 or 5, but not the whole. These 18 workers continued to work the same days, that is the five weekdays, and they had two days off, Saturdays and Sundays. The majority had worked for 7 hours on a Thursday and Friday, but this was extended to 8 on each day to make up for the 2 hours reduced from their Tuesday shift. In respect of those who had their hours reduced by 5, the other 2 hours were allocated to other weekdays.

49. 3 of the comparators became reserves and had their hours reduced to 5 from 8, similarly to the 18 others.

50. Were the claimants less favourably treated than these comparators? On a simplistic analysis, these comparators continued to work Tuesdays but the claimants did not. If that were the proper comparison, the claimants would have been treated less favourably as part-time workers to the full-time workers. But we have found not working Tuesday of itself is not a detriment. For the reasons we have identified above, it was the consequence of not working the Tuesday that caused the

claimants to have to interrupt their four working days with a non-working day and the loss of three consecutive non-working days which included the weekends, which was the detriment. The loss of the Tuesday as a working day of itself would not be less favourable treatment.

51. In respect of the detriment we have identified the difficulty is comparing like with like. The full-time comparators lost at least three hours work on a Tuesday but not all of their work on a Tuesday. The claimants lost all their work on a Tuesday. But the detriment, which is the interruption of one of the three consecutive non-working days in the claimants' working week, was one which could never apply to these full-timers. They only ever had two non-working days per week. They did not have three non-working days which could have been split into two consecutive days off and one to interpose between two working days. There could be no less favourable treatment on this comparison. The claimants lost something the full-timers never had to lose.

52. It is not a valid comparison to suggest that their two non-working days should have been interrupted. The claimants continued to have two non-working days consecutively as did the full-time workers. There was a local level collective agreement that all workers should enjoy two consecutive non-working days. Before the realignment all workers did. After the realignment all workers did. There were no early shifts on Sundays, save for the gatekeeper. The comparators would have to work on a Tuesday if they were to have two consecutive days off. We do not consider, therefore, that the claimants were treated less favourably than these comparators having regard to the detriment which arises.

53. Even if they were, this would not have been on the ground the claimants were part-time workers. The decision that these full-time workers would continue to work Tuesdays was a consequence of the fact that there were not sufficient days available in the week for them to work otherwise. Early shift on a Sunday was not worked. That meant providing 5 days of work and two consecutive days off. Tuesday would always have to be one of the working days.

54. 2 of the comparators were on Duty E3, Blair and Hawksby. Their duties were Tuesday to Saturday, 6.00 to 14.00 each day. As they worked 5 days, the same analysis as arises. The claimants had not been treated less favourably than them and even had they established they were, it was not because they were part-time workers. It is noteworthy that these comparators worked a Saturday, which was objectionable to the claimants.

55. That leaves 3 comparators on duty E2. They were full-time workers whose hours were compressed into 4 days; Mondays, 6.00 to 17.00, Tuesday 6.00 to 16.00, Wednesdays 6.00 to 14.00 and Thursdays 6.00 to 14.00. These were the most suitable comparators. The claimants were less favourably treated to them. These comparators enjoyed the three consecutive days off which included the weekends, but the claimants, as part-timers, no longer did. In the alternative set of duties which had been placed before the union membership but rejected, these workers would have worked Wednesday to Saturday and the claimants would have retained their former working pattern. When Mr Rickaby was asked by the Judge why these three had not been removed from duties on Tuesdays because of the reduced needs, he said it had been an oversight. Later, however, he gave a different account. He explained that he and the CWU had drawn up the first set of duties, that which the

membership had approved, with a view to providing the preferred shifts to those with the longest service. The 3 workers on Duty E2 all had longer service than the claimants. This was not true of only full-time workers. Mr Mortimer was on duty Pt 5, which was Monday to Thursday 6.00 to 14.00. He was a part-time worker. That duty was designed because he had longer service than the claimants. We accepted the second explanation of Mr Rickaby that it was service and not an oversight which led to this outcome.

56. Although the claimants were treated less favourably than these comparators, by having their Tuesday shift removed and replaced with a non-working day, the reason was not because they were part-time workers. It was because they did not have as long service as the others on Duty E2 or Mr Mortimer, a part time worker, on Duty Pt 5.

57. In their closing written submissions, the claimants challenged the issue about seniority. They said that many of the full-timers who still worked Tuesday were senior to them.

58. We reject that, because it was not the evidence of Mr Rickaby that every work allocation was designed by reference to seniority. There were 239 hours to allocate on the early shift under then new realignment. Once the hours for those who worked 5 days had been allocated, which was not referable to seniority but the difficulty of providing 2 consecutive days off and a 5 day working week which did not include Sundays, preference was then given to seniority, with a recognition that generally staff preferred not to work at the weekend and enjoyed an earlier finish on Fridays. That is where Mr Mortimer, a part-timer and those in E2, benefitted.

59. In closing argument, it emerged that another part-timer, Mr Wayne Scarlett, had been allocated such a shift of 36 hours, at Pt 6. He had later chosen to work nights and Mr Bentley was given the role. He was a full-timer and an extra hour on that shift was added to accommodate him. The tables provided by the respondent indicated Bentley had moved from a similar shift to those who moved on duty E1 to Pt 6, but Pt 6 became full-time at 37 hours. There was no evidence on the timing of these changes. However, it is to be noted that Mr Bentley has greater seniority to the claimants and that case would be subject to the same explanation as those on duty E2.

60. In their written submission the claimants disputed the question about priority being given to seniority. It was said the part-timer Mr Redican should have retained his work on a Tuesday were that the case as he was senior to those in E2. No questions were put to Mr Rickaby about Mr Redican, but his situation was unusual. He had been working 20 hours over 5 days which were changed to 4 days, Monday, Wednesday, Thursday and Friday. Given the potential advantages to him of having an extra day off, he not previously having had 3 days off like the claimants, it was not a good example to contradict the overall picture that the CWU and Mr Ricakby had devised a system which favoured those with seniority of service regardless of whether they were full or part-time.

61. With respect to the full-time comparators Mr Stuart Ring and Mr Norman Hogg, they discharged the duties of gatekeeper. Mr Ring's duties fell within Duty E G1, Monday to Wednesday 6 to 15.30 and Thursday 6.00 to 14.30. Mr Hogg works Friday to Sunday.

62. The claimants make no mention of Mr Hogg in their handwritten list. He seems to have fallen off the radar as a comparator. In closing submissions, Mr Serr challenged whether Mr Ring was an appropriate comparator. There was a dearth of evidence on this question with respect to making a ruling under regulation 2 and neither party made submissions by reference to those provisions. We are prepared to assume both he and Mr Hogg were appropriate comparators.

63. Although both are named as comparators at the preliminary hearing and Mr Ring is included in the claimants' handwritten list, there was no explanation in the witness statement or evidence of the first claimant about how the gatekeeper, who was discharging very different duties to parcel processing, was treated less favourably. There was a need for a gatekeeper to be present 24 hours and 7 days per week. Somebody would have to discharge the role on the Tuesday come what may. It had been Mr Ring before and after the realignment and it was never suggested one of the two claimants should have substituted for those duties on a Tuesday. The claimants were treated less favourably than Mr Ring, a full-time worker, because he had three consecutive days off which included the weekend by continuing to work the Tuesday but they no longer did. Mr Hogg, on the other hand, no longer worked the Tuesday and so was not less favourably treated.

64. The reason for the less favourable treatment, however, was not on the ground the claimants were part-time workers. It was because Mr Ring discharged a duty which had to be covered on the Tuesday by somebody. Even had the claimants cleared that hurdle, there was a legitimate aim to ensure the duties were covered 24 hours, seven days per week and it was a proportionate means of achieving that aim by retaining the post holder for those duties.

65. The first claimant spent much time challenging the proposition that there had been a significant reduction in hours on the Tuesday early shift. His views were based largely on his opinion that overtime and other additional duties were still being undertaken. He drew attention to the 10 hour shift of those on E2. In those limited cases, this overlooked the fact that work became busier later in the day. The 2 tables produced by the respondent during the hearing showed a decrease in hours being undertaken of 186 and a fall in headcount from 48 to 33. However, that did not include 15 workers on the late shift, whose hours had been increased to replace some of the hours vacated by 28 of the workers in duty E1 who now stopped work at 11am. Those 15 late shift workers took on 3 hours each to bring their start time forward to 11am rather than 2pm. That would bring the headcount up to 47 and reduce the differential in hours by 45, to 141. From cross examination of Mr Rickaby, it emerged that the first table related to April 2021 and not 25 July 2021, because Wadsworth, Rouf and Watson had moved from the shift in about April but remained on the list. In these circumstances, the claimants had good reason to challenge the reliability of this evidence as an indicator of the reduced hours in the early shift by reason of the realignment.

66. Mr Rickaby conceded that he had been incorrect in stating in his witness statement that Boot and Robinson, full-time workers, had moved from working on a Tuesday because of the reduced need for staff. The tables demonstrated they had not been on the early shift even by April 2021. The other worker who he said had moved was Pearson, but Mr Rickaby acknowledged that he could not say if he had changed his days for that reason or because he wished to do so. These full-time workers had been presented as having lost their Tuesday shift in the same way as

part-timers. The tribunal accepted the submission of the claimants, that this was either not the case or was unclear. We did not consider this established perjury, as the first claimant contended. Rather it reflected a lack of care and attention to detail and unwarranted assumptions. On analysis of the issues, however, these shortcomings did not make good the claimants' case. The staged approach which we have taken above, as required by the regulations, fell short of making a case for detrimental, less favourable treatment of the claimants as part-time workers.

67. The respondent produced statistics which had been disclosed and were contained within the bundle which demonstrated that Tuesday was by far the quietest day. There were variations in demand at the end of the year due to Christmas and on Bank holidays, but they confirmed the evidence of the respondent that there was a substantial reduced requirement for staff on a Tuesday. That involved loss of agency or casual staff in the first instance, but did not eliminate it entirely due to variations, such as annual leave of those rostered to work Tuesdays.

68. The claimants prepared an alternative proposition to the plan which the membership of the union had approved, which would have retained the existing staff but amount to fewer hours than were being saved on the approved plan. It assumed a reduction of 3 hours work for all full-timers. It amounted to 210.5 hours compared with what the claimants said amounted to 221.5 hours under the approved plan. This figure was different to the 239 hours which Mr Rickaby had said were catered for, but this was the claimants' assessment which was produced in their handwritten tables and the anomaly was never explored in the evidence. Assuming it were accurate for the purpose of the argument, it assumed that the additional hours from the late shift would not be required, that is the 15 workers who now cover 11am to 2pm, which is an additional 45 hours. Taking account of the fact the 8 part-timers would cover 27 of those hours that would leave a shortfall of 18 hours to cover. The figure of 210.5 would have to be revised to 228.5 which exceeds 221.5. More significantly, it involves the 8 part-time workers continuing to work 8 hours on that day, including at the time when there is less in work in the morning, before 11am. Adding the 28 full-timers to the 8 part-timers would create a surplus of workers; 36 compared to 31 on the basis of the comparisons in the handwritten document created by the claimants, excluding Mr Ring and Mr Hogg in both. The second claimant suggested that could be overcome by having the 28 full-timers commence at 9am rather than 6am. That would still leave a substantial workforce between 9am and 11am, which was a quieter period.

69. It would doubtless be possible to propose a number of arrangements which favoured some over others, but the tribunal was not equipped to undertake a comprehensive timetabling of work by reference to need and workers, either by way of our experience or skills or with the evidence which was produced. The claimants' proposal does not produce the savings contended for nor address the difficulty of having excess workers at a particular period of the day. An alternative framework had been prepared by the CWU and Mr Rickaby but not supported by the membership on a vote in which the union had recommended the framework which was accepted.

70. The claimants invited the tribunal to apply the pro rata principle. They said that 66% of part-timers were displaced on a Tuesday compared to no full-timers and 22% of part-timers made to start late compared to no full-timers. The latter point seems to ignore the fact that 18 full-timers had to finish early, but the general

proposition that the removal of all Tuesday duties disproportionately affected part-time workers is reflected on the figures.

71. That does not assist the claimants, because as Mr Serr pointed out this is not an indirect discrimination case. The statistical analysis provided by the claimants applies to workers as groups. Group comparison is not the correct approach in an exercise which initiates a comparison between the claimant and a full-time comparator. In respect of the matter for which we have found there to have been a detriment, it is not amenable to comparison by the pro rata principle. The pay or other benefit to which it must apply does not arise. For the reasons we have set out, those who worked 5 days and never had three consecutive days off were never in a comparably advantageous position, in that respect, to the claimants. Those who worked compressed hours for 4 days were, but that was not by reference to the pro rata principle and those cases have been further addressed by the other criteria in the regulations.

72. It was not necessary to consider justification in this case, but we would have found the respondent had justified any detrimental less favourable treatment. There was plainly a legitimate aim by way of running the service efficiently and allocating resources to demand. Tuesday was the quietest day. It was appropriate to meet that aim by realigning duties on the Tuesday. Changing the shifts of the claimants from the quieter Tuesday to the busier Monday was relevant to that aim.

73. It was reasonably necessary, that is proportionate. It could not have been achieved merely by the loss of agency and casual staff. The claimants' alternative proposal does not achieve the aim, for the reasons we have set out. Many staff were subject to changes to their working pattern and although the changes affected staff differently, there was significant movement of work from one day to another. There would have to be winners and losers in any such reorganisation but that would be subjective. It would be difficult to know who might regard themselves as a winner or a loser because preferences about working times would vary from one individual to another and could not be predicted by the particular hours or days they had worked. Nobody was to lose pay. The choice was resolved with two options being placed before the union membership for it to make the choice.

74. The objection of a loss of three consecutive days off was not a benefit most full-timers enjoyed. For the others the decision had been taken by the union and respondent to recommend seniority as the determining feature regardless of full-time or part-time status, a decision which was then voted upon and approved. Assessing proportionality involves balancing the adverse impact on the affected worker to the business need. We have indicated that the detriment was not significant. The claimants did not lose any pay. They did not have to work at the weekend. They had no problem with working the Monday shift. They could still finish their shift early on a Friday. The respondent was prepared to, and did, consider flexible working requests for particular personal reasons but the claimants chose not to make such an application. Balancing all of that against the business need, had we found that any less favourable treatment on the ground the claimants were part-time workers, we would have found it to have been justified.

75. The claimants complained that there had not been a review of the realignment after 12 weeks in accordance with the agreement between the CWU and the respondent. They say that would have exposed the unsatisfactory nature of the

arrangement which had been put in place. This was not relevant to the issues we had to decide under the regulations.

Employment Judge Jones

Date: 21 March 2023