



EMPLOYMENT TRIBUNALS

Claimant: Mr J Mireku

Respondent: London Underground Limited

Heard at: London South Employment Tribunal **On:** 12 October 2023

Before: Employment Judge Curtis

Representation

Claimant: Miss Thomas (Counsel)

Respondent: In person

JUDGMENT

The judgment of the ET is that:

1. The Claimant's claims of less favourable treatment on the grounds of being a part-time worker are dismissed, as:
 - a. they are not well founded (Third to seventh allegations)
 - b. The tribunal does not have jurisdiction to consider the claims as they have been presented outside of the time limit provided at Regulation 8(2) of the Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 and it is not just and equitable to extend time under Regulation 8(3)

REASONS

Claims and issues

1. The Claimant brings claims of detriment for being a part time worker under Regulation 5 of the Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 (**'PTW Regulations'**).
2. At the start of the hearing the Claimant said he also wanted to claim discrimination as a Black African and bullying. I explained that he would need to apply to amend his claim if he wanted to bring additional claims; there was no application to amend and so the sole claim remained a claim under the PTW Regulations.

3. The Claimant had indicated in his claim form that he wanted to bring a breach of contract claim. I explained that the tribunal only has jurisdiction to consider such a claim if it arises or is outstanding on termination of employment; as he remains employed I did not have jurisdiction to consider this claim.
4. Under Section 4(1) of the Employment Tribunals Act 1996, this case should be heard by a tribunal panel of three members. Due to a tribunal error the hearing was listed before a Judge sitting alone. After I explained to the parties that the hearing could be relisted before a full panel they provided their written consent to the claims being heard by a Judge sitting alone in accordance with s.4(2)(e) ETA 1996.
5. The issues for the tribunal to consider were discussed and agreed at the start of the hearing. There are as follows:

Time limits

- 5.1 Were the Claimant's claims presented within the time limit in Regulation 8 of the PTW Regulations? Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 2 August 2022 may not have been brought in time.
- 5.2 For those matters which occurred before 2 August 2022, were they part of a series of similar acts? If so, did the last act in the series occur after 2 August 2022?
- 5.3 If not, were the claims made within a further period that the Tribunal considers is just and equitable?

Part-time worker detriment

- 5.4 The Respondent accepts that the Claimant was a part-time worker within the meaning of the PTW Regulations
- 5.5 Was the Claimant treated less favourably than a comparable full time worker? The Claimant alleges that he was subjected to the following detriments:
 - 5.5.1 On 25 May 2022 Martin Summers said that the Claimant could not do overtime as he was job sharing. Comparator: CSM Summers
 - 5.5.2 On 4 June 2022 cancelling the approval for the Claimant to work overtime on 4th June 2022, comparator CSM Krishnan
 - 5.5.3 On 27 September 2022 the Area Manager Whitechapel sending a letter to all managers on the Whitechapel group stating that "the odd overtime shift is fine but they must be mindful James is still contracted to Area Manager Phil Simpson so extra hours by exception only" Comparator: All full-time CSMs
 - 5.5.4 Informing the Claimant on 11 October 2022 that the AM Paddington had, in principle, agreed for the Claimant to work up to one extra day per week. Comparator: All full time CSMs
 - 5.5.5 Cancelling the Claimant's overtime on 19th October 2022. Comparator CSM Khan
 - 5.5.6 On 20th October 2022 informing the Claimant that management had instructed that he was only permitted to work one day overtime on the weeks he was at work. Comparator: All full time CSMs

- 5.5.7 Not being included in the mailing list for the Edgware Road and Euston Square areas. Comparator: All staff in the Edgware Road and Euston Square area.
- 5.6 If so, was the treatment on the grounds that the Claimant was a part-time worker?
- 5.7 If so, has the Respondent shown that the treatment was justified on objective grounds? The Respondent relies on:
 - 5.7.1 The need to minimise overtime and manage the Paddington area budget; and
 - 5.7.2 To ensure that everyone was treated fairly and held the same access to overtime

Documents and evidence heard

- 6. I had witness statements from the Claimant and from Phil Simpson (Area Manager (Paddington)) for the Respondent and heard oral evidence from them.
- 7. I was provided with a bundle containing 201 pages

Fact findings

- 8. The Claimant has been employed by the Respondent since 14 March 2005 in a customer service role. Most recently, he is employed as a Customer Service Supervisor (**'CSS'**). Customer Service Supervisors supervise the safe operation of a station and the staff on duty there. The next level up is Customer Service Managers (**'CSM'**). Together with Customer Service Managers, Customer Service Supervisors deploy Customer Service Assistants who provide customer service to the public.
- 9. On 17 January 2022 the Claimant and Mr Ikram Patel signed a job share arrangement. Between them, the Claimant and Mr Patel were to cover the full time role of Customer Services Supervisor (**'CSS'**), by alternately working two weeks on and two weeks off. This job share was approved by the Area Manager of the Paddington area on 22 February 2022, and the Claimant and Mr Patel commenced work in the Paddington area from 3 April 2022.
- 10. The Respondent rosters staff on a duty roster, which includes a mixture of early, late, and night shifts as well as cover duties.
- 11. When there are insufficient staff to work a rostered duty, the Respondent first attempts to cover the duty from the staff who are on cover duties. If there are no available staff on cover duties then any remaining rostered duties are offered to staff as overtime. The process is that a list of available duties is published and staff then send a request to work one or more of the overtime shifts.
- 12. On a number of occasions between May and October 2022 the Claimant requested to work overtime, but was refused.
- 13. The first occasion relied upon was at the end of May 2022.

14. On 24 May 2022 the overtime sheet for the week ending 4 June 2022 was circulated. The Claimant says that on 25 May 2022 he verbally asked CSM Martin Summers if he (the Claimant) could work a duty on 4 June 2022 and that Mr Summers said he could not as it was one of the Claimant's weeks off and he was not allowed to work on his 'off' weeks.
15. The Respondent called no evidence to contradict the Claimant's account on this point. The Claimant's account is consistent with the email he sent to 'Stations Resourcing Queries' on the same date. I accept the Claimant's account of his conversation with Mr Summers.
16. This interaction is the Claimant's first complaint of less favourable treatment.
17. On 27 May 2022 the Claimant emailed CSM Soman Krishnan asking to cover a duty on 4 June 2022. CSM Krishnan emailed on 29 May confirming that the Claimant would have the duty, then emailed again later the same day to say that the Claimant could not work the duty as it was during his '2-week off' period under his job share arrangement.
18. The Claimant challenged this in emails on 29 and 30 May 2022, stating that he believed there was no restriction on him working during the 2-week period in his job share when he was off and Mr Patel was working.
19. Ultimately the shift was covered by CSM Krishnan whilst clarification of the position was sought. CSM Krishnan was a full-time member of staff.
20. The cancellation of the shift on 4 June 2022 is the second complaint of less favourable treatment from the Claimant.
21. Clarification of the Claimant's overtime position was received in an email dated 13 June 2022 from David Flynn in Stations Resourcing, who said: *"A job share person can work additional hours on the weeks when they are available. This does not count as overtime as they are not full time employees. It would instead be paid at the flat rate unless they exceed 35 hours working in that week. It would also not entitle them to any additional annual leave"*
22. Mr Simpson said in his evidence that he took this to mean that the Claimant could work overtime during his 'off' weeks.
23. The Claimant commenced a period of sick leave from 14 June 2022.
24. During his sickness absence the Claimant told Mr Phil Simpson (Area Manager for Paddington) that he didn't want to return to the Paddington area. Arrangements were made for the Claimant to work in the Whitechapel area on his return.
25. Whilst working in Whitechapel, the Claimant remained within the budget for the Paddington area. An important consequence of this was that any overtime worked came out of the Paddington budget and not the Whitechapel budget. For this reason Mr Simpson wanted to be kept aware of any potential overtime.
26. On 27 September 2022 Steve Ingall, Area Manager Whitechapel, sent an email to all managers on the Whitechapel group which stated:

“James Wireku (sic) will be assisting as a CSS at WCL for the immediate future, his working weeks are... [the working weeks were set out per the job share contract]... The odd OT shift is fine but we must be mindful James is still contracted to AM Phil Simpson so extra by hours by exception please (sic)”

27. The Claimant’s third complaint of less favourable treatment is this email; the Claimant says that the restriction on overtime to “extra hours by exception only” is treatment which is less favourable than that offered to full-time workers. The Claimant relies on any full-time employee as a comparator.
28. On 30 September 2022 the Claimant requested to work an overtime duty on 3 October 2022. Mr Ingall replied the following day saying *“I’m happy for you to do this but AM Simpson needs to also agree”*.
29. On 6 October 2022 the Claimant emailed Sue Lofthouse (Head of Customer Services) to complain that he was being treated differently to other staff at Whitechapel, as his overtime had to be approved by both Mr Ingall and Mr Simpson. Within the bundle I have an email chain between Ms. Lofthouse, Mr Simpson and Mr Ingall following this, in which Mr Ingall explains that overtime would be by exception as it came out of the Paddington budget, and Mr Simpson said that there may also be issues about the Claimant taking overtime away from local staff.
30. Ms. Lofthouse expressed her desire to be able to go back to the Claimant with *“something definitive”* in terms of how much overtime he could work. The email chain concluded on 11 October 2022 with Mr Simpson saying *“I’m happy for him to do overtime in accordance with business needs at Whitechapel, together with the obvious fair distribution amongst other staff. A shift a week is fine by me”*
31. This was relayed to the Claimant in an email from Ms. Lofthouse on 11 October 2022, in which she said:

“I have clarified the position with Steve and Phil. In principle. Phil is happy to pay for up to 1 shift a week for overtime if there is a business need for it at Whitechapel and obviously following local allocation process. The CSMs would have to authorise as normal but the agreement in principle is there for 1 shift a week. This may change dependent on business need, as with any overtime – it is discretionary”

The Claimant asserts that this is the fourth incident of less favourable treatment due to his part-time worker status. He claims that this imposed a 1-shift a week limit on his overtime, which is something which was not in place for full-time workers.

32. On 17 October 2022 the Claimant emailed Mr Simpson and Mr Ingall to say that he had been assigned duties for one of his non-working weeks, and that he would work the duties as overtime if agreed and authorised. He received an out of office response from both Area Managers.
33. CSM Ronald Luke emailed the Claimant to say that he had removed the Claimant’s name from the list for the week in question as it wasn’t one of

the Claimant's working weeks. In terms of the Claimant working the duty as overtime, CSM Luke said that whilst it had been indicated that the Claimant could do one overtime shift a week he needed to know how it would be agreed and he was waiting for clarification from Mr Simpson.

34. On 19 October 2022 the Claimant made a request to cover duties on 22-28 October 2022 as overtime. CSM Samuel Oluwa told the Claimant he had been pencilled in for duties in 22 and 25 October, but that he needed a completed OT request form asap.
35. CSM Mo Khan emailed the Claimant on 19 October 2022 to say that as it was not the Claimant's working week it had been cancelled. The Claimant claims that this was the fifth instance of less favourable treatment on the grounds of being a part-time worker.
36. On 20 October 2022 CSM Khan emailed the Claimant saying *"As per previous email from CSM Luke we have been told your (sic) allowed to work One day OT on the weeks you're at work. I unable to authorise anything beyond that"*
37. The Claimant claims that this email was the sixth instance of less favourable treatment on the grounds of being a part-time worker.
38. After the Claimant raised concerns about working in the Paddington area, it was agreed between the Claimant and Mr Simpson that he would be moved to Edgware Road and Euston.
39. On about 3 November 2022 the Claimant was moved to the Edgware Road and Euston Square areas. Mr Simpson emailed the area managers for the areas on 2 November 2022 to state:
 - 38.1 The reason for the move was confidential and not for discussion or debate
 - 38.2 The Claimant worked on a two week on, two week of roster, but it was possible to change his duties and rest days by agreement
 - 38.3 The Claimant could apply for any overtime advertised, just like any other member of staff, following due process. The overtime costs were attributable to Mr Simpson, and the email recipients had Mr Simpson's authority to approve overtime for the Claimant.
40. The Claimant's seventh complaint of less favourable treatment is that he was not included in the mailing list of Edgware Road and Euston Square area. Mr Simpson accepts that this was correct, and says that the Claimant remained on the Paddington mailing list as Mr Simpson (the Paddington Area Manager) remained the Claimant's employing manager. Mr Simpson told me that if the Claimant had been added to the Edgware Road and Euston Square lists then he would have been removed from the Paddington email list.

The Law

41. Regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides:

“(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

42. Part-time workers are defined at reg 2(1). It is agreed that C is a part-time worker for the purposes of this case.
43. When considering whether there has been a breach of reg 5, the ET must answer the following four key questions:
- (a) What is the treatment complained of?
 - (b) Is that treatment less favourable?
 - (c) Is that less favourable treatment on the ground that the worker is part time?
 - (d) If so, is the less favourable treatment justified?
44. Claims under the PTW Regulations require an actual comparator, and cannot be determined by reference to a hypothetical comparator.

Time limits

45. The relevant parts of Regulation 8 PTW Regulations provide:

“(2) Subject to paragraph (2), an employment tribunal shall not consider a complaint under this regulations unless it is presented before the end of the period of three months...beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.

(2A) Regulation 8A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2)

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so”

46. When considering whether there is some link between acts so that they should be considered part of a series of similar acts, potentially relevant considerations are:
- a) Were the acts all committed by fellow employees?
 - b) If not, what connection, if any, is there between the alleged perpetrators?
 - c) Were the actions organised or concerned in some way?
 - d) Why did they do what is alleged?
47. When considering whether it is just and equitable to extend time, the tribunal has a wide discretion. There is no presumption that an extension of time

should be granted, and exercise of the discretion remains the exception rather than the rule. The burden is on the Claimant to persuade the tribunal that it would be just and equitable to extend time. There is no prescriptive list of factors which are relevant in every case, but the length of and reason for delay will often be relevant, as will the relative prejudice to the parties and the potential merits of the claim.

Analysis and Conclusion

48. In this part of the decision I shall go through each of the complaints in turn, setting out whether I consider that they amount to less favourable treatment for being a part-time worker and, if so, whether the treatment was justified.

1) The Claimant being told on 25 May 2022 by Martin Summers that he could not do overtime because he was job sharing

49. I find that the Claimant was told this. Mr Summers effectively denied the Claimant the opportunity to work overtime and in my judgment that is a detriment.

50. I am satisfied that this was on the grounds that the Claimant was a part-time worker, as a full-time worker would not have been told such a thing. The comparator named by the Claimant, Mr Summers, was able to work overtime on his non-working days. The Respondent did not try to argue that any full time worker would have received the same treatment.

51. This occurred on 25 May 2022. The claim ought to have been presented to the Tribunal by 24 August 2022. The ET1 was presented on 26 December 2022. It is therefore over four months out of time.

52. I have considered whether it forms part of a series of acts, the last of which is in time. As set out below, the most recent act which constitutes less favourable treatment on the grounds of being a part-time worker was on 4 June 2022. In my judgment the acts are part of a series of similar acts as they were both acts of a CSM, they related to the Claimant's ability to work overtime at around the same time, and the acts were done for the same reason, namely a mistaken belief that the Claimant could not work overtime during his "off weeks"

53. As can be seen from my reasoning below, I am not satisfied that it is just and equitable to extend the time limit to allow the 4 June claim to be brought out of time. The reasoning which I set out below applies equally to this claim.

2) Cancelling C's overtime on 4 June 2022

54. It is accepted that the Claimant's overtime was cancelled.

55. In his oral evidence the Claimant asserted that this was done so that the CSM (CSM Krishnan) could line his own pocket by taking the overtime himself, rather than allowing a CSS to have it. If the Claimant is right then it would be somewhat difficult to argue that the reason for the treatment was the Claimant's part-time worker status.

56. I find myself in the somewhat unusual position of disagreeing with the Claimant's case, when his own case would cause his claim to fail and my alternative finding gives it a chance of success.

57. The contemporaneous documents clearly show that the reason for the cancelling of the Claimant's overtime was that there was a mistaken belief that job share workers were not permitted to do overtime on their rest days (i.e. their non-working weeks, for those on a 2-week on 2-week off arrangement)
 58. That is treatment which would not apply to a full-time worker and which was not applied to the comparator named by the Claimant, CSM Krishnan. Full-time staff were allowed to do overtime on their non-working days.
 59. It deprived the Claimant the opportunity to work overtime, which was a detriment.
 60. In my judgment it was because of the Claimant's part-time worker status.
 61. The justification grounds relied upon by the Respondent do not assist it with this claim; I find that the treatment was not justified on objective grounds.
 62. The treatment occurred on 29 May 2022. The claim ought to have been presented to the tribunal by 28 August 2022. It was therefore presented over four months late.
 63. In his evidence and submissions to me the Claimant did not seek to persuade me that it would be just and equitable to extend time; he focussed solely on whether there were a series of similar acts. The Claimant was aware of the relevant time limit; I heard in evidence that he had brought a previous claim to the tribunal which was dismissed for being presented out of time.
 64. There is no good reason for the delay in presentation of the claim.
 65. Whilst the claim is one with good merits, in my judgment that is not sufficient for me to find that it would be just and equitable to extend time in this case. The delay is lengthy, without good reason, and the Claimant has not persuaded me that it would be just and equitable to extend the time limit (having not sought to try to persuade me on that point).
 66. The tribunal therefore does not have jurisdiction to consider this claim as it was presented outside of the time limit provided at Regulation 8(2), and it is not just and equitable to extend time under Regulation 8(3) PTW Regulations. The claim fails.
- 3) Email on 27 September 2022 stating "the odd overtime shift is fine, but they must be mindful [the Claimant] is still contracted to Area Manager Phil Simpson so extra hours by exception only"**
67. There is no dispute this email was sent – it was within the bundle of documents at [115].
 68. As I have already stated above, my judgment is that denying an employee the opportunity to work overtime is a detriment.

69. The real issue is whether this was because of the Claimant's part-time worker status. The Claimant relies on an actual comparator of "any full-time employee".

70. It is clear to me from the evidence presented that the reason for limiting the Claimant's overtime and extra hours were the following:

59.1 A general desire to limit overtime post-COVID and due to financial pressures on the Respondent

59.2 The fact that the Claimant fell within the budget of Mr Simpson, although he was working for a different Area Manager

59.3 The desire to make sure that there was a fair opportunity to access overtime as between the Claimant and the others in the area he was working (i.e. no preferential treatment)

71. None of these is in any way linked to the Claimant's part-time status. His part-time status had nothing whatsoever to do with this treatment.

72. This claim therefore fails.

4) Informing the Claimant on 11 October 2022 that the Area Manager of Paddington had, in principle, agreed for the Claimant to work up to one extra day per week

73. This followed the internal discussions from 6 October 2022 between Mr Simpson, Mr Ingle and Ms. Lofthouse in which there was discussion about the concerns the Claimant had regarding overtime.

74. It was intended to be a way to make sure that there was a clear agreement as to the level of overtime the Claimant could have, as previously the Claimant had expressed frustration at having to get his overtime approved by two different area managers: the one for the area he was working (Mr Ingle) and one for the Area Manager who held his budget (Mr Simpson).

75. I am satisfied this had nothing whatsoever to do with the Claimant's part-time status. Rather, it arose solely from the fact that the Claimant was budgeted to Mr Simpson whilst working in Mr Ingle's area.

76. The circumstances of the named comparator ("any full-time employee") were materially different, as other full-time staff worked within their Area Manager's area. I heard no evidence of any full-time employees who were temporarily located in a different area to their budget holder, who wanted to do overtime.

77. This claim therefore fails, as the treatment was not on the ground that the Claimant was part-time.

5) Cancelling the Claimant's overtime on 19 October 2022.

6) On 20 October 2022 informing the claimant that management had instructed that he was only permitted to work one day of overtime on the weeks he worked

78. Unhelpfully I have not heard evidence from the decision maker as to the reason for cancelling the Claimant's overtime. I heard speculation from Mr Simpson as to why the overtime was cancelled, but I attach little weight to

this aspect of his evidence as he was not the person who cancelled the overtime on this occasion.

79. Having considered the contemporaneous documents it is clear to me that the overtime was cancelled because the staff were not sure how to process it, given the previous discussion which had taken place about the 1 day per week overtime.
80. CSM Mo Khan was wrong when he said that the Claimant was only allowed to work overtime on the weeks that he was at work (email of 20 October 2022); that is contrary to the actual position, which was that the Claimant could work one day per week (regardless of whether he was rostered), without additional authorisation from Mr Simpson.
81. In considering whether this treatment was because of the Claimant's part-time worker status, I have first considered the comparators put forward. The Claimant relies on other full-time workers, but in my judgment there are materially different circumstances between the Claimant and his comparators, in that the Claimant was working in a different area, and under a different Area Manager, to the budget holder for his overtime (i.e. the same as paragraphs 73-77 above).
82. I am not satisfied that the treatment was because of the Claimant's part-time worker status.
83. In my judgment the reference to "management instructed only work one day of overtime on the weeks C worked" is simply a mistake by the Respondent. Mistakes can occur, even in organisations which ought to do better given their size and administrative resources, but that does not mean that the reason for the treatment was the Claimant's part-time worker status. The treatment was because of the Claimant's unusual position of working under an Area Manager who did not hold the budget for his overtime.

7) Not included in mailing list for Edgware Road area

84. I accept that not being added to a mailing list was a detriment in the circumstances of this case.
85. I reject the Claimant's claim that this was because of his part-time worker status. The Claimant wasn't able to link this to his part-time worker status in any way. The circumstances of the comparators were materially different: they worked in their Area Manager's area, whereas the Claimant did not.

Other

86. I apologise to the parties for the delay in this judgment being sent out. As I explained at the hearing in October, following that hearing I had a number of professional commitments until the week commencing 13 November 2023. I had hoped to get this judgment completed more quickly after 13 November, but it took a little longer than expected as I wanted to make sure that I carefully reviewed the evidence I had heard and the relevant documents before reaching my decision.

Employment Judge **Curtis**

29 November 2023