**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000469/2024**

**Held in Glasgow on 14, 15 and 16 October 2024**

**Employment Judge S MacLean**
**Tribunal Members J Lindsay and D McFarlane**

| | |
|---|---|
| **Mr W Johnston** | **Claimant**<br>**In Person** |
| **ScotRail Trains Limited** | **Respondent**<br>**Represented by:**<br>**Ms L Usher -**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that (1) under rule 52 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the claims under sections 13 and 19 of the Equality Act 2010 are dismissed; and (2) the claim under section 13 of the Employment Rights Act 1996 is dismissed.

**REASONS**

## Introduction

1. In the claim form sent to the Tribunal on 14 April 2024, the claimant complains that he had been discriminated against on the grounds of sex and that he had been unlawfully deprived of pay. The respondent submitted a response in which the claims are resisted claim.

2. The claims were clarified at a case management preliminary hearing on 12 June 2024. It was noted that from the claimant's agenda, he also complains that he had been discriminated against on the grounds of age. The claimant confirmed that he was not seeking to advance a claim that he was subjected

to less favourable treatment on the grounds of being a part-time worker. Ms Usher, who represented the respondent, accepted that these were the claims which the respondent understood were being made and of which they had notice. It was confirmed that the respondent continued to defend the claims.

3. At the final hearing, the claimant gave evidence on his own account. For the respondent, the Tribunal heard evidence from William Black, head of employee relations, and Marion Graham, HR business partner. The parties prepared a joint file of documents to which witnesses were referred.

4. Ms Usher prepared written submissions on which she addressed all the claims. Having heard the evidence, and the respondent's submissions about the discrimination claims, the claimant confirmed that was no longer insisting on any of the discrimination claims. They were withdrawn. The claim of unlawful deduction of wages (that he had been unlawfully deprived of pay in that he had been paid 17.5 hours per week against a contract which he says states that he is employed to work 18 hours per week) was still being pursued.

5. In the circumstances, under rule 52 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Tribunal dismisses the claims under sections 13 and 19 of the Equality Act 2010.

6. In relation the unlawful deduction from wages claim under section 13 of the Employment Rights Act 1996, the Tribunal has set out the facts as found that are essential to the reasons or to an understanding of the important parts of evidence. The points made in submissions have been dealt with whilst setting out the facts, the law, and application of the law to those facts. Evidence relating to the discrimination claims, is set out only where the Tribunal considered that was relevant to the remaining issue to be determined.

**Findings in fact**

7. The respondent is a limited company providing rail transport in Scotland. Its registered office is in Glasgow, where the HR director is based.

8. The head of employee relations, head of wellbeing, head of HR, and head of talent, attraction and development report to the HR director. Employee resourcing, indirectly reporting to the head of talent, attraction and development, is responsible for issuing contracts and variations to contracts to the employees. William Black is the head of employee relations. Marian Graham, HR business partner, reports indirectly to the head of HR. Ms Graham supports the HR advisors with case management.

9. In November 1979, the claimant commenced employment with the respondent as a full-time train driver. The respondent recognises ASLEF for train drivers' pay negotiations.

10. The respondent employs train drivers on annualised hours contracts. The collectively agreed document setting out the component elements of pay grade for drivers (annex A) states that the annualised hours contract is based on a 35 hour week. However, the rosters that drivers require to work are based on 36 hours per week. To "balance the anomaly", drivers are rostered an additional weeks' leave during the year. From 1 October 2023, a main line full time driver salary was £58,581 per annum.

11. Around 2014, the respondent introduced a flexible working policy (the policy). The policy provides that:

    a. Eligible employees may apply for flexible working including job-sharing which is described as, "a form of part-time working where two (or occasionally more) people share the responsibility for a job between them".

    b. The employee should be given a copy of an application form to complete which must be considered by the line manager.

    c. If the line manager agrees to the changes of policy they should notify the employee in writing stating that the contract variation agreed and the date from which it will take effect.

    d. Otherwise, a meeting should be arranged to explore the proposed working arrangements and how best it might be accommodated. Then the line

manager makes a decision and writes to the employee, within a reasonable period, to agree a new work pattern, and start date, or provide a clear business ground why the request cannot be accepted. There is an appeals procedure.

e. A successful application results in a permanent change to the employee's terms and conditions of employment unless otherwise agreed between the parties.

12. In 2020, the claimant applied to the operations delivery manager (Queen Street Station), requesting to job-share with another full-time train driver at Glasgow Queen Street.

13. On 23 January 2020, after meeting with the claimant, the operations delivery manager completed a flexible working application acceptance form (the form) stating that the claimant's application for job-share with his colleague (the original job-share partner) could be accommodated. The job-share would commence no later than the May 2020 timetable change. The form confirmed that the claimant's new working pattern was as follows:

"Job-share with Glasgow Queen Street Driver.

The work pattern will consist of remaining in the roster and working two days each of the same line of work in the week.

This will also include any booked Sundays subject to counter agreements for any "not available" for booked Sundays."

14. On 12 March 2020, the claimant received a letter from the senior resourcing manager notifying him of a variation to his contract of employment as follows (the variation letter):

"With effect from Sunday 17 May 2020, your current contract hours will be adjusted to 18 hours per week balanced to 36 per week roster. As agreed, the working pattern will consist of remaining in the roster and working 2 days each of the same line of work in the week. This will include any booked

Sundays subject to current agreements for any "not available" for booked Sundays.

Please note that you will retain your current driver's salary pro rata and seniority date."

15. In May 2020, the claimant commenced job-sharing with the original job-share partner. They each worked 18 hours on the same 36 hour line in the roster. The claimant believed he was working 50 percent of a full time equivalent driver. He was rostered an additional pro rata two days annual leave. The claimant was paid 50 percent of the full time equivalent driver (£29,290.50). The claimant understood that the original job-share partner was receiving the same pay and also roster two additional pro rata annual leave days. The original job-share partner died in late 2021.

16. Around November 2021, another full-time train driver at Glasgow Queen Street requested flexible working to go job-share on a permanent basis, and met with operations delivery manager. On 5 November 2021, the operations delivery manager wrote to the full-time train driver (the replacement job-share partner) confirming that the request could be accommodated, the letter stated:

"Your new working arrangements will begin from 12 December 2021 and will take the following form: job-share in the roster with William Johnston, reduced hours, working up to 20 hours a week, rostered Sundays, will be worked under the existing agreements."

17. On the same day, the replacement job-share partner signed a copy of the letter to indicate his agreement to the variation of the contract. No further letter was sent by the senior resourcing manager.

18. In December 2021, the claimant was told that he was job-sharing with the replacement job-share partner. The claimant was not provided with any documentation regarding this.

19. The claimant and the replacement job-share partner commenced job-sharing around 12 December 2021. The claimant considered that, other than a change of job-share partner, the arrangement was unchanged. The

replacement job-share partner was paid 20 hours per week (£33,475 per year). The claimant was unaware of this differential.

20. Job-share contracts have been approved locally and different approaches have been taken in different depots, sometimes in the same depot by the same manager, which has resulted to inconsistencies in contractual terms. There are 105 train drivers on a job-share contracts. Of those, 26 are paid £30,127 per annum. One is paid £31,801 per annum and nine are paid £33,475 per annum.

21. Around 2022/2023, the respondent reached an agreement with ASLEF that it would automatically grant job-sharings to all train drivers who requested it, with over 40 years continuous service. The basic salary for a job-share train driver should be 50 percent of the full time equivalent: £29,290.50 as their annualised hours contract is based on working 18 hours on a 36 hours roster (18 over 36).

22. Around June 2023, the claimant became aware that the replacement job-share partner was being paid 20 hours per week for the same job-share post that he was sharing with the claimant. The claimant still believed that he was being paid for 18 hours per week.

23. Following a meeting with the operations delivery manager in July 2023, six train drivers, including the claimant, raised a collective grievance on 6 October 2023, that their job-share colleagues were being paid “20 hours per week and this has been for some time, however we were being paid 18 hours per week”.

24. Unknown to the claimant, there had been a meeting of the drivers’ divisional council on 6 September 2023, at which it was agreed between the respondent and ASLEF that the respondent would not seek to vary the contracts of those that had contracts with a greater number of contractual working hours.

25. On 26 October 2023, the job-share conditions that would be in place for any future job-share applications were discussed at the drivers’ council’s meetings. New job-sharing conditions were approved in January 2024. These conditions have not been implemented.

26. In December 2023, having received no formal response from the respondent to the collective grievance, the claimant wrote to the respondent's then managing director explaining that he had discovered that the replacement job-share partner was being 20 hours a week to the claimant's 17.5 hours a week. The claimant advised that he had a letter saying that he would be paid 18 hours per week.

27. On 4 January 2024, an employee relations manager replied to the claimant referring to his flexible working application acceptance. She said that this arrangement meant a 17.5 hour per week working pattern, although the claimant worked 18 hours in order to be entitled to the additional annual leave for drivers.

28. The claimant raised a number of issues in a reply email sent on 11 January 2024. He advised what his contract stated and commented, "when a contract states the number of hours worked, you should be paid that number of hours so if I was due to be paid 17.5 hours, the contract should have stated that."

29. The respondent requested a copy of the document from which the claimant was quoting. This was sent to the respondent. The reply was that, "as previously advised, while you are contracted for 18 hours, you are paid for 17.5 in order to have the additional weeks' leave for drivers. Similarly, when you were full-time, you were contracted for 35 hours but the roster averages over 36 hours meaning that you were entitled to the additional annual leave."

30. By email sent on 21 February 2024, the claimant was advised by the district organiser of ASLEF that the respondent believed with hindsight that offering more hours to others was a mistake. ASLEF had prevented the respondent from removing these hours from drivers but could not persuade the respondent to pay the claimant 2 hours 30 minutes more per week. In the future, all job-share drivers would be going onto the same terms as the claimant.

31. On 14 April 2024, the claimant raised an employment tribunal claim. The claimant named a female comparator, who believed that she was being paid 18 hour per week. Her variation to contract referred to, "with effect from

Sunday 21 May 2017, your current contract hours will adjust to 18 hours per week balanced to 36 hours per week roster." The comparator's wage slips showed that she had been paid for 17.5 hours per week which was contrary to her understanding.

32. The claimant raised a further grievance direct to the managing director on 15 August 2024 to which he received no response.

*Observation on witnesses and conflicts of evidence*

33. The Tribunal considered that the claimant gave his evidence honestly against a background of information provided by colleagues, and a lack of transparency from the respondent as to the basis upon which decisions had been reached.

34. The Tribunal did not consider Mr Black's evidence to be of assistance given that he was not involved in the implementation or oversight of the flexible working policy and any variation of contracts. His reasoning for the discrepancies in the level of pay made to the job-sharing train drivers appeared to be speculation rather than an understanding based on any investigation into the background. The Tribunal felt that at times, he was evasive and avoided answering the questions put to him. That said, he expressed his strong opinion that the claimant's contract was honoured to the letter.

35. The Tribunal appreciated that Ms Graham was also not involved in dealing with the variation of the job-share contracts. However, when the discrepancies came to light, she was involved in making enquiries as to the possible explanations for this, and candidly explained to the Tribunal that following enquiries she was aware of none. She had also made some enquiries to the context of the claim that was before the Tribunal and was able to provide clarification for which the Tribunal was grateful. The Tribunal considered that she was a credible and reliable witness.

36. Before going onto deliberate, the Tribunal considered the evidence before it, and made the following observations.

37. Some of the evidence related to a payment agreement which incorporated an automatic right for all train drivers with over 40 years' service to be given a job-sharing arrangement. Under this arrangements, two drivers can split one full-time equivalent job between them. This agreement was not in place when the claimant applied for a job-share. Accordingly, the Tribunal did not consider this, or indeed the "new job-sharing conditions" prepared by Mr Black, as they were not relevant in the issues that the Tribunal was determining.

38. The Tribunal's focus was on the flexible working agreement. The original application was not produced. The Tribunal referred to the acceptance and variation letter. The documentation relating to the original job-share partner was not produced. Only the acceptance of the replacement job-share partner was produced. The same delivery manager approved the three applications within 18 months but the form and content was inconsistent despite the same manager being involved. The situation was further complicated in that inconsistencies were not confined to the Queen Street depot. From the documents, the wording of the contracts to job-share train driver posts in Stirling and Perth also differed.

39. The claimant had named his comparator in the sex discrimination claim on the basis that she had told him that she was being paid 18 hours per week. This was based on the wording of the letter varying the contract which was identical to that of the claimant. However, while they understood that they were being paid 18 hours per week, the claimant and the comparator were being paid 17.5 hours per week.

40. There was conflicting evidence as to the meaning of various contracts. Mr Black's evidence was that employees were paid what they were contractually entitled. The Tribunal's understanding was that despite the contract of the replacement job-share referring to him "working up to 20 hours per week", he was paid at the rate of 20 hours per week although he worked the same hours as the claimant. Another job-share driver was who was contractually required in February 2022 to "work 18 hours per week job-sharing with a named driver" was paid 18 hours per week but was not required to work 18 hours per week.

His contract made no reference to balancing to the 36 hour roster. All the job-sharing drivers who were being paid more than 17.5 hours per week were rostered for the same leave as their job-share partner. They were contracted to work more hours than their job-share partners but from the evidence before the Tribunal they had not been asked to do so.

**Deliberations**

41. The Tribunal started by referring to section 23(1) of the Employment Rights Act 1996 (ERA) which gives workers the right to complain about deductions from wages.

42. The Tribunal also referred to section 13(1) of the ERA which provides that a worker has the right not to suffer an unauthorised "deduction". A deduction is defined as "where the total amount of wages paid on any occasion by an employer to a worker employed by him, is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated… as a deduction by the employer from the worker's wages on that occasion". Accordingly, a shortfall in payment of the amount of wages properly payable is to be treated as a deduction. The definition of what wages are properly payable is critical to determining whether an unlawful deduction has been made.

43. The claimant says that his contract, as varied, states that he is entitled to be paid for working 18 hours per week but he has been receiving pay for 17.5 hours per week since early 2020.

44. In the Tribunal's view to decide what was properly payable to the claimant, it required to consider the pay terms in the claimant's contract of employment. This required focussing on the meaning of the relevant words in their documentary, factual and commercial context. The meaning has to be assessed in the light of (a) the natural and ordinary meaning of the clause, (b) any other relevant provision of the contractual agreement, (c) the overall purpose of the clause and the agreement, (d) the facts or circumstances assumed by the parties at the time the document was executed, and (e)

commercial common sense, but (f) disregarding subjective evidence of any of the parties' intentions.

45. As a full-time driver, the claimant's wage was calculated on annualised hours based on a 35 hour per week. He worked a roster based on 36 hours per week. To balance this anomaly he received a week of additional paid time off.

46. Ms Usher argued that the job-share role for drivers involves splitting one full-time post equally between two drivers. The Tribunal accepted that this was the claimant's understanding of how a job-share worked. However from the documentation before the Tribunal the "job-share" arrangements did not reflect that position. In practice each job-share partner worked 18 hours per week to cover a line of 36 hours in the roster. They are also rostered two additional annual leave days. They were not each paid 17.5 hours per week based on half of the full time equivalent.

47. The variation letter stated that from 17 May 2020, the claimant's current contract hours will be adjusted to 18 hours per week balanced to 36 hours per week roster. He was to retain his current driver salary pro rata and seniority date. The variation letter did not state which provisions of the "written statement of main terms and conditions of employment" were amended.

48. Given that the variation letter referred to "contract hours" the Tribunal considered that the natural and ordinary meaning was that the claimant's contract hours were now 18 (rather then 35) hours per week which suggested that he should be paid for 18 hours per week. However, the variation letter went on to state that the contract hours were to be balanced to 36 hours per week roster. The reference to "balance" in annex A, is balancing a 35 hour week to a 36 hour week.

49. The claimant works an average of 18 hours per week on the roster and it is balanced to 36 hours: 18/36 = 0.5 (50 percent). Therefore the claimant's rostered hours are 0.5 of a full-time equivalent. The variation letter states that the claimant's salary will be paid pro-rata. The claimant is paid 50 percent of

a full time salary for working 50 percent of the full-time hours. He also receives pro-rated additional annual leave.

50. Accordingly, the claimant has received all of the sums to which he is entitled and his claim for unlawful deduction of wages was dismissed on that basis.

51. The Tribunal could understand why the claimant was aggrieved when he discovered the pay differential between himself and the replacement job share partner. Given the size and administrative resource of the respondent the Tribunal was at a loss to understand why such discrepancies had arisen over so many years.

52. The variation contracts were poorly drafted. This had resulted in some employees being paid more for doing the same work as their job share partners. The Tribunal could understand why those variations, which were not linked to the 36 hour per week roster, could give rise to unlawful deduction claims. The Tribunal appreciated that this was of little consolation to the claimant.

**S MacLean**
**Employment Judge**

**3 December 2024**
**Date**

**Date sent to parties** **4 December 2024**