Neutral Citation Number: [2025] EAT 57

Case No: EA-2024-000025-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 April 2025

Before:

MARCUS PILGERSTORFER KC

DEPUTY JUDGE OF THE HIGH COURT

Between:

MR J MIREKU

Appellant

- and -

LONDON UNDERGROUND LIMITED

Respondent

- -
- -

Lucas Nacif (instructed by Advocate) for the **Appellant**
Rebecca Thomas (instructed by Eversheds Sutherland (International) LLP) for the **Respondent**

Hearing date: 16 January 2025
- -

JUDGMENT

SUMMARY

Part Time Workers – Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

The Claimant works part-time as a Customer Service Supervisor for London Underground. On 19 October 2022, he requested overtime duties. That request was initially agreed, but then cancelled. The Tribunal found the cancellation was not because of the Claimant's part-time status and that there were materially different circumstances between the Claimant and his comparators. The Claimant appealed on the basis that the Tribunal applied the incorrect test of causation. He submitted the correct approach involved considering whether the "effective and predominant cause" of the treatment was his part-time status. He invited the EAT to depart from its conclusion in **Augustine v Data Cars Limited** [2025] ICR 19, viz that to satisfy Regulation 5(2)(a), a claimant's part-time status must be the "sole ground" for the treatment.

Held, dismissing the appeal:

(i) Applying **British Gas Trading Ltd v Lock & Another [2016] ICR 503,** it was not appropriate to depart from the decision of the EAT in **Augustine**. Whilst there were inconsistent EAT authorities concerning the test of causation under Regulation 5(2)(a), there was no inconsistency concerning how those authorities, and the decision of the Inner House of the Court of Session in **McMenemy v Capita Business Services Ltd [2007] SC 492**, fell to be reconciled: see **Augustine**. In any event, there were good reasons for this Tribunal to apply the approach set out in **Augustine** unless and until such time as the more senior courts took a different view.

(ii) In the present case, the Employment Tribunal did not err in law in dismissing the Claimant's claim under Regulation 5. Whatever test of causation is applied, the Tribunal's findings about why the overtime request had been cancelled were incompatible with part-time status being the ground for the treatment. In these circumstances, it was not necessary or desirable for the EAT to await the Court of Appeal's decision in **Augustine**.

(iii) The Claimant's case was in any event bound to fail because the Tribunal had found the comparators he relied on were not comparable full-time workers. No appeal was advanced to challenge that finding.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. Part-time workers have a right not to be treated less favourably than a comparable full-time worker if the treatment is "on the ground that the worker is a part-time worker": see Regulation 5(2)(a) of the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("the Regulations"). The interpretation of that causal requirement has, over the years, produced different views from this Tribunal and the Inner House of the Court of Session. A recent assessment of those authorities is contained in the judgment of Eady P in **Augustine v Data Cars Limited [2025] ICR 19**. By this appeal, the Appellant, Mr Mireku, invites the Employment Appeal Tribunal ("EAT") to depart from **Augustine** and reach a different view as to the causation test which applies. The appeal therefore raises the issue of whether in the circumstances it is appropriate to depart from a recent previous decision of the EAT: see **British Gas Trading Ltd v Lock & Another [2016] ICR 503**. Further, it is necessary to consider the submission of the Respondent, London Underground Limited, that Mr Mireku's claim falls to be dismissed whatever test of causation applies.

The Appeal

2. On 26 December 2022, Mr Mireku presented a claim to the Employment Tribunal at London South in which he complained of detrimental treatment contrary to the Regulations. He also complained of breach of contract. The matter came before Employment Judge Curtis on 12 October 2023. In a judgment dated 29 November 2023, sent to the parties on 5 December 2023, the Judge dismissed the part-time worker claim. Mr Mireku applied for reconsideration of the judgment by letter of 17 December 2023. In response, on 1 February 2024, the Tribunal sent to the parties a corrected judgment (which confirmed the breach of contract claim had also been dismissed for want of jurisdiction) and corrected some minor errors in the written reasons. The Tribunal also promulgated a judgment otherwise dismissing the reconsideration application.

3. By a Notice of Appeal received 11 January 2024, Mr Mireku appealed against the judgment sent

to the parties on 5 December 2023. There is a single ground of appeal which contends that the Tribunal erred in law when it decided that the cancellation of Mr Mireku's overtime on 19 October 2022 was not less favourable treatment on the grounds of being a part-time worker. Mr Mireku's case is that the knock-on effect of that finding was that the Tribunal failed to conclude that two other detriments, which had been found to be less favourable treatment on the grounds of being a part-time worker, were part of a series of acts ending on 19 October 2022 (a date in time). Instead, the Tribunal decided that the two earlier detriments were out of time and it was not just and equitable to extend time.

4. Andrew Burns KC, Deputy High Court Judge, decided on the sift on 29 February 2024 that the appeal raised a discreet point about causation in cases brought under the Regulations, namely whether the adverse treatment had to be solely because of part-time status or whether it was sufficient for that status to be an effective cause of the treatment.

The Facts

5. Mr Mireku has been employed by London Underground since 14 March 2005, most recently as a Customer Service Supervisor ("CSS"). In that role, he is responsible for supervising the safe operation of a station and its staff. On 17 January 2022, Mr Mireku signed a job share arrangement with Ikram Patel. Between them, Mr Mireku and Mr Patel were to cover the role of a full time CSS by working alternately two weeks 'on' and two weeks 'off'. The Area Manager for Paddington, Phil Simpson, agreed this arrangement on 22 February 2022 and it began on 3 April 2022.

6. London Underground rosters staff on a duty roster. There are a mixture of early, late and night shifts as well as cover duties. When there are insufficient staff to work a rostered duty, attempts are made to cover the duty from those staff on cover duties. However, there can be times when there are no staff on cover duties available to cover the shift. In those instances the rostered shift is offered to staff as overtime. A process is followed whereby available shifts are published and staff respond by sending a request to work one or more of them.

7. An overtime sheet publishing available shifts for the week ending 4 June 2022 was circulated to staff on 24 May 2022. The next day, on 25 May 2022, Mr Mireku asked Customer Service Manager ("CSM") Martin Summers if he could work a duty on 4 June 2022. Mr Summers refused *"as it was one of the Claimant's weeks off and he was not allowed to work on his 'off' weeks"*: see judgment [14].

8. On 27 May 2022 Mr Mireku emailed CSM Soman Krishnan asking to work an overtime shift on 4 June 2022. Initially, on 29 May 2022, CSM Krishnan agreed, but later the same day he emailed again to say Mr Mireku could not work the duty *"as it was during his '2-week off' period under his job share arrangement"*: judgment [17].

9. Mr Mireku challenged this by emails of 29 and 30 May 2022, rejecting the notion of a restriction preventing him working during the period of his job share when Mr Patel was working.

10. Clarification of the position was then forthcoming from David Flynn who worked in Stations Resourcing on 13 June 2022. He explained in an email that a person with a job share arrangement could work additional hours on the weeks when they are available. He said, however: *"This does not count as overtime as [those with job share arrangements] are not full ti[m]e 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"*: judgment [21]. The Tribunal recorded that Mr Simpson said in his evidence that he took this to mean that Mr Mireku could work overtime during his 'off' weeks.

11. Mr Mireku was then signed off sick for a period from 14 June 2022. During this time, he told Mr Simpson that he did not want to return to the Paddington area. Arrangements were made for him to work in the Whitechapel area upon his return to work. Although his work was in Whitechapel, Mr Mireku's employment was still to sit within the Paddington budget. The Tribunal found that *"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": judgment [25].

12. On 27 September 2022, the Area Manager for Whitechapel, Steve Ingall, sent an email to all managers in the area stating that Mr Mireku would be working in the Whitechapel area and giving details of his working pattern. The message continued: *"The odd OT shift is fine but we must be mindful James is still contracted to AM Phil Simpson so extra … hours by exception please":* judgment [26].

13. On 30 September 2022, Mr Mireku requested an overtime shift on 3 October 2022. Mr Ingall agreed subject to Mr Simpson also agreeing. Mr Mireku complained about this to Sue Lofthouse, Head of Customer Services, on 6 October 2022. He was aggrieved because, unlike other colleagues at Whitechapel, his overtime had to be approved by two managers. The Tribunal had before it an email thread between Ms Lofthouse, Mr Ingall and Mr Simpson about this. Mr Ingall explained that overtime would be by exception as it came out of the Paddington budget and there might be issues about Mr Mireku taking overtime away from local staff. After Ms Lofthouse indicated she wanted to go back to Mr Mireku with something definitive, Mr Simpson said: *"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"*: judgment [30]. Accordingly, Ms Lofthouse wrote to Mr Mireku on 11 October 2022 explaining:

> *"I have clarified the position with Steve [Ingall] and Phil [Simpson]. 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."*

14. Later that month, on 17 October 2022, Mr Mireku emailed Mr Simpson and Mr Ingall to say that he had been assigned duties on one of his non-working weeks and would work it as overtime. In the absence of Mr Simpson and Mr Ingall, another CSM (Ronald Luke) emailed Mr Mireku to say he had removed his name from the duty list as it was not one of his working weeks. In relation to overtime, CSM Luke said that whilst it had been indicated that Mr Mireku could do one overtime shift a week, he

needed to know how that would be agreed and was waiting for clarification from Mr Simpson.

15. On 19 October 2022, Mr Mireku made a request to do overtime duties between 22-28 October 2022. CSM Samuel Oluwa informed Mr Mireku that he had been pencilled in for 22 and 25 October, however CSM Mo Khan then emailed (also on 19 October 2022) to say that as it was not his working week, the overtime had been cancelled. On 20 October 2022 CSM Khan emailed Mr Mireku saying *"As per previous email from CSM Luke we have been told [you are] allowed to work one day OT on the weeks you're at work. I am unable to authorise anything beyond that".*

16. On or about 3 November 2022, Mr Mireku was moved to the Edgware Road and Euston Square areas. Mr Simpson emailed the area managers for these areas on 2 November 2022 to give details of his work pattern and to say that he could apply for any overtime advertised, just like any other member of staff, following due process. Mr Simpson agreed to be responsible for the overtime costs and the recipients of the email were given authority to approve overtime for Mr Mireku. Unfortunately, however, following his move, Mr Mireku was not included on the mailing list to which overtime vacancies at Edgware Road and Euston Square were sent; rather he remained on the Paddington mailing list.

The Judgment Below

17. Mr Mireku's case was that he had been subject to seven detriments contrary to Regulation 5(1)(b) of the Regulations. These were as follows:

i. On 25 May 2022, CSM Summers saying he could not do overtime as he was job sharing.

ii. On 29 May 2022, CSM Krishnan cancelling approval for Mr Mireku to work overtime on 4 June 2022.

iii. On 27 September 2022, Area Manager Ingall telling managers at Whitechapel that the odd overtime shift was fine but they must be mindful that Mr Mireku was still

contracted to Mr Simpson "so extra hours by exception only".

iv. On 11 October 2022, Ms Lofthouse communicating the decision that Mr Mireku could work up to 1 shift per week as overtime.

v. On 19 October 2022, CSM Khan cancelling Mr Mireku's pencilled in overtime for 22 and 25 October 2022.

vi. On 20 October 2022 CSM Khan informing Mr Mireku that he was only permitted to work one day overtime per week.

vii. Not including Mr Mireku in the mailing list for overtime for the Edgware Road and Euston Square areas.

18. After setting out the relevant parts of the Regulations, the Tribunal considered each of the detriments in turn.

19. It found that the first two allegations amounted to less favourable treatment on the ground that Mr Mireku was a part-time worker. In relation to allegation (i), the Tribunal held that Mr Summer's refusal on 25 May 2022 to allow Mr Mireku to work overtime would not have happened to a full-time worker: *"a full-time worker would not have been told such a thing"*: see judgment [50]. The Tribunal found the comparable full time worker that had been named, Mr Summers, was able to work overtime on his non-working days.

20. Similarly, in respect of allegation (ii), the Tribunal considered the reason Mr Mireku's overtime on 4 June 2022 was cancelled was because of *"a mistaken belief that job share workers were not permitted to do overtime on their rest days*", a reason which did not apply to a full-time worker: judgment [57-8].

21. A different conclusion was reached on allegations (iii) and (iv). In respect of (iii), the reason for limiting Mr Mireku's overtime and extra hours were found to be as follows (judgment [70-1]):

> *"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:*
> *[70.1] A general desire to limit overtime post-COVID and due to financial pressures on the Respondent*
> *[70.2] The fact that the Claimant fell within the budget of Mr Simpson, although he was working for a different Area Manager*
> *[70.3] 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."*

22. Similarly, the Tribunal said this about Ms Lofthouse's communication of 11 October 2022 (allegation (iv)):

> *"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 In[g]le) 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."*

23. The Tribunal then dealt with allegations (v) and (vi) together. Given the centrality of this part of the determination to the appeal, I extract the relevant paragraphs of the Tribunal's judgment in full ([78-83]):

> *"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 20222); 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, and that the Claimant was working in a different area, and under a different Area Manager, to the budget holder for his overtime…*
>
> *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 proposition of working under an Area Manager who did not hold the budget for his overtime."*

24. The final allegation for analysis was (vii). The Tribunal did not consider that the failure to include Mr Mireku on the mailing list for Edgware Road and Euston Square 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"*: judgment [85].

25. Although allegations (i) and (ii) were made out substantively, the Tribunal found they had been presented out of time[1]. There was no 'in time' act which could be said to be the last of a series of similar acts to which the allegations could belong (see Regulation 8(2)). Further the Tribunal found it was not just and equitable to extend time for them: see [53, 62-66] and Regulation 8(3). Accordingly all allegations were dismissed.

The Relevant Statutory Provisions

26. The right not to be treated less favourably is contained in Regulation 5 of the Regulations:

> *"(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.*

[1] As the Tribunal recorded at [5.1], given the date of presentation and the dates of early conciliation, a complaint about something that happened before 2 August 2022 was *prima facie* out of time: see Regulation 8(2).

(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.

(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime."

27. Supplementing Regulation 5(2)(a) is Regulation 8(6) which provides as follows:

"(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."

28. The pro rata principle referred to in Regulation 5(3) is defined in Regulation 1(2):

""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;"

29. The Regulations were made under section 19 of the **Employment Relations Act 1999**. They were introduced to comply with obligations owed under **Council Directive 97/81/EC concerning the Framework Agreement on Part-Time Work concluded by UNICE, CEEP and the ETUC** ("the Directive"). The Directive was extended to the United Kingdom by **Council Directive 98/23/EC**. By Article 1, the Directive implemented the Framework Agreement, which was annexed to the Directive. The Framework Agreement provides as follows at clause 4.1 and 4.2:

"Clause 4: Principle of non-discrimination

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

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

Causation: The Different Approaches

30. The Regulation 5 right enables a part-time worker to complain about treatment falling within the scope of Regulation 5(1). However, such treatment is only actionable if the requirements of Regulation

5(2) are also satisfied. For the purposes of this appeal, the important requirement is that in Regulation 5(2)(a): the treatment must be "on the ground that" the worker is a part-time worker. All the authorities under the Regulations recognise that this requires some kind of causal connection between the treatment and the claimant's status as a part-time worker. They do not, however, speak with one voice as to the nature of the connection required.

31. One line of authority focuses on the language of clause 4.1 of the Framework Agreement which speaks of less favourable treatment "solely because" of part-time status. In **McMenemy v Capita Business Services Ltd [2007] SC 492**, the Inner House of the Court of Session noted the agreement of the parties that the Regulations should be construed consistently with the Directive and given a purposive construction: [5]. Lord Nimmo Smith, giving the Opinion of the Court, and citing the decision of the EAT in **Gibson v Scottish Ambulance Service (2004) (EATS/0052/04)**, held as follows at [6]:

> *"It was common ground between the parties that the foregoing cases established the proper approach construction of the legislation. It was not suggested that the 2000 Regulations went further than the Directive in conferring protection on part-time workers, or were intended to do more than to bring UK law into line with community law. Where the parties disagreed was over the implications of the inclusion of the word 'solely' in cl 4.1 of the Directive. In our opinion, the language of cl 4.1 of the Directive connotes the need to consider whether there is a causative connection between the discrimination complained of by the worker and the part-time nature of the worker's employment. As we have said, the prohibition is against less favourable treatment of part-time workers, than comparable full-time workers, for the reason that they work part-time and for that reason alone. This necessitates inquiry into the employer's intention in so treating the part-time worker. In Gibson v Scottish Ambulance Service, the Employment Appeal Tribunal, in construing this legislation, said (para 11):*
>
> > *'Whatever may be the motive of the employer, it is necessary to look at the intention behind the decision to impose part-time working, whatever may be its consequence in other respects. We therefore reject the "but for" test in this context and we consider that for the reasons given by the Tribunal, they applied their minds to the right question and reached a conclusion, namely, that the real reason was the issue of demand in the local area which means that the appellant was not being discriminated against on the ground that he was a part-time worker per se.'*
>
> *We agree with this approach. The part-time worker who complains that his employer is treating him less favourably than he does a comparable full-time worker in breach of the legislation must therefore establish that the employer intends to treat him less favourably on the sole ground that he is a part-time worker (see the passage in Wippel v Peek & Cloppenburg GmbH & Co KG quoted). Additional reasons for construing the word 'solely' in this way are that, as counsel for the respondents pointed out, there is, first, no reference in the Directive to indirect discrimination and, secondly, different treatment, if established, may nevertheless be 'justified*

on objective grounds'."

32. The **McMenemy** approach was seemingly followed by the EAT in **Engel v Ministry of Justice [2017] ICR 277** at [18] (HHJ Richardson) and **Forth Valley Health Board v Campbell (2021) (UKEATS/0003/21)** at [14] (Lord Fairley).

33. The other line of authority emerges from decisions of the EAT in **Sharma v Manchester City Council [2008] ICR 623** and **Carl v University of Sheffield [2009] ICR 1286**. In **Sharma** the EAT, Elias P presiding, took the view that requiring the worker's part-time status to be the sole reason for the discriminatory treatment was not a legitimate construction of the Regulations. At [48-51] Elias P said this:

> *"48. In our judgment, the reference to "solely" in Directive 97/81 is simply intending to focus upon the fact that the discrimination against a part-timer must be because he or she is a part-timer and not for some other independent reason.*
>
> *49. To take a simple example, if the employer decided to discriminate against all part-timers over the age of 30 it could be said that there were two reasons for the discrimination: being a part-timer, and being of a certain age. Similarly, if the employer deliberately discriminates against all his part-timers in factory A but not those with identical full-time comparators in factory B, can it really be said that, because only some part-timers are selected for the less favourable treatment, the Directive (and by extension the Regulations) are not intended to be applicable?*
>
> *50. In our judgment it is inconceivable that the Directive was not intended to outlaw such treatment (subject to justification) and we have no doubt whatsoever that it would inevitably be construed by the European Court of Justice to do so. Any other conclusion would wholly undermine the very purpose of the Directive. The fact that not all part-timers are treated adversely does not mean that those who are cannot take proceedings for discrimination if being part-time is a reason for their adverse treatment.*
>
> *51. In our judgment, once it is found that the part-timer is treated less favourably than a comparator full-timer and being part-time is one of the reasons, that will suffice to trigger the Regulations."*

34. Subsequently, in **Carl**, the EAT, HHJ Peter Clark presiding, agreed, holding as follows at [42]:

> *"The expression "on the ground that" or "on the grounds of" frequently appears in our domestic legislation. It was considered by the Court of Appeal in English v Thomas Sanderson Blinds Ltd [2009] ICR 543, in the context of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), where the majority (Sedley and Lawrence Collins LJJ) read*

> *the domestic provisions consistently with the Equal Treatment Framework Directive 2000/78/EC (OJ 2000 L303 , p 16) which they were designed to implement. Laws LJ took a different view. However, we agree with Elias J in Sharma that, whereas domestic legislation must provide the protection contained in the Directive, it is not limited to such protection. "On the ground that" in regulation 5(2)(a) means what Mummery J said the similar expression in the Sex Discrimination Act 1975 meant. Part-time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause."*

35. A remarkable feature of the authorities in this area is the circumstances in which the causation issue came to be addressed[2]. In **McMenemy** the correct construction of the Regulations was not the subject of contested argument: the parties were agreed as to the approach to be taken. In **Gibson** the focus of the EAT was less on the issue of whether part-time status had to be the sole cause of the treatment, and more on whether the correct test involved asking a 'but for' question, as opposed to scrutinising the subjective reasons of the alleged discriminator as explained in **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065. **Sharma** considered the authority of **Gibson** but the EAT was seemingly not referred to **McMenemy**. In **Carl**, the EAT was referred to all the relevant authority but its decision on causation was *obiter*. The judgment in **Engel** does not suggest that the EAT was referred to any of the previous authorities I have mentioned. Finally, in **Campbell** the EAT was referred to **McMenemy** but not, it would seem, the **Sharma** and **Carl** line of authority[3].

The EAT's Judgment in Augustine

36. It was in these circumstances that the issue came before the EAT, Eady P presiding, in **Augustine v Data Cars Limited** [2025] ICR 19. Ground 2 of that appeal involved the Appeal Tribunal addressing the question of whether the correct approach was to ask (per **McMenemy**) if part-time status was the *sole cause* of the treatment complained of; or (per **Sharma/Carl**) if that status was its *effective cause*. The EAT handed down its decision on 15 July 2024[4]. At the hearing of this appeal, the parties were aware that **Augustine** was due to be considered further by the Court of Appeal. That appeal hearing is understood to have taken place on 10 April 2025 with judgment reserved.

[2] In **Augustine**, cited below, Eady P noted that it had been unfortunate that appellate decisions had often been made without reference to all the relevant authorities: see [39].
[3] A further authority is **Ministry of Justice v Blackford [2017] ICR 277** in which Lady Wise, sitting in the EAT, was referred to the two approaches, but did not consider it necessary to express a view as to which was correct: [73].
[4] This was after the decision on the sift in the present appeal.

37. After undertaking a thorough review of all of the relevant authorities in this area (see [39] to [61]), the EAT temporarily put aside the past cases and considered how it would construe Regulation 5(2)(a) afresh. It drew parallels with the statutory language found in the legacy discrimination statutes and section 47B **Employment Rights Act 1996** (detriment on the ground that a worker has made a protected disclosure). Eady P held at [67]:

> *"If we were approaching regulation 5 PTWR absent any prior judicial consideration, we would not hesitate to adopt the same approach. To require that the complainant's status as a part-time worker be an effective cause of the less favourable treatment, even if not the sole cause of that treatment, seems to us to be entirely consistent both with the language of regulation 5(2) and with the protective purpose of the legislation. To hold otherwise would seem to us to be inconsistent with the approach standardly taken to questions of causation (see per Mummery J in O'Neill), and to risk the obviously perverse outcomes hypothesised by Elias J at para 49 of Sharma."*

38. At [67-70] the EAT supported that conclusion by explaining (i) that the Framework Agreement and the Directive which implemented it set out minimum requirements, but that member states could provide more favourable protection (e.g. under section 19 **Employment Relations Act 1999**); and (ii) the language of clause 4.1 of the Framework Agreement ("solely because") was not inconsistent with the construction preferred by the EAT. Eady P agreed with observations in **Sharma** that such language does not mean that where part-time status is an effective cause of less favourable treatment, protection is lost if some other factor can be identified which is part of the cause of the treatment. Accordingly the EAT agreed in principle with the approach in **Sharma** and **Carl**, and would have departed from **McMenemy**: [71-72].

39. The EAT next turned to the question of precedent, and whether it was bound to, or should, follow any of the previous caselaw. It decided that the previous jurisprudence of the EAT fell into one of the exceptional categories identified in **British Gas Trading Ltd v Lock and another [2016] ICR 503**, namely that there were two or more inconsistent decisions of the Appeal Tribunal. The position in relation to **McMenemy** was, however, different. The EAT recognised that as it was hearing an appeal from a decision of an Employment Tribunal in England and Wales, it was not formally bound by a decision of the Inner House of the Court of Session as it would have been had it been hearing an appeal

from a Tribunal sitting in Scotland. Notwithstanding this, and despite the view that the EAT itself had reached on the construction of Regulation 5(2)(a), it considered there was "pragmatic good sense"[5] in following the decision of the Inner House in **McMenemy**.

40. At [82-84] Eady P said this:

> *"82. Although the decision in McMenemy does not bind us as a matter of law, we consider there is a compelling case for not departing from what has been acknowledged to be good practice, whereby the EAT - which has a Britain-wide jurisdiction - should ordinarily follow relevant decisions of higher Courts within Great Britain, notwithstanding that the doctrine of precedent would not normally apply. Where, as here, the decision in question relates to a legislative protection that extends throughout Great Britain, and where there is no separate question as to the application of Scottish law, or the law of England and Wales, there is a legitimate public interest in consistency of approach. The fact that the issue raised by the present appeal has come before us by way of an appeal from an English ET is a matter of chance; as the case-law makes clear, this is an issue that has arisen (not infrequently) in cases both north and south of the England/Scotland border. In these circumstances, we consider that the appropriate course is to approach this appeal on the basis that the decision in McMenemy is binding upon us.*
>
> *83. For completeness, we should make clear that we thus consider we are required to read regulation 5(2)(a) of the PTWR as providing that the less favourable treatment must be :*
>
> > *"on the sole ground that he is a part-time worker." (McMenemy, paragraph 6)*
>
> *84. That, as we see it, is the ratio of the judgment of the Inner House, notwithstanding that, on the facts of the case, it might have been thought that the addition of the word "solely" was unnecessary: the reason for the less favourable treatment was unrelated to the fact that Mr McMenemy worked part-time, it purely arose from the fact that he did not work on Mondays."*

The Arguments on this Appeal

41. Mr Nacif, who appeared for Mr Mireku, advanced his submissions under two headings:

i. First, he submitted that the correct approach to Regulation 5(2)(a) was that outlined in **Sharma** and **Carl**. He argued that this was consistent with the Directive setting minimum (not maximum) standards for protection for part-time workers and with the approach adopted in other areas of employment law (discrimination cases, whistleblower detriment cases). He placed great emphasis on the preferred approach of

[5] Per Laws LJ in **Marshall's Clay Products Limited v Caulfield & Others** [2004] ICR 436.

the EAT in **Augustine**, and submitted that **McMenemy** was not binding and should not be followed. Mr Nacif then squarely addressed the EAT's decision in **Augustine** to follow **McMenemy**. He submitted that **Augustine** was wrongly decided on this point and should not be followed and that I was free to do so, applying **British Gas Trading** because there were conflicting decisions reached by different constitutions of this Appeal Tribunal: **Sharma** and **Carl** on the one side, and **Augustine** on the other.

ii. Mr Nacif accepted that the next part of his argument only arose in the event that he was successful on the first. Thus were I to follow the approach in **Augustine** and **McMenemy**, the appeal would fall to be dismissed. However were I to hold that Regulation 5(2)(a) required only the "effective and predominant cause" of the treatment to be part-time status, Mr Nacif submitted that the Tribunal erred in law by failing to adopt that approach and the case should be remitted to a fresh Tribunal. Mr Nacif took me to [79] of the judgment in which the Employment Judge found that Mr Mireku's overtime was cancelled on 19 October 2022 because "staff were not sure how to process it", and [83] where the Judge saw that confusion as a mistake. Mr Nacif submitted that when searching for the "effective cause" of the cancellation, it was incumbent upon the Judge to examine why there was confusion and whether Mr Mireku's part-time status lay behind it.

42. Ms Thomas, for the Respondent, submitted the appeal should be dismissed.

i. First, on the issue of principle, Ms Thomas emphasised that all the relevant authorities on causation were comprehensively and recently reviewed by this Tribunal in **Augustine** and that a clear conclusion was reached that **McMenemy** should be followed. That conclusion, she submitted, should be followed by this Tribunal.

ii. Ms Thomas then submitted that whatever approach to causation is taken in this case,

the result would be the same. The Tribunal found that the cancellation of Mr Mireku's overtime on 19 October 2022 was due to confusion arising because of his position working for an Area Manager who did not hold the budget for his overtime: see [79, 83]. She submitted that meant part-time status was neither the sole cause, nor an effective and predominant cause of the cancellation.

iii. Further, by reference to the Respondent's Answer, Ms Thomas submitted that Mr Mireku's appeal must fail in any event because the Tribunal found (at [81]) that in respect of the cancellation of overtime on 19 October 2022, Mr Mireku could point to no actual comparator and that is an essential requirement of Regulation 5(1).

Discussion and Conclusions

43. Neither party invited me to await the outcome of **Augustine** in the Court of Appeal. I independently concluded that it would not be necessary to do so for reasons which follow, particularly those in sections (2) and (3) below.

(1) Precedent and the Causation Test

44. It is convenient, first, for me to address Mr Nacif's submission that I should depart from the conclusion reached by the EAT in **Augustine**, viz that Regulation 5(2)(a) should be read as requiring the less favourable treatment to be *"on the sole ground that [the claimant] is a part-time worker"*.

45. The relevance of previous decisions of the EAT was the subject of careful review by Singh J (as he then was) in **British Gas Trading Ltd v Lock and another [2016] ICR 503**. Singh J summarised the principles that apply as follows (at [75]):

> *"…Although this appeal tribunal is not bound by its own previous decisions, they are of persuasive authority. It will accord them respect and will generally follow them. The established exceptions to this are as follows:*
> *(1) where the earlier decision was per incuriam, in other words where a relevant legislative provision or binding decision of the courts was not considered;*
> *(2) where there are two or more inconsistent decisions of this appeal tribunal;*

(3) where there are inconsistent decisions of this appeal tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;
(4) where the earlier decision is manifestly wrong;
(5) where there are other exceptional circumstances."

46. In that case, the issue concerned whether the EAT's previous decision in **Bear Scotland v Fulton [2015] IRLR 15** should be departed from on the basis that it was manifestly wrong, or for other exceptional reasons. Singh J said this at [77-8]:

> *"77. I would not wish to add any further gloss to the concept of "manifestly wrong": it means a decision which can be seen to be obviously wrong ("manifest"). If the error in the decision is manifest it should not be necessary for there to be extensive or complicated argument about the point.*
>
> *78. As for the concept of "exceptional circumstances" it is inherently one that is flexible and dependent on the circumstances. It is deliberately not defined by reference to an exhaustive list or in some other way because one cannot predict what circumstances will arise in the future and which may justify departure from an earlier decision. In this way courts and tribunals retain the flexibility required to do justice in the case before them. On the other hand it is also important to recall that certainty in the law is also a fundamental value: indeed it lies at the root of the concept of legal certainty which is well established in EU law and on which reliance has been placed by Mr Cavanagh in the course of his submissions albeit in a different context."*

47. The learned Judge then concluded at [104]:

> *"In my judgment the present case does not fall into any of the established exceptions to the general principle that this appeal tribunal will normally follow one of its own earlier decisions. I have come to the conclusion that it would be inappropriate for me to reconsider the merits of the substantive argument, considered recently and at length by Langstaff J in Bear Scotland. If I were to accede to the invitation extended by Mr Cavanagh, however eloquently put, there would be nothing to prevent this appeal tribunal, if differently constituted, taking yet again a different view in a third case, perhaps in a year's time. Furthermore it would in the meantime merely create uncertainty for everyone who has to apply the relevant legislation, including the employment tribunal, which is bound by decisions of this appeal tribunal. I agree with the submission made on behalf of the Secretary of State by Mr Tolley that, if Bear Scotland was wrongly decided, then it must be for the Court of Appeal to say so, not for me sitting in this appeal tribunal."*

48. In the present case, Mr Nacif invites me to depart from **Augustine** on the basis that there are two or more inconsistent decisions of this appeal tribunal: the exceptional category identified in **British Gas Trading** at [75(2)].

49. In respect of the underlying substantive question of what causal test applies under Regulation 5(2)(a), I readily accept that this is a situation where different decisions of the EAT have reached different conclusions. Indeed, **Augustine** itself so held at [78]. However, the decision in **Augustine** did not simply concern whether a "sole ground" or "effective and predominant cause" test should apply under the Regulations ("the substantive question"). The EAT took matters further and determined how the divergence in authority at the level of the Appeal Tribunal fell to be resolved in the context of the decision of the Inner House of the Court of Session in **McMenemy** ("the question of precedent"). In her judgment for the EAT, Eady P concluded that the appropriate approach was to apply the test outlined by the Court of Session in **McMenemy**.

50. On the question of precedent, I do not consider that there are conflicting authorities at the level of the EAT. As I have explained at paragraph 35 above, in many cases where the causation issue has arisen, material authorities do not appear to have been cited to the EAT and the EAT unsurprisingly did not set out to resolve inconsistencies within them. **Carl** comes, perhaps, the closest to doing so. There the EAT referred to **McMenemy**, **Gibson**, and **Sharma**, stated that it was not strictly bound by these cases, and then indicated its own preference for an "effective and predominant cause" test: see [42]. However, the EAT did not deal in any detail with whether, in light of observations in **Marshall's Clay Products Ltd v Caulfield [2004] ICR 1502**, **McMenemy** should be followed as a matter "pragmatic good sense". Indeed, that would have been unnecessary because in **Carl** the EAT's conclusion on causation was *obiter*. The claim ultimately failed due to the absence of a true actual full-time comparator: see [51].

51. By contrast, the decision on the question of precedent in **Augustine** formed part of the essential reasoning of the EAT. The result led to the EAT considering whether to remit the causation question for a rehearing and to it expressing the preliminary view that on the Tribunal's findings, applying the "sole ground" test, the only possible outcome would be that the claim under Regulation 5 must fail: see

[90].

52. In my judgment it follows that on the question of precedent decided in **Augustine**, the exceptional category identified at [75(2)] of **British Gas Trading** does not apply. No other exceptional category is said to be engaged. Accordingly, I conclude that this Tribunal should follow **Augustine**.

53. I would add, in case I am wrong, that even if I had taken the view that there was inconsistency on the question of precedent, I would still have declined Mr Nacif's invitation to depart from **Augustine** for the following reasons:

i. First, causation is a critical constituent element of liability under Regulation 5. All involved in predicting the effect of, or applying, the Regulations have a legitimate need for clarity as to the correct test that applies. In **Augustine** the EAT sought to resolve the inconsistencies in the previous case law and provide a clear answer (at least at the level of this Tribunal). If I were to accept Mr Nacif's invitation and reconsider the substantive question, it would undermine the attempt in **Augustine** to provide certainty and clarity. Even if I were to reach the same conclusion as in **Augustine**, there would be nothing to stop a future appellant extending a similar invitation to a differently constituted EAT (as Singh J observed in **British Gas Trading** at [104]). The conscious attempt by the Appeal Tribunal to resolve previous inconsistencies and provide guidance would be for nothing.

ii. Further, the general position in the Courts is that *"where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decision"*: see **White v Alder & Another [2025] EWCA Civ 392**, per Asplin LJ at §18, applying **Colchester Estates (Cardiff) v Carlton Industries Plc [1986] Ch 80,** per Nourse J at 85D. Like the High Court, the

EAT is a superior court of record[6] and I can see no reason of principle why the same general approach is not justified when the EAT is considering its own conflicting decisions. Here, the decision in **Augustine** was clearly reached after a full consideration of the earlier relevant decisions.

iii. Finally, there are two circumstances which make it undesirable to depart from **Augustine** in the present appeal. First, for reasons I shall shortly explain, I have reached the conclusion that on the facts found by the Tribunal, Mr Mireku's claim must fail whichever approach is taken to causation. It is therefore strictly unnecessary to decide whether to depart from **Augustine** in order to determine this appeal. Secondly, it would appear that the Court of Appeal is in any event considering **Augustine** on further appeal. It is therefore unnecessary, and undesirable, for the EAT to revisit the substantive question in the interim.

54. Accordingly, and for the above reasons, I take the view that it would be inappropriate for the EAT to depart from **Augustine**. It follows that unless and until the Court of Appeal or Supreme Court takes a different view, the correct approach to causation is that outlined at [83] of Eady P's judgment: the claimant's part-time worker status must be the sole ground of the less favourable treatment complained of.

(2) Application to the Present Case

55. As I have recorded above, Mr Nacif accepted that were I to conclude that the correct approach to causation was that outlined in **Augustine** and **McMenemy**, the appeal should be dismissed. I consider that concession to be well made. The Employment Tribunal found that the reason why Mr Mireku's overtime was cancelled on 19 October 2022 was because staff were not sure how to process it and made a mistake: see judgment [79, 83]. That finding, which was open to the Tribunal on the evidence, is

[6] See section 19 of the **Senior Courts Act 1981** and section 20(3) of the **Employment Tribunals Act 1996**. See also **Portec (UK) Limited v Mogensen [1976] ICR 396** in which the EAT held that decisions of the High Court were not binding on the EAT, albeit that they were of "great persuasive authority" and "we would not lightly differ from the principles which are there to be found": at 400C-D.

inconsistent with the sole ground for the treatment being Mr Mireku's part-time status.

56. I also address briefly Ms Thomas' submission that Mr Mireku could not have succeeded even had I concluded that the "effective and predominant cause" test was applicable. Mr Nacif argued that on the **Sharma** and **Carl** approach it would have been necessary for the Tribunal to ask why staff were not sure how to process the overtime, why the mistake had been made, and specifically whether that was due to Mr Mireku's part-time status. Ms Thomas' response was that the Tribunal did so and made a finding which provides the answer. After reaching its findings concerning the confusion and the mistake, the Tribunal found *"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"*: see judgment [83]. Ms Thomas submitted that read in context, and in light of all the previous findings, the Tribunal was rejecting any suggestion that part-time status was the cause of the treatment complained of. Ms Thomas also submitted that although the Tribunal did not expressly refer to **Carl** (or, I might add, any of the case law I have referred to in this judgment) she had made reference to that decision in her oral submissions in order to submit that Mr Mireku could not establish causation whatever approach was taken.

57. I agree with Ms Thomas that even had the "effective and predominant cause" approach been applicable, the Tribunal's findings on the evidence are such that Mr Mireku could not succeed with his Regulation 5 complaint. Read fairly, at [83] the Tribunal found that Mr Mireku's unusual working arrangement – working under an Area Manager who did not hold the budget for his overtime – gave rise to the confusion and the mistake and therefore the cancellation of the overtime. That was a reason which the Tribunal had found was entirely independent of Mr Mireku's part-time worker status. At [71], it held that the fact Mr Mireku fell within the budget of Mr Simpson although he was working for another Area Manager was not *"in any way"* linked to Mr Mireku's part-time status: *"His part-time status had nothing whatsoever to do with this treatment"*. Those findings do not only address whether Mr Mireku's part-time status was the sole cause of the cancellation of his overtime on 19 October 2022, but also reject any case built on that status being an effective or predominant cause.

58. It follows that the appeal must fail whatever approach is taken to causation.

(3) The Comparator Point

59. Under Regulation 5(1), a part-time worker is not to be treated less favourably by his employer than the employer treats "a comparable full-time worker". Such a worker is defined by Regulation 2(4) as follows:

> *"(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place—*
>
> *(a) both workers are—*
>
> *(i) employed by the same employer under the same type of contract, and*
>
> *(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and*
>
> *(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements."*

60. In **Carl** the EAT decided that under these provisions it was incumbent upon a claimant to rely on an actual comparator. A hypothetical comparator did not suffice. In his judgment for the Appeal Tribunal, HHJ Peter Clark explained that whereas the legacy discrimination legislation defined direct discrimination in terms of a discriminator treating the complainant less favourably than he "treats or would treat" a relevant comparator, the Regulations do not include the "or would treat" formula: see [9, 14]. Weight was also attached to provisions concerned, respectively, with full-time workers switching to part-time contracts and vice versa. Regulations 3(2) and 4(2) provide that Regulation 5 should apply "as if there were a comparable full-time worker": see [15]. The EAT also rejected an argument that the Directive required that claimants be entitled to rely on a hypothetical comparator: see [17-22]. Neither party on this appeal suggested that **Carl** was incorrectly decided on this point.

61. As summarised above, Ms Thomas submitted that Mr Mireku's appeal must fail in any event

because the Tribunal found, at [81], that the real comparators he had identified in respect of the cancellation of his overtime on 19 October 2022 were not comparable full time workers. I have set out the Tribunal's reasoning at [81] above (see paragraph 23). It will be seen that the essential finding was that Mr Mireku was in a materially different position from that of his comparators because he was working in a different area and under a different Area Manager than the holder of the budget for his overtime. Ms Thomas submitted there was no appeal against this finding and that it was fatal to Mr Mireku's claim.

62. I agree with Ms Thomas that no appeal was brought against the Tribunal's finding at [81], and that, following **Carl**, it is essential for a claimant to be able to point to a comparable full time worker in order to make out less favourable treatment under the Regulations. Whilst there may have been room for argument concerning whether the Tribunal properly addressed the Regulation 2(4) considerations when it reached its conclusion at [81][7], that was not a ground on which this appeal was advanced.

63. It follows that I agree, for this further reason, that Mr Mireku's case cannot succeed and the appeal falls to be dismissed.

Disposal

64. For the reasons I have given, I dismiss the appeal.

[7] The Tribunal expressed itself in [81] in terms of whether there were "materially different circumstances" between Mr Mireku and his comparators. That appears to reflect the approach that would be taken in a direct or indirect discrimination case: see section 23(1) **Equality Act 2010**. Regulation 2(4), by contrast, provides a structured set of considerations which determine whether a full-time worker is a "comparable full-time worker".