

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr J Mireku

AND

London Underground Limited

HELD AT London Central

ON: 10 July 2018

Before: Employment Judge A Davidson
Mr R Pell
Ms E A Flanagan

Appearances

For the Claimant: In person

For the Respondent: Ms E Wheeler (Counsel)

RESERVED JUDGMENT

Issues

1. The issues as set out by Employment Judge Okator-Jones at a preliminary hearing on 10 July 2018 were as follows:

Time limits

- 1.1. Were the claims brought within 3 months as prescribed by Regulation 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the Regulations") and section 123 Equality Act 2010 ("EqA")?
- 1.2. If not, would it be just and equitable to permit the claims, or either of them, to proceed?

Claims

- 1.3. By failing to allocate overtime hours to the Claimant on 12 and/or 21 and/or 24 and/or 28 July 2017, did the Respondent treat the Claimant less favourably than Mr S or Mr F?
- 1.4. If yes, was the less favourable treatment because of the Claimant's race (EqA, section 13)?
- 1.5. If yes, was the less favourable treatment on the ground that the Claimant was a part-time worker (Regulation 5)?

1.6. If the answer to 1.5 is yes, was the treatment justified on objective grounds?

Remedy

1.7. What compensation should the Claimant be awarded?

Evidence

2. The tribunal heard evidence from the claimant on his behalf and from Michael Graves (Area Manager) and Mercellina Adesida (Head of Central and Waterloo & City Line Customer Services) on behalf of the respondent. In addition, there was a bundle running to some 200 pages.

Facts

3. The tribunal found the following facts on the balance of probabilities:

Background

- 3.1. The respondent is the operating company for the London Underground system. The claimant, who is Black African, has been employed since March 2005 as a Customer Service Supervisor in the Loughton Area of stations on the Central Line. He continues to be employed there.
- 3.2. The claimant was originally a full-time worker but, in July 2013, he voluntarily changed his working pattern to be a weekends-only part-time worker, covering two shifts per week.
- 3.3. The Loughton area comprises five stations and is part of a wider 'cover area' with surrounding Hainault and Wanstead areas. The day to day management of station staff within the Loughton area is carried out by a team of Customer Service Managers (CSMs) who report to Mr Graves.
- 3.4. The deployment and rostering of staff is governed by a Framework Agreement which has been agreed with the trade unions and includes provisions requiring overtime to be 'allocated fairly amongst the staff concerned' and requiring that 'part-time staff will be treated equitably with full time staff in respect of terms and conditions of employment'.
- 3.5. Each week, on a Thursday, a list of uncovered shifts is published and staff members can put themselves forward to cover these shifts by way of overtime. Overtime is voluntary and there is no obligation on employees to offer to cover shifts and no guarantee that shifts will be given to them. The CSMs are responsible for allocating overtime and must try and be fair to all staff in the number of shifts they allocate. The CSMs can provisionally accept

overtime offers from staff but subsequently adjust the shifts offered if other members of staff, who have worked less overtime, ask for the same shift.

- 3.6. This process is necessarily informal, frantic and unscientific. The CSMs do their best to be fair and we found no evidence of bias or deliberate disadvantaging of any employees. There is no running total of overtime shifts worked although periodically these are reviewed to ensure health and safety is being complied with.
- 3.7. Overtime rates of pay are 1.25 the normal hourly rate once the employee has worked 35 hours at the normal hourly rate that week.

12 July shift

- 3.8. On 6 July 2017, the claimant put himself forward for four shifts. One of the CSMs (Grace) replied, offering him three shifts (Tuesday 11th, Wednesday 12th and Thursday 13th) with the proviso that 'if anyone wants one of these, this would be shared out'. In the event, another employee, Mr I (believed to be Asian), requested an overtime shift. The duty CSM that evening, Colin, told the claimant that the Wednesday shift would be given to Mr I but he still had the Tuesday and Thursday shifts. Mr I had not had an overtime shift since May, during which time the claimant had worked in excess of 20 overtime shifts.

21 July shift

- 3.9. On 13 July 2017, the claimant asked for shifts on Monday 17th and Friday 21st and was allocated these. Subsequently, the Friday shift was taken from him and given to Mr S (white British) after Mr S complained that the claimant was allocated a disproportionate number of shifts. Mr S originally asked Grace for the shift but she refused his request on the grounds that the shift had already been allocated. This was later overruled by Mr Graves and Colin informed the claimant.

24 July shift

- 3.10. The claimant offered to do a shift on 24 July by email dated 22 July. No response to this email was received and the shift was offered to another employee (Mr S). The claimant did not follow up his unanswered email by another email or by telephone.

28 July shift

- 3.11. On 20 July, the claimant offered to cover shifts on Thursday 27th and Friday 28th. One of the CSMs, Ian, replied that the Thursday shift had been offered in error and the Friday shift had been given to another employee (Mr F).

Shortly afterwards on 20 July, he was offered an alternative Friday shift in another station but did not respond. The claimant says that he only checked his emails on Saturday 22 July when he was next at work. On 21 July the alternative Friday shift had been offered to someone else (Mr S) because the claimant had not confirmed his interest.

- 3.12. The claimant told the tribunal that he had not put himself forward for any shifts since July 2017 as he found this too stressful.

Claimant's complaints

- 3.13. On 19 July, the claimant complained to Mr Graves by email. Mr Graves was on leave from 20 July until early August. On his return he gradually caught up with his outstanding emails and saw the claimant's email on 23 August, by which time the claimant was himself on holiday.
- 3.14. They finally met to discuss the issue on 18 October when the claimant presented his complaints to Mr Graves. At this meeting the claimant did not mention race. His complaint was that he was deprived of the opportunity to clock up sufficient overtime hours to bring him to the 35 hours threshold for enhanced payments.
- 3.15. Mr Graves did not uphold his complaint and pointed out that he had done more overtime shifts than most others. At that time, the claimant was not complaining about the 24 July and 28 July shifts.
- 3.16. He appealed to Ms Adesida on 31 October and she treated this as a grievance appeal. They met on 29 November at which the claimant complained of discrimination on the grounds of his part-time status. He did not mention race discrimination.
- 3.17. Ms Adesida investigated the complaint by speaking to Mr Graves, reviewing the terms of the Framework Agreement, considering the claimant's submissions and looking at the overtime allocations over the previous year.
- 3.18. She rejected the claimant's complaint and wrote to inform him of this on 5 January 2018. The claimant received this on 29 January 2018 and contacted ACAS on that day. His conciliation period ended on 20 February 2018 and he submitted his ET1 on 21 March 2018. He claims to have sent it on the evening of 20 March but had no evidence to support this and we take the relevant date to be 21 March, as date stamped on the original ET1.

The law

4. The relevant law is as follows:

Part-time workers Regulations

- 4.1. 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 as regards the terms of his contract or by being subject to any detriment on the grounds that he is a part-time worker unless the treatment is justified on objective grounds.
- 4.2. A complaint to a tribunal must be made within 3 months of the treatment complained of unless the tribunal consider it would be just and equitable to extend time.

Direct Race discrimination

- 4.3. An employer directly discriminates against an employee on grounds of race if, because of the employee's race, it treats the employee less favourably than it treated or would treat another employee not of that race.
- 4.4. A complaint to a tribunal must be made within 3 months of the treatment complained of unless the tribunal consider it would be just and equitable to extend time.

Determination of the issues

5. We determine the issues as follows:

Time issue

- 5.1. We find that the claims are out of time. We find that the last incident complained of is 28 July 2017. The claimant accepts he has not requested overtime since then. He makes no complaint of discrimination in relation to the grievance or grievance appeal.
- 5.2. In relation to the race discrimination claim, taking into account the length of time since the last incident complained of and the lack of reasonable prospects of success, we do not consider it would be just and equitable to extend time.
- 5.3. In relation to the part-time workers discrimination claim, taking into account the length of time since the last incident complained of, we find that the respondent is prejudiced in not being able to answer details of the complaint and we do not consider it would be just and equitable to extend time. We have taken into account the delay in dealing with the complaints through the internal process, partly due to the claimant's own holiday absence but mostly due to delays in the respondent dealing with matters. Even if we were minded to extend time, we note that the ET1 was presented on 21 March 2018, a day after the one month time

limit after Date B on the ACAS early conciliation certificate which is 20 February 2018.

Substantive claims

- 5.4. If we are wrong about the time issue, we go on to consider the merits of the claimant's claims. We also consider that it would be helpful to the parties, in light of the fact that the claimant is still employed by the respondent and may, in future, request overtime shifts, for us to address the substance of the complaints.

Race discrimination

- 5.5. The claimant has failed to show facts from which the tribunal could infer that discrimination had taken place and therefore the burden of proof has not shifted to the respondent. It is not sufficient that a claimant has suffered treatment and is of a certain race, he must show some reason why the treatment is connected to his race. The claimant failed to put this contention to the respondent's witnesses and did not address it in his own witness statement. The claimant's race discrimination therefore fails and is dismissed.

Part-time workers discrimination

- 5.6. The claimant's complaints under the Part-time Workers Regulations were
- 5.6.1. he was not offered the opportunity by way of overtime shifts to reach 35 working hours whereas others who had reached that threshold were given overtime shifts at a premium rate;
 - 5.6.2. shifts were taken from him after having been allocated to him in order to give overtime shifts to other employees but shifts were not taken from others to give to him;
 - 5.6.3. full-time employees were given overtime shifts on a higher proportion of their free days than he was given as a proportion of his free days as he was a part-time worker. For example in four week period, Mr S worked 6 shifts out of 8 free days and the claimant was allocated 11 (but only worked 9 due to cancellations) out of 20 free days.
- 5.7. We find that the claimant's complaint regarding reaching the 35 hours threshold is misconceived. The difference in normal hours is due to his part-time status and the respondent is under no obligation to add to his normal hours to reach the equivalent full-time hours at the expense of offering full-time workers overtime shifts. Overtime is not guaranteed and the framework agreement stipulates that overtime shifts should be allocated fairly. The respondent measures this by comparing actual overtime shifts offered to each employee irrespective of part-time/full-time status and irrespective of the hourly rate the overtime attracts. We find nothing to criticise in the respondent's approach.

- 5.8. We find that shifts were reallocated from him to other employees on two occasions: 12 July and 21 July. One of these was to Mr I and the other to Mr S. We find that the respondent, on both these occasions, acted within the provisions and the spirit of the Framework Agreement. In the period since Mr I's previous overtime shift, the claimant had worked more than 20 overtime shifts. At the time that the 21 July shift was given to Sweeney, he had done three overtime shifts that month and the claimant had done seven. Mr S drew the discrepancy to the attention of the CSMs which resulted in the reallocation to him from the claimant.
- 5.9. The respondent was unable to explain in detail why shifts were not reallocated to the claimant having originally been given to Mr S and Mr F on 28 July due to the passage of time that had elapsed before he made a complaint about these shifts. However, we do not find that the reason for this is due to the claimant's part-time status. In fact, his part-time status enabled him to do more overtime than full-time workers and he was the employee who was allocated more overtime shifts than anyone else. We therefore do not uphold this aspect of his claim.
- 5.10. We find that the claimant is misguided in comparing the proportion of free days offered as overtime to full-timers and to part-timers. The Framework agreement does not allow for this approach and we do not consider that this calculation is relevant to fairness of allocation. The fundamental difference between the claimant and his comparators is that they are full-time workers and he is on a completely different work pattern. He chose to work part-time in the knowledge that there was no guarantee of overtime. We do not find that he has been disadvantaged in the allocation of overtime shifts as alleged.
- 5.11. If we are wrong about this, we find that the respondent was justified in taking this approach as it was consistent with its obligations in the framework Agreement, negotiated with the trade unions.
6. The claimant's complaints of race discrimination and part-time workers discrimination fail and are hereby dismissed.

Employment Judge Davidson
1 November 2018

For Secretary of the Tribunals
2 November 2018

Date sent to the Parties