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fixed fee employment law solutions

2 JUNE 2025

Issue 237

In this edition we cover:

Whether the imposition of a flat rate fee breaches the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

A case discussing whether an employee who worked more hours than intended under their contract was entitled to additional pay

Part-time worker discrimination: Clarification from the Court of Appeal

Does the imposition of a flat rate fee which applies to full and part-time workers equally, breach the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000?

No, found the Court of Appeal (CoA), because current judicial authority means part-time status must be the sole reason for the less favourable treatment where here, it was not.

Background

In the case of *Augustine v Data Cars Limited*, the claimant, Warren Augustine, was a part-time private hire driver employed by Data Cars Limited (DC Ltd). Mr Augustine worked an average of 34.8 hours per week and was required to pay a flat weekly circuit fee of £148, which was the same fee payable by all drivers, regardless of the number of hours they worked.

Augustine alleged that this flat-fee arrangement constituted part-time worker discrimination.

Law

The legal framework for this case is based on the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR), which implement the European Union's Part-Time Work Directive 97/81.

These regulations require that part-time workers are not treated less favourably than comparable full-time workers unless such treatment can be objectively justified.

Decision
The Employment Tribunal initially rejected Mr Augustine's claim, finding that there was no less favourable treatment because both part-time and full-time drivers were subject to the same flat circuit fee.

Mr Augustine appealed to the Employment Appeal Tribunal (EAT), which upheld the tribunal's decision.

The EAT acknowledged that the tribunal had erred in its approach to the question of less favourable treatment but concluded that the flat fee was not imposed solely on the ground of part-time status.

The case was then taken to the CoA, which also dismissed Mr Augustine's appeal. The CoA followed the precedent set by the Inner House of the Court of Session in *McMenemy v Capita Business Services Ltd*, which requires that unfavourable treatment must be solely on the ground of part-time status to constitute discrimination under the PTWR.

Although the CoA expressed misgivings about the correctness of the McMenemy decision, preferring an approach which looked at the 'effective and predominant cause' of the less favourable treatment, it felt bound to follow it to maintain consistency across Great Britain.

Comment
Kate Wyatt, Partner in our Employment team comments:

"This case underscores the complexities employers face when dealing with part-time worker discrimination claims and highlights the importance of understanding the legal requirements for proving less favourable treatment under the PTWR.

"Employers should ensure that their policies and practices do not inadvertently discriminate against part-time workers and should be prepared to justify any differential treatment objectively.

"The CoA's decision also points to a potential area of legal uncertainty, as it acknowledged that the current interpretation of the PTWR might not fully align with the intended protections, in particular where unfavourable treatment is not solely because of part time status.

"Leave has been granted to appeal to the Supreme Court which may result in a change to the current approach that part-time status must be the sole reason for less favourable treatment for discrimination to be actionable.

"Until a decisive ruling on this point, where part-time status is one of a number of reasons for less favourable treatment, we recommend employers seek early advice on how best to manage risks arising as a result."

Lorry driver not entitled to additional pay due to a contractual requirement for flexibility

In the recent case of *Brake Bros Ltd v Hudek, the Employment Appeal Tribunal (EAT)* considered whether a lorry driver who worked more hours than intended under his contract was entitled to additional pay for those extra hours.

Background
The claimant, Mr Hudek was employed by Brake Bros Ltd as a lorry driver (based out of their Reading Depot) from 18 February 2019 until 31 December 2021. He is still employed by Brake Bros, since 1 January 2022, in a different role.

Mr Hudek's contract as a lorry driver required him to work five shifts per week averaging 9 hours per shift (inclusive of breaks) however noting that those hours may fluctuate and vary according to the needs of the business.

His contractual hours stated that: *"Your normal weekly working hours are 45 (to include breaks / not including breaks) completed within any shifts 5 from 7." His contract also provided that his role required him to "...work such hours for each working shift as are necessary for the proper performance of your work duties on each shift".* His gross basic salary was £27,591.

On reviewing hours, Brake Bros found that several delivery routes out of Reading were more than 9 hours long. They therefore introduced a 4.4% salary increase to allow for an additional 2 hours pay per week.

Overtime was paid for any additional full shift or half shift worked. If a normal shift took longer than expected but did not involve at least an additional 4.5 hours' work, no additional payment was made.

Mr Hudek noticed his shifts averaged ten hours and seven minutes between 2021 and 2022, and he brought an Unlawful Deduction from Wages claim, claiming he should receive pro rata payments, based on his annual salary, for the additional hours he had worked.

Law

Section 13 to 27 of the Employment Rights Act 1996 (ERA) protects workers from unlawful deductions from wages (which also applies to non-payment or under-payment of wages).

It is unlawful for an employer to make a deduction from a worker's wages unless:

- The deduction is required or authorised by statute or a provision in the worker's contract; or
- The worker has given their prior written consent to the deduction.

Unlawful deductions claims are important because they enable workers to claim unpaid (or underpaid) wages in the employment tribunal while the employment relationship continues.

Decision

An Employment Tribunal initially upheld the claim, finding that the contractual terms provided flexibility given that drivers were expected to complete the deliveries allocated to each shift, regardless of how long they took.

However, it was of the view that a principle of the contractual agreement was that occasions when drivers worked more than their expected shift hours would be "balanced out" by others when they worked less. It found that it was implied that, if working hours did not average out over a reasonable period, Brake Bros would pay drivers for hours worked over their 47-hour contractual commitment. However, the overtime provisions were directed only at additional shifts or half shifts.

Brake Bros appealed this decision.

The EAT found that the tribunal erred in its decision and dismissed Mr Hudek's claim
It found that it was incorrect for the tribunal to extend additional payment for flexibility, which was an enforceable contractual obligation, over and above the overtime entitlements which were provided for separately.

The contract provided basic pay for working five shifts of variable length each week. There was no term implied that provided pay for hours worked beyond intended normal working hours, other than when the overtime provisions were engaged.

Comment

Christine Jamieson, Senior Paralegal in our Employment team comments:

"This case is an example of the benefit of clear drafting of a Contract of Employment, to minimise the chance of a dispute between the parties about the true meaning of a term.

"When a dispute arises in the employment context, the starting point for ascertaining the intention of the parties is usually the written contract.

"However, it may become necessary to look beyond the written document to the course of dealings between the parties and their subjective beliefs about what obligations they have entered into.

"This may be because:

- The written document does not reflect the true intention of the parties or was a sham.
- The parties did not intend the written document to be an exclusive record of the terms agreed between them.
- The written documents are sparse and shed little light on the actual arrangement envisaged.

"Implied terms are terms that have not been specifically set out or stated by the parties at the time of entering into the contract. In some cases, custom or practice (where an action is "reasonable, notorious and certain"), may indicate a term is implied.

"Therefore, had Brake Bros made a habit of paying for extra hours, despite the contractual wording, the original Employment Tribunal's decision may have been upheld.

"It is however important to keep in mind when exercising a contractual requirement for an employee to work additional hours for the proper performance of duties without additional pay, that those additional hours do not bring the employee's average hourly rate of pay to below the relevant National Minimum Wage rate."

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