



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102660/2024**

**Held in Glasgow on 12 September 2024**

**Employment Judge: M Sutherland**

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**Mr T Innes**

**First Claimant  
Represented by  
Mr N Patterson -  
Solicitor**

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**Ms M Bergen**

**Second Claimant  
Represented by  
Mr N Patterson -  
Solicitor**

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**Forth Valley College of Further and Higher Education**

**Respondent  
Represented by  
Ms F Ross -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the complaints brought by the first claimant and  
25 second claimant were presented out with the statutory time limit and the claims are  
hereby dismissed for want of jurisdiction.

**REASONS**

1. The claimants have presented complaints of part time worker discrimination.  
An open preliminary hearing was arranged to determine whether the  
30 complaints were presented within the statutory time limit. Both parties had  
professional representation.
2. It was established in discussion at the start of the hearing that the claimants  
assert that: they were treated less favourably than a comparable full time  
worker as regards their entitlement to paid leave in respect of 3 winter closure

5 days in 2022/23 which was not pro-rated (calculated proportionately) for part time staff; this entitlement pertained to a contractual term which was less favourable until it was changed in September 2024; and in the alternative there should be a just and equitable extension of time because the claimants did not know of the relevant facts, their rights or how enforce them until October 2024.

3. The claimants had initially asserted in correspondence that under Regulation 8 (2) of the Part-time Workers Regulations 2000 the complaints were not time barred because there was a series of detrimental failures to give paid leave  
10 for 3 winter closure days and the period in which this might reasonably have been given ended with the holiday year namely 31 August 2023 (in apparent reliance upon Regulation 8(5)(b)). However the claimants subsequently asserted at case management that they relied upon Regulation 8 (4) (a) specifically that the complaints were not time barred because the failure to  
15 give paid leave was a less favourable term which was not removed until September 2023. At today's hearing the claimants initially appeared to rely upon Regulation 8(5) (b) (the period in which paid leave might reasonably have been given) and also Regulation 8(4)(a) (the period of the less favourable term) in the alternative. However, in discussion it was noted there  
20 was on the face of it an act inconsistent with doing the failed act, namely the failure to pay the claimants in January 2023 for 3 winter closure days, such that Regulation 8(5)(a) applied. In these circumstances the claimants confirmed that they sought to rely only upon Regulation 8(4)(a) (the period of the less favourable term) and not upon Regulation 8(5) (b) (the period in which  
25 paid leave might reasonably have been given).

4. The claimants did not attend or give evidence. Grace Hepburn, Unison Trade Union Representative, gave evidence on their behalf. Ralph Burns, respondent's Head of Human Resources, gave evidence on behalf of the respondent.

30 5. A bundle of documents was provided and parties made oral submissions.

6. The issue of whether the claimants were treated less favourably than a comparable full time worker as regards their entitlement to paid leave for 3

winter closure days (including that the treatment is not justified on objective grounds) falls to be determined at a final hearing, if any.

7. The issues to be determined at this hearing were as follows:

5 a. Was the complaint lodged within 3 months of the less favourable treatment (Regulation 8)?

i. Was entitlement to paid leave for 3 winter closure days a contractual term?

ii. If so, what was the period during which the term was less favourable?

10 b. If not, was it lodged within such other period as the tribunal thinks just and equitable?

### Findings of Fact

8. The tribunal makes the following findings in fact-

9. The first claimant is employed by the respondent as a Technical Assistant as part of Support Staff / Corporate Services. He was employed full time from 15 October 2019 and then part time from 28 November 2022.

10. The second claimant is employed by the respondent as an Assessor as part of Support Staff / Corporate Services. She has been employed by the respondent since at least 2013. She was employed as full time until August 20 2023 when she changed to part time.

11. Both claimants are members of the trade union Unison.

12. Staff written contracts describe the annual holiday entitlement as including fixed days. The contracts make no reference to 3 winter closure days.

13. The respondent holiday year was from 1 September to 31 August. Prior to 25 change in September 2023, the full time holiday leave entitlement comprised 15 fixed days and 30 flexible days. (That entitlement did not include 3 winter closure days.) The holiday leave entitlement of 45 days was pro-rated for part time staff.

14. Historically support staff were required to work part of the winter period unless they requested holiday leave. Given the absence of students and academic staff, it was not considered efficient to have support staff attend work and around 10 years ago the respondent took the decision in consultation with the union to close the campus for 2 weeks during the winter period.
15. During this period staff were required to take 7 fixed holidays and in addition there were 3 closure days. These closure days arose at end December or early January depending upon the dates of the school holidays and whether Christmas and New Year fell on working days. There have been 3 winter closure days each year for around 10 years and staff were advised the dates of the closure over a year in advance. Staff are given paid leave for those days if they would otherwise have worked on those days.
16. The claimants as full time workers were aware that they were on paid leave during the 3 winter closures days; that as part time workers they only received paid leave on a closure day if they were otherwise scheduled to work; and that annual leave is normally pro-rated (calculated proportionately) for part time workers.
17. The respondent has on a number of occasions (albeit not regularly) advised staff that the closures are discretionary (there is no contractual entitlement) and staff can be required to work during a closure. In practice all of the advised closures went ahead and most staff have never been required to work during a closure day.
18. In October 2022 GH, union rep raised concern that part time staff don't get the benefit of 3 closure days. It was explained by RB, HR in response that staff can be expected to work a closure day and these days are not part of the 45 days holiday entitlement. GH, union rep did not dispute this description but sought an equality impact assessment ('EQIA').
19. An EQIA was completed in November 2022 which expressly stated that "these are not contractual holiday dates and are therefore not reflected in overall leave entitlement...FVC reserves the right not to close on these days on any given year as business need requires". It noted that depending upon the dates

of the closure and their working pattern, in any given year, some part time staff would receive less than their pro-rate share, and some part time staff would receive more than their pro-rata share, but this should balance itself over time. It proposed to monitor the impact on part time staff. The union was  
5 provided with a copy of the EQIA and did not challenge it terms.

20. 3 winter closure days occurred on 4, 5 and 6 January 2023. The claimants were not scheduled to work on some of these days and they did not receive payment in respect of those closure days when their wages were paid at end January. In that year they received less than the proportion of paid leave  
10 based upon the number of days they worked with that of a full time worker.

21. Management and Unison hold bi-monthly consultation meetings. At meetings in January and March 2023 RB, HR explained that at this time there was no information on whether the 3 winter closures days caused a disadvantage to part time staff, that there would be a review which would be ready by next winter, and if there was found to be a disadvantage this would be resolved.  
15 The TUS considered that the disadvantage was apparent.

22. In September 2023 the respondent took the decision to add 3 fixed days to the annual holiday entitlement (which would be pro-rated) instead of having 3 winter closure days. It did not proceed with the review of the impact of the  
20 previous practice on part time staff.

23. In October 2023 unison wrote to its members, including the claimants, raising the issue of part time worker holiday discrimination in respect of the failure to pro rate paid leave for the winter closures. GH, union rep held meetings with the claimants. It was apparent to GH from those meetings that the claimants  
25 did not previously know that they might have a claim for discrimination.

24. Both claimants engaged in ACAS Early Conciliation from 28 November 2023 to 9 January 2024. Both claimants lodged their claims on 13 February 2024.

### **Observations on the evidence**

25. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.
26. The witnesses were on the whole credible and reliable in their testimony which reflected the documentary evidence. The only exception was GH, TU rep's evidence on whether the winter closure days were discretionary.
27. GH, TU initially accepted in cross examination that unlike holidays the closure days were discretionary, there was no staff entitlement, and that staff could be required to work during a closure. However she latterly stated in evidence that she did not think that at the time and had only been adopting RB's subsequent explanation. RB, HR stated in evidence that the respondent had on a number of occasions (albeit not regularly) advised staff that the closures were discretionary (there was no contractual entitlement) and staff could be required to work during a closure. Given the terms of the email from RB in October 2022 and the EQIA in November 2022, which were not challenged by GH, TU rep or the trade union at the time, it is considered more likely than not that GH considered that the closures were discretionary and staff could be required to work. It appeared that the issue being raised by the union was that the decision not pro-rate payment for the closure days was a discriminatory practice rather than a discriminatory term.
28. The claimants did not attend, and there was accordingly no evidence from them on what they knew and when regarding the relevant facts, their right to bring claims and the method and timing for doing so. It's likely that both claimants were aware of the following: that as full time workers they were on paid leave during the 3 winter closures days; that as part time workers they only received paid leave on a closure day if they were otherwise scheduled to work; and that annual leave is normally pro-rated (calculated proportionately) for part time workers. It is also likely that both claimants were aware that in January 2023 they did not receive paid leave on all of the closure days. They were therefore aware of the relevant facts. However they may not have been aware of the legal implications of this without seeking union advice.

29. A complaint of part time discrimination may not be made after the end of the period of 3 months beginning with the date of the less favourable treatment or detriment (Regulation 8(2)) or such other period as the tribunal thinks just and equitable in all the circumstances of the case (Regulation 8 (3)). Under Regulation 8(4)(a) where a term in a contract is less favourable, that treatment shall be treated as taking place on each day of the period during which the term is less favourable. Under Regulation 8(4)(c) a deliberate failure to act shall be treated as done when it is decided upon. In the absence of evidence establishing the contrary, a person shall be taken to decide not to act when he does an inconsistent act, or if no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act (Regulation 8(5)).
30. Unfavourable treatment may relate to the terms of a contract or a detriment resulting from an act or a deliberate failure to act (Regulation 5). These are not mutually exclusive: the failure to provide a pension may relate to the terms of an office (or contract) during the appointment (or employment) and there may also be a detriment for a failure to act on retirement (*Miller and ors v Ministry of Justice (EWCA Civ 1368 SC [2019] UKSC 60)*).
31. A term may be implied by custom and practice if it is reasonable, notorious (that it is known to employees) and certain (that the practice will be followed consistently) (*Bond v Cav Ltd [1983] IRLR 360*). The issue is whether it can reasonably be inferred from all the circumstances considered objectively that the parties intended to create a binding contractual term (*Albion Automotive Ltd v Walker 2002 EWCA Civ 946, CA*).
32. When determining what period is just and equitable in all the circumstances, the tribunal has a broad discretion to consider all factors it considers relevant (*Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*). Factors which may be relevant, but neither exhaustive nor determinative, include: the length of the delay; the reasons for the delay; the claimant's knowledge of the act and the promptness of seeking advice; whether the cogency of evidence will be materially affected; prejudice to the respondent; medical conditions preventing or inhibiting the claim; and whether

there are little or no reasonable prospects (*Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132).

### Submissions

33. The claimant's oral submissions were in summary as follows –

- 5 a. The full time comparators had a contractual right to paid leave for 3 winter closure days.
- b. A contractual term to that effect had been implied by custom and practice. The 3 winter closures days were known to all; the policy had been applied for an extensive period of time; and the employees had
- 10 a reasonable expectation (per *Albion*).
- c. The term was less favourable until early September 2023 when it was removed and replaced by the additional 3 fixed days holiday. The complaints were accordingly in time applying Regulation 8(4)(a).
- d. Alternatively, the holiday year is the period in which the respondent
- 15 might reasonably have been expected to make payment for the 3 winter closure days. Accordingly the failure to pay was a continuing act which ended on 31 August 2023 under Regulation 8(2).
- e. Alternatively, there should be a just and equitable extension of time
- 20 under Regulation 8(3). The tribunal has a broad and unfettered discretion (per *Abertawe*). There is no requirement for a good reason for the delay and time may be extended without any explanation from the claimant. The respondent would suffer little prejudice but claimants would be unable to proceed.

34. The respondent's oral submissions were in summary as follows –

- 25 a. The winter closure days were not certain – it was a matter of management discretion. The parties must be shown to be applying the term because of a legal obligation to do so rather than as a matter of policy (*Solectron Scotland v Roper & Ors* EAT/0305/03).



- b. The claimants' submissions focused erroneously on the failure to rectify the failure rather than on the timing of the failure itself.
- c. The closure days were not holidays and accordingly the holiday year is of no relevance.
- 5 d. The complaints are at least 8 months out of time. Time limits are to be strictly observed. An extension must be justified and is the exception rather than the rule (*Miller v MOJ & Others EAT/0003/15*) but the tribunal retains a wide discretion (*Jones v SSHSC [2024] EAT 2*).
- 10 e. In considering prejudice to the claimants the low value of the claims and the claimants' failure to attend the hearing is relevant. There was a substantial delay which was unexplained given their trade union membership.

### Discussion and decision

#### *Was paid leave for 3 winter closure days a contractual term?*

- 15 35. There have been 3 winter closure days each year for around 10 years and staff were advised the dates of the closure over a year in advance. Staff are paid for those days if they would otherwise have worked on those days. Accordingly, full time staff are paid for all 3 days and part time staff are not paid for the days they would not have worked. The amount of paid leave was
- 20 not pro-rated but instead depended upon the dates of the closure, and their working pattern. In any given year, some part time staff would receive less than their pro-rate share and some part time staff would receive more.
- 25 36. The practice of giving paid leave for 3 winter closure days was notorious but it was not certain. The respondent had on a number of occasions (albeit not regularly) advised staff that the closures were discretionary (there was no contractual entitlement) and staff could be required to work during a closure. Notwithstanding the consistent and lengthy practice, the nature of that communication did not support the inference considered objectively that the employers intended to be contractually bound (per *Albion*). Paid leave for 3

winter closure days was not therefore a contractual term implied by custom and practice or otherwise.

*If so, what was the period during which the term was less favourable?*

37. It is noted for completion, that had there been such a contractual term, the period of the term ended with the decision to change to 3 fixed holidays in early September 2024.

*What was the date of the deliberate failure to act?*

38. Contrary to the agreement reached at the start of today's hearing the claimants again appeared to rely in submissions upon Regulation 8(5) (b) (the period in which paid leave might reasonably have been given). To the extent that this was not waived by earlier agreement, it is noted for completion that by not paying for the 3 winter closure days in January 2023 the respondent had done an act inconsistent with doing the failed act and this was therefore the date of the deliberate failure to act (Regulation 8(5)(a)).

*Was the complaint lodged within 3 months of the less favourable treatment?*

39. The complaints were not therefore lodged within 3 months of the less favourable treatment.

*If not, was it lodged within such other period as the tribunal thinks just and equitable?*

40. In October 2022 the union raised a concern that part time staff don't get their fair share of the 3 winter closure days. By November 2022 the issue was the subject of an equality impact assessment. In January 2023 the claimants, who were members of the union, received less than their pro-rata share of paid leave for the 3 winter closure days. In Spring 2023 the respondent confirmed that the review of whether there was disadvantage would be concluded by next winter. The trade union considered that the disadvantage was apparent. In September 2023 the respondent added 3 fixed days to the annual holiday entitlement and ceased its practice of having 3 winter closure days. In October 2023 the union sought to represent members who had been affected. Both claimants engaged in ACAS Early Conciliation from 28 November 2023 to 9 January 2024. Both claimants lodged their claims on 13 February 2024.

41. The claimants were aware that full time workers received paid leave for all of the closure days but part time workers did not – they only received paid leave for the days they were otherwise scheduled to work. The claimants were also aware that annual leave is normally pro-rated (calculated proportionately) for part time workers. By November 2022 the union was aware that some members were receiving less than their pro rata entitlement in some years in arguable breach of the Regulations. By January 2023 the claimants were aware that they had not received paid leave for all of the closure days that year. The claimants were members of the union could readily have taken advice on their legal entitlement to paid leave for closure days. The claimant did not proceed to ACAS Early Conciliation until some 10 months later and only once the respondent had given 3 additional fixed days holiday (which would be pro-rated) instead of the 3 closure days. It may be of relevance to the prospects of establishing less favourable treatment (including objective justification) that long serving employees (such as the claimants) are likely to have received more than their pro rata entitlement to paid leave in some years and less in others. In all the circumstances the claims were not lodged within such other period as the tribunal thinks just and equitable and the claims are therefore dismissed for want of jurisdiction.

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<b>Employment Judge:</b>	<b>M Sutherland</b>
<b>Date of Judgment:</b>	<b>19 September 2024</b>
<b>Entered in register:</b>	<b>20 September 2024</b>
<b>and copied to parties</b>	