

THE INDUSTRIAL TRIBUNALS

CASE REF: 9825/18

CLAIMANT: Robert Armitage
RESPONDENT: Mourne Heritage Trust

DECISION

The claimant was not treated less favourably when compared to permanent Countryside Officers within the respondent organisation. His claim is therefore dismissed in its entirety.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Browne
Members: Mrs J Foster
Mr I O'Hea

APPEARANCES:

The claimant was represented by Mr P Sloan of Citizens Advice Bureau.

The respondent was represented by Mr M Carey, Chief Executive of the respondent organisation

ISSUES AND EVIDENCE

1. The claimant's case is based upon his assertion that he as a part-time worker was treated less favourably than full-time workers in the respondent organisation.
2. His claim is focused upon the period between 2 April 2018 until 11 May 2018, arising from a reduction in his working hours by the respondent during that period.
3. The respondent is a company limited by guarantee, and a charity. It receives core funding from government. It also applies annually for continued funding from its local council, and from Tourism NI. The respondent annually makes further ad hoc grant applications to outside bodies, to supplement its primary sources of funding.

4. The respondent's evidence was that the additional funding applications, when successful, enable it to carry out remedial and other tasks it could not otherwise afford. The respondent also occasionally receive additional funding from its core sources, to deal with unforeseen events, such as storm damage, which require immediate attention.
5. The claimant was first employed by the respondent in June 2016 as a temporary seasonal Countryside Assistant for the high [summer] season, which annually runs from June until September. It has been the practice of the respondent over many years to bring in additional staff to cover this, its busiest period.
6. In May 2016, the claimant had unsuccessfully applied for the advertised post of Countryside Officer. It was advertised as being "one year fixed term (with potential for extension subject to funding)".
7. The respondent however was able to offer the claimant one of two further posts advertised at the same time as that of Countryside Officer, for which he also applied, namely, Countryside Assistant (Casual).
8. That job title was broken down in to two in the advertisement. The first, which the claimant was offered, was "37 hours per week in the high season, approx May to September (2 posts)". The second was "Variable hours throughout the year (2-4 posts)".
9. The claimant was informed by letter of 17 June 2016 that he had been unsuccessful in his application for Countryside Officer, but that he had been successful in the post of Countryside Assistant (seasonal). The job description for that post made clear that its renewal depended upon funding, and that the two roles were entirely separate as regards one being guaranteed during high season, and the other as and when required across the whole year.
10. The respondent was unsuccessful in filling the Countryside Officer post. In August 2016, it conducted an internal trawl, and the claimant applied, but again was unsuccessful.
11. Whilst the claimant's high season period of work as Countryside Assistant was due to end in September 2016, the respondent was able to offer him work under the second limb of that role, namely, "variable hours throughout the year", as appeared in the advertisement. Its ability to do so was because it received unanticipated additional ad hoc funding for remedial storm damage work and for specific projects.
12. The result was that the claimant was needed to work five days per week. His additional skill of being qualified to use a chainsaw was of particular benefit to the respondent in light of the severe storm damage to trees, as well as that to paths and trails, during that autumn and winter period. That skill was listed as a desirable but not essential criterion for both advertised posts.
13. The respondent made the case that, had it not been for these incidents and projects, it would not have received the money required to address them, and consequently it could not have afforded to offer this work to the claimant. It was

also the respondent's case that the additional workload drew staff from its core team of full and part-time staff away from their usual duties, thereby necessitating the deployment of casual staff.

14. The additional work lasted in to the spring of 2017. Rather than end the claimant's working hours between March and the start of the high season in May, the respondent decided to draw in advance from its 2017/2018 high season budget, as an acknowledgment that he had always made himself available to carry out whatever work was required.
15. The respondent explained to the claimant that this was being done. The claimant in evidence accepted that he had been informed by the respondent on a number of occasions, both personally and at team meetings, of the fluid situation around additional hours.
16. At the end of the 2017 high season, the respondent again was in receipt of additional funding for specific projects, and was able to offer the claimant regular additional hours of work, which it anticipated would end in around November 2017.
17. Instead however, further funding became available throughout the winter season, enabling the respondent to offer additional hours to the claimant and to other Countryside Assistant staff. The claimant was therefore employed at full time hours until the end of the financial year in April 2018.
18. At that point however, the respondent's case was that it was significantly less secure than before. This was due in part to an additional burden of pension contributions, with no parallel increase in income. There also was in early March 2018 an initial refusal by the local council to accede to the respondent's application for additional core funding. That issue was not resolved until after a meeting between the respondent and the council in early May 2018.
19. The respondent therefore made the case that its decision in late March 2018 to offer the claimant only three days' work per week between early April and the start of his contracted high season work period was only because of financial constraints outside its control.
20. The insecure funding position of the respondent was notified to the claimant in an email, explaining that this would result in his hours being reduced until the start of the high season in mid May 2018.
21. The respondent made the point to the tribunal that part of its reasoning in offering this "bridge" of continuous, albeit reduced, employment was also to enable the claimant to be eligible for a redundancy situation which was on the horizon. The claimant was in fact given a redundancy payment in September 2018, by which time he had secured employment elsewhere, commenced on 3 September 2018.
22. The claimant's case was that, by cutting his hours between 1 April 2018 and 13 May 2018, the respondent treated him less favourably than his full-time (permanent contract) colleagues. On his case, their hours also should have been

reviewed by the respondent. Part of his reasoning for this was that his tree management skills were significantly better than those employed on permanent contracts.

23. The claimant also considered that the decision to reduce his hours was at least partially influenced by complaints by colleagues about the quality of his work, and about his reported attitude to other staff. Those complaints were only raised with him at a meeting on 30 April 2018 with Matthew Bushby, the respondent's Countryside Services Manager, after the claimant had been informed by Mr Bushby on 27 March 2018 of the decision to reduce his hours. Mr Bushby confirmed in his evidence that the complaints only came to his attention after he had informed the claimant of that decision. There was no evidence which contradicted that assertion.
24. The claimant's case to the tribunal was that he, in effect, was at least as capable as his permanent Countryside Officer colleagues of carrying out the same work as they performed. It was also his case that he in performing his contractual role as Countryside Assistant identified what jobs required attention, and that he decided whether, when, and how to do them.
25. The respondent's case was that, whilst the claimant had a degree of autonomy as to how practically to perform his designated tasks, the other decisions remained firmly outside his sphere of control. His function, as a reflection of his job title and job description, was to assist with work decided by the permanent core team, under the overall control of Mr Bushby, in accordance with how they perceived its urgency, and in terms of its affordability within the constraints of budget.

LAW AND CONCLUSIONS

26. The relevant legislation applicable to this case is contained in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 and in the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002:-

“Meaning of full-time worker, part-time worker and comparable full-time worker

2.-(1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.

(2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.

(3) For the purposes of paragraphs (1), (2) and (4), the following shall be regarded as working under different types of contract:-

- (a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship;
- (b) employees employed under a contract for a fixed term that is not a contract of apprenticeship;
- (c) employees employed under a contract of apprenticeship;
- (d) workers who are neither employees nor employed under a contract for a fixed term;
- (e) workers who are not employees but are employed under a contract for a fixed term;
- (f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.

(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...”

“Less favourable treatment of fixed-term employees

3.-(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee:-

- (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.”

- 27. The tribunal unanimously concluded that the terms of Regulation 2 (4) (a) (1), when applied to the facts of this case, preclude the claimant from using his full-time colleagues as comparators. The evidence clearly showed them to be employed under entirely separate contracts from the outset.
- 28. Their jobs and contracts were for full-time work as Countryside Officers, whereas the claimant was employed as a Countryside Assistant. That post was demonstrably a supplementary, supporting role to that of Countryside Officer. It was from the outset casual, seasonal, employment.

29. The claimant sought to conflate his performance of the tasks required to equate to those of a Countryside Officer, regardless of the fact that the two posts were, and were from the outset declared to be, entirely separate, with separate job descriptions and contracts.
30. The claimant sought to establish that utilisation by the respondent of his tree management skills meant that he, despite two unsuccessful attempts to be appointed, was a Countryside Officer in all but name. It was clear to the tribunal however that the possession of that skill alone was never what distinguished one role from the other.
31. The differences between the two contracts were clearly demarcated from the outset in each job description as to the inherently supplementary nature of the Countryside Assistant role; and in the consequent clearly worded contract, which highlighted absence of guaranteed work outside the high season.
32. Whilst the nature of the work was similar across both jobs, the nature of the respondent's business is such that this is inevitable. The key difference is that one was permanent, the other casual, confined to the high season and to any ad hoc requirement.
33. There additionally was no minimum number of hours a Countryside Assistant was required to work outside the high season, so the respondent was able to, and did offer them consistently to the claimant, but did so at its discretion, in line with that portion of his contract of employment.
34. The tribunal concluded that, as conceded by the claimant in evidence, and as set out in the job description for his role, there was at most a hope of additional hours, but no enforceable expectation implied or created by its terms. Any such additional hours were clearly expressed as such, to be wholly dependent upon need, as identified by the respondent, and where funding was available.
35. That situation was also repeatedly explained to the claimant by the respondent.
36. The tribunal is therefore satisfied that the claimant was not a part-time employee for the purposes of the relevant legislation, as he was not employed under a similar contract to that of a Countryside Officer.
37. His claim is therefore dismissed in its entirety.

Employment Judge:

Date and place of hearing: 26 February 2019, Belfast.

Date decision recorded in register and issued to parties: