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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101656/2022

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Employment Judge Porter

Mrs C Fairbairn

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Claimants  
Represented by:  
Simon Maisey,  
Cabin Crew Union UK

Easyjet Airline Company Limited

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Respondents  
Represented by:  
Ms Greenley,  
Barrister

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REASONS

Introduction

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1. The claimants remain employees of the respondents. The claims brought by them in these proceedings are resisted and there was a Preliminary Hearing ("PH") on case management on the 6<sup>th</sup> June 2022 at which the claimants' representative (Mr Maisey) identified the claims as claims of breach of contract, unpaid wages and holiday pay.

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2. At that PH Further and Better Particulars of the claimants' claims were ordered and the case was set down for a Preliminary Hearing on time bar to take place on the CVP Kinkyplatform.
- 5 3. The Further and Better Particulars were intimated by the claimants on the 26 June 2022. The Further and Better Particulars identified the claimants' claims as being claims under Regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
- 10 4. The Preliminary Hearing on time bar took place on the 14<sup>th</sup> July 2022. At the PH the claimants were represented again by Mr Maisey of the Cabin Crew Union UK and the respondents were represented by Ms Greenley, barrister.
- 15 5. At the outset of the PH there was discussion on the Further and Better Particulars submitted by the claimants. It was agreed that these identified new claims. After taking instructions Ms Greenley did not oppose the same as an amendment of the existing pleadings. The claimants' claims of breach of contract, unpaid wages and holiday pay were accordingly dismissed.
- 20 6. At the PH evidence was heard from Cheryl Fairburn only. Parties made reference to a bundle of documentation numbered 1-100.
7. An oral Judgment was delivered on the 14<sup>th</sup> July 2022. On the 28<sup>th</sup> July 2022 solicitors instructed by the claimants asked for written reasons.

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#### Findings in Fact

8. It was not in dispute that agreement was reached between the respondents and Unite the Union to introduce a minimum number of non working days for part time staff such as the claimant. This agreement was intimated to the parties on the 10<sup>th</sup> September 2021 and implemented on the 1<sup>st</sup> of October 2021. The Tribunal had no reason to disbelieve the evidence of Ms Fairbairn that at the material time cabin crew had difficulty accessing their emails; however the Tribunal observed that the changes implemented by the
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agreement reached by Unite the Union on their behalf must have been apparent to the claimants given the change in rosters that took place from 1<sup>st</sup> October 2021.

- 5 9. Neither was it in dispute that in the period prior to and after 1<sup>st</sup> October 2021 all cabin crew including the claimants had access to legal advice via Unite the Union and the Cabin Crew Union UK. The Tribunal observed that in the time period of 3 months from 1<sup>st</sup> October 2021 the claimants were aware of cabin crew employed by the respondents in Glasgow raising Tribunal proceedings under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 against a similar factual matrix.
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10. On the 25<sup>th</sup> November 2021 7 of the 8 claimants raised a collective grievance concerning the number of part time days worked by them compared to full time colleagues during the period prior to the implementation of this agreement. The grievance was investigated and the outcome intimated on 15 15<sup>th</sup> December 2021. The claimants were unsuccessful in their grievance in that the respondents concluded that looking back over a 3 year period the claimants had in fact been available to work proportionately fewer days than 20 the number of working days set out in full time contracts; and that, further, payment for days off for part and full time staff were subject to a separate agreement with Unite the Union which they concluded resulted in no historical unfairness.
- 25 11. The claimants commenced early conciliation on 13<sup>th</sup> January 2022 and an ACAS Certificate was issued on 23<sup>rd</sup> February 2022.
12. Ms Fairbairn gave evidence that she contacted ACAS with a view to raising proceedings on 21<sup>st</sup> December 2022. She then provided ACAS with the history to this dispute. The Tribunal found Ms Fairbairn overall to be a 30 credible witness; however the Tribunal found it difficult to believe that in the course of discussions with ACAS on the 21<sup>st</sup> December 2022 discussions on the issue of time bar did not take place.

13. ACAS then sent links by email to Ms Fairbairn with a view to her commencing proceedings on behalf of the other claimants. The Tribunal accepted that the links sent were not for the bringing of a multiple but were for the bringing of an individual action only. Ms Fairbairn took no further action in the matter until 7<sup>th</sup> January when she contacted ACAS again and 6 days later (on the 13 January 2022) the Early Conciliation Certificate was issued.
14. The explanation given by Ms Fairbairn for the delay in raising proceedings was that she believed that time started to run from the date of lodging the claimants' grievance being the 25<sup>th</sup> November 2021. Again, whilst the Tribunal found overall Ms Fairbairn to be a credible witness the Tribunal did not find it credible that she was unaware of the fact that time began to run after the changes to the claimants' contract were implemented on 1<sup>st</sup> October 2021. The Tribunal reached this conclusion having regard to the fact that Ms Fairbairn had access to advice from 2 unions; that she was aware of similar claims being raised by Glasgow colleagues and that she had contacted ACAS on 21<sup>st</sup> December 2022 within the 3 month time limit and then had a discussion about the claims.
15. The Tribunal observed that it would have been of assistance to hear evidence from additional claimants. However Mr Maisey chose to lead evidence from Ms Fairbairn only.
16. Regulation 8 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides that an Employment Tribunal shall not consider a complaint unless it is presented before the end of the period of 3 months beginning with the date of the less favourable treatment or detriment to which the complainant relates. The Regulation also provides that a Tribunal may consider a complaint which is out of time if in all the circumstances of the case it considers that it is just and equitable to do so.

17. The “just and equitable” discretion is a wide discretion. However, the onus remains on claimants to persuade a Tribunal that the extension should be granted (Robertson v Bexley Community Centre [2003] IRLR 434: Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.)
18. In essence the discretion is a question of fact and judgment to be answered by the Tribunal of first instance which is empowered to answer it. There is considerable case law on the “just and equitable” extension; however if there is a matter in which the appellate authorities are united it is that the exercise of the just and equitable discretion is one for the Tribunal to exercise at first instance with only a limited scope to challenge the exercise of that discretion on appeal.
19. Adedeji v University Hospitals Birmingham gave guidance to Tribunals in determining whether to grant the just and equitable extension. The Tribunal concluded that, from the caselaw, relevant factors are the length of and reasons for the delay; the prejudice which each party would suffer as a result of granting or refusing to grant an extension; and the potential merits of the claim.

#### Discussion and Decision

20. The Tribunal considered firstly the length of and reasons for the delay. The Tribunal noted firstly that the delay itself is relatively short being a matter of weeks. However on the Findings in Fact the Tribunal were not satisfied that adequate reasons had been given for that delay. To this end the claimants must have been aware of their course of action at the latest by 1<sup>st</sup> October 2021 when the changes to the Contract of Employment were implemented. They were also aware that similar proceedings had been raised by part time cabin crew based in Glasgow. The claimants at all time had access to advice from 2 unions.

21. Further, during the critical period between the outcome of the grievance and this case being time barred only one call was placed by Ms Fairbairn to ACAS and she did not contact them again until 7<sup>th</sup> January 2022. The Tribunal noted that there was a further delay before the Early Conciliation Certificate was requested and granted on 13 January 2022.
22. The Tribunal then proceeded to determine the important issue of prejudice. On the one hand the claimants face the undoubted prejudice of being unable to pursue their claim. Against this, the Tribunal observed it was not in dispute that if the claimants were allowed to engage in their claim the respondents would have to engage in detailed scrutiny of historic rotas which would involve considerable manpower.
23. In considering the issue of prejudice, the Tribunal noted that whilst this factor is of importance it is not, in itself, determinative of whether the Tribunal should exercise their just and equitable discretion to extend time.
24. Finally, the Tribunal considered the merits of the claim. To this end, the Tribunal noted that at the PH on the 6<sup>th</sup> June 2022 Mr Maisey submitted that the claimants intended to take legal advice from a barrister in early course.
25. The Tribunal noted that the claimants have had 2 opportunities to articulate their claim. The Tribunal agreed with the respondents that notwithstanding this opportunity the claim before the Tribunal remains unclear and unspecified. In particular, there is no adequate specification of the periods over which the claimants claim less favourable treatment; no comparator is specified; and further clarity is required the basis of the claim for each contractual element in respect of which less favourable treatment is alleged. Remedy remains unspecified.

26. In all of these circumstances it is the decision of this Tribunal that the claimants have failed to discharge the onus upon them. The Tribunal concludes that it is not just and equitable to extend time in all the circumstances of this case.

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<b>Employment Judge:</b>	<b>J Porter</b>
<b>Date of Judgment:</b>	<b>8th August 2022</b>
<b>Entered in register:</b>	<b>9th August 2022</b>
<b>and copied to parties</b>	

