EMPLOYMENT TRIBUNALS

Claimant: **Mrs J L Davis**

Respondent: **Students International Limited**

Heard at: **Leicester** **On:** **Tuesday 24 October 2017**

Before: **Employment Judge Britton (sitting alone)**

Representation
Claimant: **In Person, assisted by her Husband**
Respondent: **Mrs A Blythe, Director of the Respondent**

JUDGMENT

1. The Respondent will pay the Claimant a balance statutory redundancy payment of £5,680.56. Section 166 of the Employment Rights Act 1996 applies to this element of the award.

2. The claim for breach of contract (failure to pay balance notice pay) succeeds. The Respondent will pay the Claimant damages of £1,546.56.

3. The claim for unlawful deduction from wages (short fall on payments) succeeds and the Respondent will pay the Claimant compensation of £1,350.00.

REASONS

Introduction

1. The claim is for balance statutory redundancy pay, notice pay and outstanding holiday pay and some wages. The claim was presented to the Tribunal on 12 May 2017. There was then a response. And as reiterated by the statement produced today for Mrs Blythe the defence is that the reduction in the Claimant's hours was agreed to by the latter. Thus on the termination of the employment the Respondent was entitled to pay the Claimant pro rata at the reduced earnings rate which it did, The Claimant pleaded and so maintains today that she never so agreed. So the issue is simple. Did the Claimant waive her contractual rights by agreeing to a reduction in her hours and by her actions thereafter thus showing that she had accepted the position and not under protest.

2. I have read the bundle before me. I started with two but with the parties leave I have condensed them into one as otherwise there was much duplication. I have heard from the Claimant under oath. Both parties in this case are very honest; thus in her questioning of the Claimant Mrs Blythe made several

concessions and therefore understandably didn't see the need for herself to give any further evidence. I did of course invite her to do if she wished.

Findings of fact

3. So post the concessions what are the facts in this case? They can be taken very short. The Claimant had a very long standing working relationship with Mrs Blythe who in effect was the proprietor of what is an international school (a) teaching foreign languages but (b) more important perhaps also providing a pastoral role caring for children from overseas for instance during school holidays. Mrs Davis joined the business many years ago in March 2001 and developed over the years into becoming the full time Personal Assistant. She knew everything about the business and enjoyed an extremely close working relationship with Mrs Blythe.

4. The contractual position before I get to events commencing in December 2017 was therefore one whereby the Claimant worked full time hours, Monday to Friday, 9 to 5 (Bp29)[1]. She did extra work, going the extra mile, but that doesn't concern me as she never asked for further remuneration: it was part of the goodwill existing between her and Mrs Blythe. So before the change in her terms and conditions to which I shall come she had a salary of £2,100 a month gross, £1,696.00 per month net; and therefore it is easy to do the weekly equivalent which would be £484.61 gross and £391.38 net. By the time of material events she was a lady of mature years, 66 years of age, but not wishing to retire.

5. So what happened? Not in dispute is that sadly the business had gone into decline. The roll of students had dramatically declined and therefore the viability of the business had reached a parlous state despite two substantial injections of cash by Mrs Blythe.

6. Therefore in terms of her remaining employees Mrs Blythe was by December 2016 working out what she could do; and at that stage on 19 December just before school broke up for the 2 week Christmas holiday she proposed to the Claimant that one solution would be for the Claimant to work 4 days per week instead of 5 and on a pro rata reduced salary. The Claimant was not happy about this but was prepared to think about it as she didn't want to retire. And what is very clear indeed out of the evidence I have heard today, and I again commend Mrs Blythe for her honesty, is that this was only a proposal by the latter. It was never taken further because of course the school broke up for Christmas.

7. The Claimant started back to work on Tuesday 3 January 2017. On the Wednesday Mrs Blythe had a further discussion with the Claimant; as was their way they met informally in the kitchen, I gather to share Christmas cake. Mrs Blythe said she had been thinking again over the Christmas holiday about what to do and had decided that she couldn't afford 4 days per week and wanted the Claimant to consider working 2.5 days a week. I have no doubt coming out of what I have heard today that the Claimant did not give agreement. She said that she would have to think about it. And then what happened is that, albeit it seems she did work the two and a half days a week but having made it clear she wasn't committing herself, she got the letter from Mrs Blythe dated 10 January 2017[2] making it plain that it would now be two and a half days a week. It is not in dispute that this letter would have been handed out a week or so after the

[1] Bp = bundle page.
[2] Bp2-34

discussion in the kitchen on the 4th.

8. What did the Claimant do? She booked herself an appointment to see a solicitor. It took about 2 weeks until the appointment. She was then correctly[3] advised by that solicitor that a unilateral imposition of such a diminution in terms and conditions and thus a deduction in wages could not be imposed upon the Claimant unless there was a written provision to that effect in the contract of employment or the Claimant had signified in writing her consent to the change. As to the latter she had done no such thing. As to the former the contract at Bp 29 contains no such provision. And as to the unsigned document at Bp27[4] Mrs Blythe told me that at some stage she had got this from Peninsula but never provided it to the Claimant as a variation to the existing contract: hence why the Claimant never saw it or signed it.

9. In any event having seen the solicitor the Claimant made plain to Mrs Blythe she was not accepting the reduction in her hours by her letter dated 19 February (Bp 36a)[5]. There was then correspondence back and forth between the parties; but suffice it to say the position never changed. Mrs Blythe by now had also realised that with the still declining numbers she didn't really need Mrs Davis at all. Hence why she decided by 6 March that the Claimant would have to be made redundant and which she confirmed in the meeting that took place with the Claimant on 13 March; thence reiterated at the meeting on 15 March and confirmed in the letter which is dated 14 March 2017 but wasn't actually issued until the 15th.

10. So I have no hesitation in saying on those facts that in that circumstances there was no waiver by the Claimant of the breach of contract in terms of the unilateral imposition of the change in terms and conditions or that conversely she is be taken to have accepted the change thus renouncing her rights to rely in particular upon s13 of the ERA. It is obvious that she never accepted the change but for a short period worked the reduced hours under sufferance not having said she agreed to them and whilst she waited to see the solicitor.

The result of my finding

11. Thus the contract remained as it was pre 19 February ie 5 days a week, 9 to 5 on the salary that I have rehearsed. Thus it means that the Respondent cannot avoid its legal obligations. I have considerable sympathy for Mrs Blythe. She has spent her all on trying to keep a business going that she is clearly devoted to; and the business now has little funds. But those are not matters that concern me. The business of course is not Mrs Blythe; it is a corporate legal entity.

12. That brings me to what is therefore due. Essentially it is not in dispute, once the battle on the contractual point has been lost by the Respondent. I am going to set out fully the figures because the balance statutory redundancy payment can now be claimed from the Secretary of state via the Insolvency Fund pursuant to s166 of the ERA. As to the other sums, he is not legally obliged to consider paying unless prior thereto the Respondent has bee placed into a state of formal insolvency pursuant to s168. Enforcement is not a matter for me.

The Redundancy Award

13. The redundancy award. The statutory entitlement would be based

[3] S13(1) Employment Rights Act 1996
[4] Headed "Deductions from pay Agreement".
[5] My numbering.

upon length of service of 16 years. That is because the effective date of termination of 14 March 2017 cannot abort length of service accruing for the purposes of a redundancy payment. In other words the statutory notice period has to be added on. Thus given the Claimant's length of service she was entitled to 12 weeks statutory notice and albeit she was paid in lieu, subject of course to the shortfall, the 12 weeks has to be added on to get the year of service for the purposes of the redundancy payment. Thus start date of employment is 19 March 2001. Date of dismissal is 14 March 2017 but add in 12 weeks for notice period, thus equals 16 years service. As I have already said the weekly wage was £486.41. This would of course be subject to the statutory cap at the time of £479.00. Thus applying the ready reckoner the Claimant is correct, her redundancy entitlement is 24 x £479.00 = £11,496.00. The Respondent paid the Claimant by way of a redundancy entitlement £5,185.44. Thus the shortfall is £5,680.56. Therefore the Respondent is ordered to pay the Claimant a balance statutory redundancy entitlement of **£5,680.56**. Section 166 of the ERA applies to this element of this award.

Notice entitlement

14. Not in dispute is that the Claimant had of course accrued more than 12 weeks' continuous service and thus was entitled to 12 weeks' statutory notice. The Respondent paid in lieu but on the reduced hours now being worked. But the correct figure would be as follows: £391.38 net per week x 12 = £4,696.56. The Respondent paid £3,150. Therefore the balance due equals **£1,546.56**.

Unpaid wages

15. The third element of the claim is actually limited to a shortfall in the payment of wages. Essentially this is the difference between the contractual wage as I have found it to be and the reduced pay that was made. The calculation provided by the Claimant is agreed thus the balance payable by the Respondent is £**1,350.00**.

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Employment Judge P Britton

Date: 2 November 2017

JUDGMENT SENT TO THE PARTIES ON

25 November 2017

FOR THE TRIBUNAL OFFICE