EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr A Dunwell	**v**	Hurst Lodge Ltd

Heard at: Reading **On:** 15, 16 and 17 October 2018

Before: Employment Judge S Jenkins
Members: Miss L Farrell and Mrs J Smith

Appearances
For the Claimant: In person
For the Respondent: Mr A Rozycki of Counsel

JUDGMENT

The Claimant's claims of unauthorised deductions from wages, part-time worker discrimination and health and safety detriment fail and are dismissed.

REASONS

BACKGROUND

1. The case before us involved claims for unauthorised deductions from wages, discrimination on the basis of part-time worker status, and detriment on the basis of having raised a health and safety issue. We heard evidence from the Claimant on his own behalf and from Ms Philippa Moorby, Bursar; Mrs Jatinder Kalsi, Deputy Head Teacher; and Ms Victoria Smit, Principal; on behalf of the Respondent. We also considered the documents within the bundle to which our attention was drawn during the course of the hearing together with a small number of additional documents produced during the course of the hearing.

PRELIMINARY ISSUE

2. On 8 October 2018, the Claimant had sent an email to the Tribunal asserting that the Respondent had failed to provide a hard copy hearing bundle to him (which had been ordered to be provided by 23 August 2017) and also had failed to provide "numerous specified documents". He

contended that two legal advisers he had consulted had informed him that, without full documentation, they were unable to fully assess or conduct the case. He concluded by asking for the case to be relisted.

3. The Respondent's representatives responded on the same day asserting that the bundle had indeed been sent to the Claimant in August 2017, both by email and in hard copy (the case having been originally due to be heard in November 2017) and had sent a further copy, at the Claimant's request, to one of his legal advisers in May 2018. They also asserted that they had provided all documents to the Claimant that were relevant to the issues in the case.

4. A reply was sent to the parties by the Tribunal on 10 August 2018 noting the direction of Employment Judge Gumbiti-Zimuto that the bundle issue could be sorted out at the hearing. The Claimant then sent a further email on 12 October 2018, the final working day before the commencement of the hearing, stating that the Respondent's failure to provide a bundle had prevented his engagement of lawyers and impacted on his case and preparation; he again asked for a relisting. The employment tribunal later that day sent a further communication to the parties recording Judge Gumbiti-Zimuto's direction that the application to postpone was refused as having been made too late and that the matter would need to be explained to the Tribunal hearing the case.

5. Consequently, at the start of the hearing, we explored these issues with the parties. With regard to documentation, it transpired that the Claimant had made a request for six documents, or groups of documents, to be provided to him. These were: pay scales, minutes of meetings, total number of pupils on the school roll, exams officer job description and salary, statement of employment particulars, and staff handbook. The Respondent's position was that not all of these documents were available, it being contended that there were issues regarding accessibility of computer systems following the recent merger of the Respondent with another school, and that others were not relevant. We observed that the pay scale information was provided during the course of the hearing and we ultimately saw no reason why the staff handbook could not have been provided nor why the pupil numbers could not have been provided, although we did not see that those documents would have been particularly relevant.

6. With regard to the bundle, the Claimant contended that he himself had not received the hard copy of the bundle, although he had received the electronic version. He contended that his legal advisers had not been in a position to advise him and would have represented him had they been able to access the bundle and consider it. He referred to correspondence with those advisers which would confirm that. We pointed out to the Claimant that he needed to consider the appropriateness of producing those document as he would be waiving legal privilege in doing so. He was given time to consider his position, following which he produced some emails between his advisers and himself. Ultimately, they showed that one adviser had simply asked the Claimant to request himself an electronic copy of the

bundle from the Respondent, whilst the other, who was asked by the Claimant to confirm that a bundle had been sent to him by the Respondent's representative, replied to say that he had been sent a hard copy in May 2018, albeit that it was incomplete, covering only 234 pages rather than the initial 346 pages which were in the bundle before us. That legal adviser also however attached a copy of the electronic bundle that the Claimant himself had sent to him. There was no indication that the electronic bundle was incomplete, nor was there any indication that either of the legal advisers was going to represent the Claimant at the hearing.

7. In the circumstances, we considered that the lack of provision of a hard copy bundle to the Claimant, taking at its highest his assertion that he had not received it, did not prejudice the Claimant's ability to participate in the hearing. He had received the bundle in electronic form, as indeed had his adviser and he was therefore familiar with the documentation. There was also a further hard copy for him to use at the hearing.

8. With regard to documents, we were not convinced that anything materially relevant had not been disclosed to the Claimant and we observed to the Respondent that, by not producing all requested material, they ran the risk of any issue being considered against them if it could have been resolved by reference to any of the documents that had been requested by the Claimant but had not been supplied.

9. Ultimately therefore, we were satisfied that it was appropriate to proceed with the hearing.

ISSUES AND LAW

10. The issues had been identified by Employment Judge Vowles at a case management hearing held on 31 May 2017. These were as follows:

6. Unauthorised Deduction from Wages - section 13 Employment Rights Act 1996

6.1 The Claimant claims that he is owed the following wages:

6.2 March 2015 – September 2015 - £2,136.12;

6.3 September 2015 – September 2016 - £10,150.92;

6.4 September 2016 – February 2017 - £8,501.52.

6.5 The total of the above sums is £20,788.56.

7. Part-time Worker Discrimination - regulation 5 Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

7.1 The Claimant is a Teacher and a part-time employee.

7.2 The comparator is Mr Richard Earl, who is a Teacher and a full time employee.

7.3 The less favourable treatment was the gradual reduction in the Claimant's hours, and consequent reduction in pay, from 3 days per week in September 2014 to 3 hours per week by February 2017.

7.4 The comparator did not suffer any reduction in hours or pay over the same period.

7.5 The less favourable treatment is on the ground that the Claimant is a part-time employee.

8. Health & Safety Detriment – section 44(1)(a) and (c) Employment Rights Act 1996

8.1 In January 2015 the Claimant complained that his health & safety were being adversely affected by the role of Exams Officer without adequate time to fulfil the role.

8.2 The detriment was being left in the role of Exams Officer without adequate time to fulfil the role.

8.3 The detriment was done on the ground that the Claimant had made the complaint.

11. The crux of the case with regard to the unauthorised deductions from wages and part-time worker discrimination claims was the question of whether the Respondent's actions in reducing the Claimant's hours, and consequently reducing his salary, were lawfully made or otherwise amounted to unauthorised deductions from wages and/or involved less favourable treatment than a full-time comparator.

12. With regard to the health and safety detriment claim, we had to be satisfied that the Claimant's complaint that his health and safety were being adversely affected by undertaking the role of exams officer, amounted to his bringing to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, pursuant to section 44(1)(c) of the Employment Rights Act 1996, although ultimately in his closing submissions, Mr Rozycki on behalf of the Respondent accepted that the Claimant's complaint satisfied that particular section. We then had to consider whether the Respondent's actions in not removing him from that role of exams officer and/or to provide adequate support to him, amounted to a detriment. Finally, if we considered that it did amount to a detriment, we had to consider whether it was done on the ground that the Claimant had raised the health and safety issues.

13. With regard to the health and safety detriment claim, there was also a time issue for us to continue. This was on the basis that the Claimant did not

continue with the role of exams officer beyond the summer of 2015 and yet contact was not made with ACAS for the purposes of his claims until December 2016. Complaints of health and safety detriment have to be brought within three months from the date of the act or failure to act to which the complaint relates, or where the act or failure was part of a series of similar acts or failures, the last of them, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (section 48(3) ERA).

FINDINGS

14. Whilst there was a considerable amount of difference between the parties on matters which were not directly relevant to the issues we had to decide, the principal material issues were not largely in dispute. Our findings in relation to them, assessed on a balance of probabilities where any dispute arose, were as follows.

15. The Respondent is a small, independent school. It has pupils aged from three to 18 but has only approximately 180 pupils. It has a significant proportion of pupils with special educational needs. The Claimant was, and we presume is, a teacher of Information Technology. He was engaged by the Respondent initially in 2011. That engagement was on a part-time basis to work three days a week teaching 24 periods, in contrast to the 40 periods taught by full-time members of staff.

16. The Claimant was issued with an offer letter dated 2 March 2011 which noted that his salary would be 60% of the Respondent's salary scale. He was also issued with an employment contract the same day which included the following relevant terms:

> *"**17. Working Hours:***
> *Full time and part-time teachers are required to work such hours as are reasonably necessary for the proper performance of their duties (for example, to include registration and extra-curricular activities). As a part-time teacher, you are required to teach 24 periods per week during term time. According to the requirements of the timetable, the number of periods you teach may vary each term at the discretion of the Principal."*
>
> *"**18. Salary:***
> *You will receive a salary of £20,506.80 per annum in accordance with the school's salary scale from time to time in force. The school has the right to alter the scale from time to time and any such alteration will be effective from the date notified to you. A copy of the scale is available from the bursar."*
>
> *"**51. Part time staff:***
> *All benefits and payments in this agreement will be pro-rated for part-time members of staff unless otherwise stated."*

17. There was also produced to us an email from the Claimant to Ms Smit dated 7 February 2011, which followed his interview and was prior to the job offer. This noted that *"Consideration of part-time and pro rata is partly a family lifestyle choice as is relocation to enjoy quality time with our daughter aged 2 during pre-school years"*. The Respondent contended that this demonstrated, in addition to the terms of the contract, that the Claimant was well aware that his salary would be pro rata the full time equivalent and could vary. However, we did not consider that the email was of any particular relevance and it did not impact on our analysis of the terms of the contract itself.

18. During his first two years of employment, the Claimant worked for 24 sessions over three days, although some of his sessions involved football coaching and others involved cover. In the 2013/14 academic year, the Claimant's hours actually increased such that he worked 31 sessions, predominantly teaching IT to various classes, including at GCSE and A level, but again including some sports teaching and some cover. The Claimant's salary was increased as a result of that.

19. The following year, however, 2014/215, the Claimant's teaching sessions were reduced to 21. This again included some football and some cover but also included two sessions in relation to exams. This related to his undertaking the role of exams officer of the school which although not being undertaken necessarily during the two specified sessions times, covered what the Respondent anticipated would be approximately 1.5 hours work each week in that role. The timetable indicated that the Claimant was not teaching any year 10 or 11, i.e. GCSE class, and only had one lesson teaching one pupil at year 12. The Claimant's evidence was that the role of exams officer was forced upon him and he did not want to do it and certainly felt that having some 1.5 hours allocated to do this was insufficient. The Claimant noted that he had undertaken the role of exams officer in a previous role at a large state school. Nevertheless, the Claimant did work in the exams officer role in the 2014/15 year.

20. However, in January 2015, the Claimant completed, as it is presumed did all members of staff, a verification of medical fitness form, which noted that he had high blood pressure. He sent that to Ms Moorby on 3 February 2015 under cover of an email which noted: *"Unfortunately due to the nature of this form (and under Health and Safety Regulations), I am obliged to point out, that I have been advised by the medical centre that I should not take on the role of exams officer at this time, due to the stress involved, given my high blood pressure and other family factors"*.

21. In the event, the role of exams officer was not taken away from the Claimant at this time and he continued to undertake some of the duties of that role and to be paid for two sessions each week up to the end of the 2014/15 academic year. However, the Respondent took immediate steps to appoint staff to provide support to the Claimant. This involved the appointment of an administrative assistant in February 2015, the assistance of Mrs Kalsi and two other members of staff to deal with the external exam period in May and

June 2015, and finally the appointment of a new employee to undertake the exam officer role from September 2015 on a two day per week basis. The Claimant confirmed himself that he did not undertake the exam officer role beyond the end of the summer term in 2015.

22. The Claimant's teaching duties decreased further in the 2015/16 year such that he only taught for 12 sessions. This arose principally out of the lack of take-up of Information Technology as an option at GCSE and A level. Whilst the Claimant raised concerns about the further reduction of his workload, and consequently his salary, he nevertheless remained in post.

23. By the time that the timetable for the following academic year came to be assessed, in March and April 2016, it became apparent that there were, in fact, going to be no pupils undertaking GCSE or A level Information Technology in the following academic year. At the same time, there was a change of approach in the provision of Information Technology to pupils in the junior part of the school with Information Technology being taught by the junior teachers in conjunction with all other subjects. As a consequence, the Claimant was left with only three lessons to be taught during the 2016/17 year.

24. The Claimant raised a number of concerns about this reduction, which left him with a pro rata salary of only 3/40^{ths} of the full time equivalent, i.e. an annual salary of £2,589.00. He complained, principally to Ms Moorby, that that this was not in accordance with his contract and he involved his union in support. This ultimately led to the Respondent offering the Claimant voluntary redundancy on the basis that there was a significant reduction in the Claimant's workload and there were no other redeployment opportunities. This would only have been a small sum of money and was not accepted by the Claimant. He did however remain in work and taught the four sessions during the 2016/17 year. He did not however return at the start of the September 2017 year and contended that he was in fact allocated no lessons for that academic year, although the evidence of Ms Moorby was that his workload was due to increase slightly from 10% to 13% although no further evidence was put before us of that.

CONCLUSIONS

25. Applying our findings to the issues initially identified, our conclusions in relation to the Claimant's claims were as follows.

Unauthorised deduction from wages

26. In light of the terms of the contract of employment, which contained an indication that the number of periods to be taught could be varied each term at the discretion of the Principal and the provision which said that payments would be pro-rated for part-time members of staff, we were satisfied that the Respondent had the contractual power to vary the number of periods to be taught by an employee from time to time and, as a consequence, to vary the individual's salary.

27. The Claimant, in his submissions to us, maintained that this effectively meant that he was working on a zero hours contract and we considered that his assessment of that was not far removed from the reality of it. It appeared to us that the Respondent assessed its teaching needs for the forthcoming academic year in about the March or April of the previous academic year and then put in place timetables for each individual member of staff. This could involve an increase in teaching sessions, and consequently an increase in salary, or a decrease in teaching sessions and a decrease in salary.

28. Evidence was put before us that variations did occur from time to time, with Mrs Kalsi, although employed on a full time basis, having experienced in the past a year when her teaching duties were reduced and her salary was reduced. Also, other employees had their teaching loads reduced, some appearing to accept them and stay in post whilst at least one person appearing to have decided that he could not work on the basis of his hours being reduced from full time to four days, with a consequent reduction in salary, and who then tendered his resignation and left. We also noted that the Claimant's own hours had varied in nearly every year he worked. Initially, this was an upward variation, but that upward variation was followed by downward variations of increasing severity until the position was finally reached where the Claimant was left with only a workload of some three lessons per week.

29. The Claimant contended that some of his duties, which he could then have undertaken, were instead undertaken by an Information Technology technician. The evidence of the Respondent's witnesses however, which we preferred, was that the technician simply observed some teaching of Information Technology in the junior section of the school as he was undertaking a PGCE course and it was therefore of assistance to him to observe classroom teaching. He also ran an after-school coding club. We were satisfied that the work of the technician in this regard had no bearing on the workload that the Claimant could otherwise have done and we were satisfied that the state of affairs where the Claimant was left with only a small number of teaching sessions each week had been genuinely reached.

30. Ultimately, we were satisfied that the terms of the contract allowed the Respondent to vary the Claimant's hours and consequently to make reductions to his salary. Whilst we accepted that the Claimant found this to be unfair and unacceptable, and it seemed to us that it was a state of affairs that was certainly not desirable, we did not see that the Respondent's payment to the Claimant, by reference to a pro rata amount of salary relative to his hours worked, was anything other than a lawful payment in accordance with the terms of his contract and therefore that there had been no unauthorised deduction from his wages.

31. We considered further that even if there had been any ambiguity over the Respondent's powers under the express terms of the contract, the custom and practice of the Respondent, established both in relation to the

Claimant's own position but also in relation to several other employees where there was evidence that their hours, and consequently salaries, had been varied, was that a term had become implied into the contract to allow such variations.

Part-time worker discrimination

32. The Claimant's comparator was a full-time teacher in the school who taught Physics. The Respondent contended that the individual was not a valid comparator in that he was a head of department and had a number of other duties. We were however satisfied, applying the terms of regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, that there was a valid comparison to be made in that both individuals were employed by the same employer under the same type of contract and were engaged in the same or broadly similar work, i.e. teaching.

33. However, we did not consider that there was any less favourable treatment of the Claimant referable to his part-time status in comparison to the treatment of his comparator. His comparator was a teacher of Physics, i.e. a core subject, and consequently the take-up of the subject was considerably higher. We were satisfied however that had the requirement in that particular subject reduced then the comparator's hours and consequently salary would have been reduced, noting in particular that that had happened to Mrs Kalsi in the past. Consequently, we did not consider that there was any less favourable treatment of the Claimant by virtue of his part-time status.

Health and safety detriment

34. Finally, turning to the health and safety detriment claim, we noted that the detriment set out in the issues identified at the initial case management hearing was that of being left in the role of exams officer without adequate time to fulfil the role. Mr Rozycki, on behalf of the Respondent, contended that as the latest time at which the Claimant could claim any detriment of this type was the summer of 2015, then his claim was considerably out of time. We put that point to the Claimant when making his own submissions and he commented that he felt that his detriment was not confined to being left in the role of exams officer but expanded to the treatment he received beyond that, i.e. the reduction of his hours and his salary.

35. In the event, we felt that we needed to consider the health and safety detriment claim by reference only to the issues identified, bearing in mind that the case management summary had stated that "*no other claims or issues will be considered without the permission of the tribunal*". In those circumstances, we concluded that the claim had not been brought in time in that if the end of the summer term in 2015 was considered as being the last date, or even if the end of the summer holidays that year, i.e. the end of August 2015, was considered to be the appropriate date, the claim was not progressed for over 12 months beyond that and was therefore considerably out of time. No evidence was put before us as to whether it had not been

reasonably practicable for the Claimant to have brought the claim in time and therefore we had to consider that the claim was out of time.

36. For the avoidance of doubt however, we considered that even if the Claimant's claim of health and safety detriment had been expanded to cover the reduction in his workload and salary, we did not consider that that occurred by reason of him having raised a health and safety issue. As we have identified above, the reason why the Claimant's hours were reduced, and consequently his salary was reduced, was due to the lack of take up of the subject he taught at GCSE and A level, the transfer of the teaching of Information Technology at junior level to the junior classroom teachers, and the lack of alternative work available within the school at the time.

37. Ultimately, we therefore concluded that all the Claimant's claims should be dismissed.

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Employment Judge Jenkins

Date: ……7 November 2018

Judgment and Reasons

Sent to the parties on: ..14 November 2018

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For the Tribunal Office

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