



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Dowle

**Respondents:** (1) The Governors of Hawarden High School  
(2) Flintshire County Council

**Heard at:** Mold **On:** 11 December 2017

**Before:** Employment Judge T Vincent Ryan

**Representation:**

Claimant: Mr C Adkins (NASUWT)

Respondents: Mr B Rozier and Ms C Robinson (HR Business Advisers)

**JUDGMENT** having been sent to the parties on 2 January 2018 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

## REASONS

### 1. The Issues

1.1 The Claimant was employed as a teacher from 1 September 2016 until 23 June 2017 on a fixed term contract providing maternity leave cover. The teacher for whom he was providing cover returned from maternity leave before the end of the academic year in question. The claimant's contract treated him as an established teacher and on a different basis to that of a supply teacher.

1.2 It was agreed that the correct Respondent to these proceedings was the First Respondent and so the Second Respondent was dismissed. Hereafter references to "the respondent" relate only to R1 above, The Governors of Hawarden High School.

- 1.3 The Claimant withdrew his claim of breach of contract, which claim was dismissed.
- 1.4 The claimant's claim is only one of there having been an unauthorised deduction from his wages. There is no discrimination claim relating to any protected characteristic or relating to the claimant's employment status (such as part time or fixed term employee detriment).
- 1.5 The issue remaining between the parties is whether, on termination of his contract, the claimant was entitled to a re-calculation of his wage rate so that he could be compensated for anticipated school holidays imminently following the termination of his contract. He argues this as supply teachers are contractually entitled to a rate of pay that compensates them for holiday periods whereas "established teachers" are paid by twelve equal monthly installments during their employment he was worse off than a supply teacher and that his pay rate ought to have been re-calculated in termination of his placement. The claimant had been paid as if he was an established teacher and his pay ended on termination of the cover provided by him. He sought payment for the following vacation.

## **2. The Facts**

These are facts agreed between the parties.

- 2.1 The Claimant was appointed by letter dated 12 May 2016 when the Respondent confirmed the Claimant's appointment subject to recruitment formalities. The basis of the Claimant's appointment was "fixed term maternity cover ending on a date to be determined by the school". The Claimant's engagement was by reference to standard terms and conditions of employment. The Claimant's employment was subject to the School Teachers Pay and Conditions Document ("STP & CD") and the Condition of Service for Teachers in England and Wales ("the Burgundy Book").
- 2.2 The Claimant was employed on a full time basis as if he was an established teacher (as opposed to a supply teacher). During his employment he was paid in accordance with a contract described above up to and including his effective date of termination. During that period he enjoyed all the benefits of a permanent full time employee, as provided for in STP&CD and the Burgundy Book.
- 2.3 On 22 May 2017 the Respondent's employee who had been on maternity leave informed the Respondent of her intention to return to work on 25 June 2017. The Respondent gave the Claimant oral notice to terminate his contract with effect on 25 June 2017. Until that date his position with the Respondent was established, by which is meant that during the

period of his engagement he did not work anywhere else than with the Respondents and he benefitted from the said contractual terms.

- 2.4 Schools in Flintshire also employ teachers to “supply” on an as and when needed basis to provide cover, for example if a permanent teacher were to be on sick leave. These teachers are not established within a school and they are paid on a daily rate basis. They do not receive the same benefits as are received by teachers that are “established”. Their pay rate effectively compensates them for the fact that they are only paid for hours worked and do not receive pay during school holidays. Supply teachers do not have all of the contractual benefits of an established teacher such as pay during holiday periods, and training.
- 2.5 STP & CD at paragraph 52.2 provides that full time teachers must be available for work for 195 days per annum for which they are paid an annual salary and 12 equal monthly installments during their employment. By way of this payment they do not accrue annual leave entitlement or request holidays outside the usual school holidays.
- 2.6 Paragraph 43.1 STP & CD provides that supply teachers described above are paid on a daily basis calculated on the assumption that an academic full year is 195 days in length. Payment is made on a pro rata basis for the days that the teacher actually works. The claimant was paid up to the date of termination of the contract and not for the following summer vacation.
- 2.7 The Claimant’s appointment and the way in which he was treated during the time he was employed by the Respondent was the same as any long term permanent full time teacher would have been treated; he was treated in the same way as an established employee in accordance with the normal and approved practices. That is what he agreed to upon his appointment. Both parties abided by the contract between them throughout its duration and upon its termination.

### **3. Submissions**

- 3.1 The Claimant sought Judgment in principal only and not with regard to quantum as Mr Adkins required further instructions. Neither of the parties was aware of any previous claims such as this one.
- 3.2 Claimant’s submissions: A fixed term teacher should not be treated any less favourably than a permanently employed comparator or a supply teacher. On the effective date of termination of the Claimant’s employment there should have been a recalculation of his pay “to reflect the pro rata principal in respect of the expectations of 195 days work per annum”. The Claimant worked 175 days of a 195 day academic year

which was the full time established teacher obligation; thus as his pay was calculated per day there was a shortfall in his pay up to the effective date of termination in that no provision was made for holiday pay. The Claimant contended that if the Respondent's interpretation of the contract was correct it would be open for the Governors of a school to employ a teacher on maternity cover until the penultimate day of the summer term and then to terminate the contract thus avoiding liability for holiday pay for the month of August. The Claimant says this is less favourable treatment than a non-established "supply" teacher. The claim is not however one of detriment related to a protected characteristic or employment status; it is a claim that the claimant suffered an unauthorised deduction from his wages.

- 3.3 Respondent's submissions: The Respondent says the Claimant was paid in full for the entire period of maternity leave for which he worked, that was from 1 September 2016 until 25 June 2017. The Claimant's pay for that period was calculated by reference to the 195 per annum obligation upon established teachers and it was paid in equal monthly instalments throughout the period. During that time the Claimant had the benefits of sick pay, paid training days and paid time off to seek alternative employment at the end of his employment with the Respondent, none of which benefits would have been available to a "supply" teacher. The respondent abided by the claimant's contract and paid him in accordance with it as he had agreed and expected at the time. The claimant was not entitled to pay for a period, the Summer holiday, imminently following the termination of his contract, as that had not been provided for within the agreed terms.

#### **4. The Law**

- 4.1 The Claimant's claim was brought as one of an unauthorised deduction from wages claim under s.13 of Employment Rights Act 1996. Section 13 of Employment Rights Act 1996 (ERA) provides for the right of a worker not to suffer unauthorised deductions from wages. An employer shall not make a deduction from the wages of a worker unless required to do so by virtue of law or a provision within the workers contract or where the worker has previously signified in writing his agreement or consent to the making of a deduction.
- 4.2 The Claimant specifically withdrew his claim of breach of contract. Parties to a contract cannot vary its terms unilaterally. For there to be a binding contract there must be some mutuality of obligation and in this context that would include the provision of work by the Respondent and the Claimant undertaking that work in consideration of payment by the Respondent. Questions of breach of contract do not primarily rely upon the principal of reasonableness but rather what the contract provides and

how the parties have performed their contractual obligations. One ought not to imply conditions into a contract unless necessary to give effect to the express terms.

- 4.3 Part time workers ought not to be treated less favourably than full time comparators within given circumstances contained in the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (“the 2000 Regulations”). The 2000 Regulations provide that a part time worker has a right not to be treated by his employer less favourably than the employer treats a comparable full time worker as regards terms of the contract or by being subject to any detriment. In this case the Claimant accepts that he was treated in the same way as a full time worker, that is he was paid wholly or in part by reference to the time he worked and having regard to the custom and practice of the Respondent in relation to workers employed by it under the same type of contract. The Claimant’s argument is that by treating him as An established worker during the course of the fixed term contract he was treated less favourably than part time workers who were “supply” teachers. He made no claim under the 2000 Regulations.
- 4.4 Fixed term employees’ employment is covered by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (“the 2002 Regulations”). Regulation 2 defines comparable employees for the purposes of the 2002 Regulations where both employees are employed by the same employer engaged on the same or broadly similar work and where the permanent employee comparator is based at the same establishment as the fixed term employee. A fixed term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee. In this case however it is the Claimant’s argument that he was treated exactly the same as a comparable permanent employee during the course of his employment by the Respondent and that is what he did not wish to happen because he feels it would have been more favourable to him to have been paid on a different basis; he argues for a recalculation of his hourly rate increasing it retrospectively upon termination of employment to include an element of holiday pay for the school vacation imminently following termination of his employment. He made no claim under the 2002 Regulations.

## **5. Application of Law to the Facts**

- 5.1 There are three separate contractual relationships in the teaching profession relevant to our considerations namely:

- (1) Permanent employee (full time or part time) where that employee is established within a school and receives pay and benefits such as paid sickness leave, training pay and the like.
  - (2) Fixed term employees (whether full time or part time) to cover events such as maternity leave. Teachers on fixed term contracts receive pay and the same benefits as do the permanent established employees.
  - (3) Supply teachers (part time or full time) who receive pay but no security of employment, no mutuality of obligation beyond their daily appointments and they do not receive any benefits such as enjoyed by established staff.
- 5.2 Rates of pay are calculated for teachers on the basis of a teacher's availability to work for 195 days per annum being the academic year.
  - 5.3 Permanent and full time employees are paid at a rate calculated on the basis of a 195 day working year in 12 equal monthly instalments thus compensating during the holiday periods, it is said "without any paid annual leave entitlement".
  - 5.4 Supply teachers are paid on a 195 day per annum basis but they are paid daily and therefore notionally they get the benefit of a calculation that takes into account days during the school holidays when they would not be working.
  - 5.5 Reference in the calculations to the principal of 195 days per annum of availability is a mechanism to calculate rates of pay whether the teachers are then paid per hour, per day or per month. This method ensures equal pay for work of equal value.
  - 5.6 Teachers are paid at that rate for the contracted hours that they work.
  - 5.7 A continuing established permanent employee will receive pay calculated as so described in equal monthly instalments on a continuing basis.
  - 5.8 A supply teacher will receive that pay for each day worked.
  - 5.9 A fixed term teacher will receive pay for the duration of the contractual relationship.
  - 5.10 The Claimant received the pay due to him for the work performed by him during the fixed term of maternity leave cover.

- 5.11 There is no contractual provision, or requirement for such provision, for any recalculation of the Claimant's pay on termination before the end of an academic term which would entitle him to pay for a school holiday period falling outside the academic term of his fixed term contract.
- 5.12 By virtue of security during the fixed term engagement, longevity of the work provided, and the benefits received the Claimant was not less favourably treated than a hypothetical supply teacher but in any event this was not the claim that was being advanced by the Claimant; there is no discrimination claim. The claim is for an alleged unauthorised deduction from wages.
- 5.13 The Claimant received the pay that had been agreed and anticipated calculated in accordance with the contractual documentation. He has been paid accordingly for every day worked by him. There has been no unauthorised deduction from the Claimant's pay.

Employment Judge T Vincent Ryan  
Dated: 2<sup>nd</sup> May 2018

REASONS SENT TO THE PARTIES ON

.....3 May 2018.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS