



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs E Bradshaw

**First Respondent:** Hartsdown Technology College

**Second Respondent:** Coastal Academies Trust

**Third Respondent:** Hartsdown Academy

**Heard at:** Ashford

**On:** 2 May 2018

**Before:** Employment Judge Pritchard

**Representation**

**Claimant:** Miss E Doherty, solicitor

**Respondent:** Mr J Heard, counsel

## RESERVED JUDGMENT

- 1 The correct Respondent is Coastal Academies Trust (hereinafter “the Respondent”). The First and Third Respondents are dismissed from proceedings.
- 2 The Claimant’s claim that she suffered unlawful deductions from her wages is dismissed.
- 3 The Respondent did not breach the Claimant’s contract of employment by failing to pay expenses.

## REASONS

1. The Claimant claimed unlawful deductions from wages: the sum of £5,600 in unpaid wages; and unpaid expenses in the sum of £84.97. The Respondent resisted the claim.
2. The Tribunal heard evidence from the Claimant on her own behalf and from Matthew Tate, the Respondent’s Head Teacher. The Tribunal was referred to a number of documents contained within a hearing bundle. The parties were given the opportunity to provide written submissions within 14 days of

the conclusion of the hearing. The parties have done so and the Tribunal has had regard to them.

## **Issues**

3. At the outset of the hearing the parties were invited to explain the grounds for their respective claims and the response. By the end of the hearing it was clear that the following issues would fall for determination:
  - 3.1. Did the Claimant enter into an oral agreement in about April 2015 with Andy Somers, the Respondent's former head teacher, that she would be entitled to invoice the School Students and Teachers Network (SSAT) directly and retain the sums paid by the SSAT for work undertaken by her?
  - 3.2. If so, is the Claimant entitled to enforce the agreement or has the Claimant rendered the agreement illegal through performance?
  - 3.3. If the Tribunal determines that the Claimant did enter into the oral agreement and that she did not render the agreement illegal through performance, did the terms of the agreement remain binding on the Respondent or were the terms varied in September 2016?
  - 3.4. If varied, what were the terms following variation and were they sufficiently certain?
  - 3.5. If the terms were sufficiently certain, did the Claimant nevertheless affirm any breach of that agreement?
  - 3.6. Did the Respondent make deductions of wages properly payable to the Claimant? If so, what deductions?
  - 3.7. Did the Respondent make deductions of wages properly payable to the Claimant by failing to pay expenses? Although not pleaded as a breach of contract claim, for completeness the Tribunal has considered whether the Respondent breached the Claimant's contract by failing to pay the expenses claimed.

## **Findings of fact**

4. The Claimant commenced employment with the Respondent in January 2002 as a Learning Support Assistant. In 2006 the Claimant was appointed a classroom teacher (although the document at pages 43 to 47 of the bundle shows that the Claimant was appointed a classroom teacher, perhaps on a temporary basis, in 2003). In 2011 she became an Advanced Skills Teacher and was placed on the Advanced Skills Teacher pay scale with a salary of £41,343.00. A letter dated 9 January 2011 from the Respondent to the Claimant confirming her salary as an Advanced Skills Teacher provides:

### *School Teachers Working Time Provision*

*The working time provisions for classroom teachers as detailed in the current School Teachers' Pay and Conditions Document do not apply to members of the Leadership Group. You will be required to work such reasonable hours as may be needed to enable you to effectively discharge*

*your professional duties.*

With effect from 1 September 2013 the Claimant was assimilated to the Leading Practitioners Pay Scale with a salary of £43,957.00.

5. The Tribunal has been asked to determine whether, in about April 2015, the Claimant entered into an oral agreement with Mr Somers, the Respondent's former head teacher, that she would be entitled to invoice the School Students and Teachers Network (SSAT) directly and retain the sums paid by the SSAT for specific project work undertaken by her. The Claimant refers to a document (at pages 29 to 32 of the bundle) in support of her assertion that she entered into such an agreement. This document, which appears to have been issued by the SSAT, provides, amongst other things:

*EEF Embedding Formative Assessment – Lead Practitioner Agreement – Liz Bradshaw*

***The Project***

...

*SSAT has received funding to test the impact of the Embedding Formative Assessment ["EFA"] ... This project comprises of a two-year professional development pack for schools and colleges...*

***Evaluation***

*... SSAT have recruited 140 secondary schools from across the country, who have been randomly allocated to receive the "treatment" ...*

...

***Supporting schools - Commitment***

*Each school in the experimental group is allocated an LP [lead practitioner] to support with implementation of the pack. Support time for each school is equivalent to 6 days over two years.*

*A minimum commitment of supporting 3 schools over the 2-year period is required to participate in this project. You have agreed to support 5 schools, this is equivalent to 30 days, of which 12 days would be out of school. This included attendance at both the launch event on September 11<sup>th</sup> 2015 and a celebration event in 2017.*

***Funding***

*You will be paid at a daily rate of £350. There will be funding for 1 day per term, per school you support. Initially you have been allocated 5 schools to support.*

*\*Update – after the first term one school withdrew reducing the number of schools supported to 4.*

*You will also be funded a further £350 for attending the lunch and celebration event (2 events at £175 per event), which are a personal*

professional development opportunity. Funding will be paid to the school and LPs are expected to negotiate with the school for any time spent outside of school.

**Travel expenses**

SSAT will reimburse the cost of reasonable public transport only...

...

**Method of payment**

Funding for fees and expenses will be paid in termly milestone payments. The further payment for the launch and celebration events will be paid in the respective term of the event.

Purchase Order numbers (SSAT's approval to spend system) will be provided for each claim and must be raised to the correct payee. Fees will be paid to the school unless otherwise agreed. Expenses will be paid to the individual unless otherwise agreed. Every invoice will need to quote the relevant PO in order to be processed.

Payment will be made within 30 days after receiving the invoice with the PO number for the funding around the following dates:

Please confirm the total amount for your expenses in each term ....

<i>Date</i>	<i>Amount – fees</i>	<i>Amount - expenses</i>
<i>End of autumn term 2015</i>	<i>£1750 + £175</i>	<i>To be confirmed each term by LP</i>
<i>End of spring term 2016</i>	<i>£1750</i>	<i>To be confirmed each term by LP</i>
<i>End of summer term 2016*</i>	<i>£1450</i>	<i>To be confirmed each term by LP</i>
<i>End of autumn term</i>	<i>£1450</i>	<i>To be confirmed each term by LP</i>
<i>End of spring term 2017</i>	<i>£1450</i>	<i>To be confirmed each term by LP</i>
<i>End of summer term 2017*</i>	<i>£1450 + £175</i>	<i>To be confirmed each term by LP</i>

\*due to financial year end these invoices must be received by 31<sup>st</sup> July each year

**The role of lead practitioner**

The LP will be the school's main contact over the two year project alongside contact with the SST project staff. The support has been structured so there are seven professional contact points over the two years. The purpose of these conversations is to support, guide and challenge the school leads' thinking to maximise the impact of the programme.

...

**How SSAT support you**

- LP Training Session – Monday 13<sup>th</sup> July 2015
- LP Online Forum
- Support via [efa@ssat.co.uk](mailto:efa@ssat.co.uk)
- Access to school case studies at the end of year 1 and 2

Signed:

Liz Bradshaw  
Hartdown Academy

Corinne Settle  
SSAT (The Schools, Students and  
Teachers Network)

6. The copy of the document before the Tribunal was unsigned by either party.
7. A further undated document placed before the Tribunal (at pages 27 and 28 of the bundle) which also appears to have been issued by SSAT provides, amongst other things:

TEEP Train the Trainer – Level 3 Training

*The TEEP programme uses experienced TEEPers as the training teams the programme is keen to support the development of individuals to become trainers in TEEP.*

...

**What are the benefits for the school?**

...

*Once qualified as a trainer, a Level 3 practitioner is able to TEEP train their own school for free, but also join the SSAT TEEP training team, delivering TEEP into schools across the country. The school would receive funding for this release and preparation time.*

...

8. The EFA and TEEP were separate projects.
9. The Claimant presented an invoice to SSAT on 26 February 2016 for autumn term 2015 EFA fees in the sum of £1,750.00 and launch event attendance fee in the sum of £175.00. The Claimant included her personal bank details on the invoice. The SSAT paid the Claimant direct. The Claimant also invoiced SSAT direct for EFA project work undertaken in the Spring term 2016. Again the SSAT paid the Claimant direct. The fees claimed by the Claimant and paid to her by SSAT represented 100% of the fees payable under the written agreement.
10. The Claimant did not disclose to HMRC the monies she had been paid for the EFA project work undertaken.

11. In September 2016, Matthew Tate succeeded Mr Somers as the Respondent's head teacher. Shortly afterwards, Mr Tate met with the Claimant to discuss the EFA project work the Claimant had been undertaking. In particular, Mr Tate was concerned when he discovered that the Claimant had been invoicing SSAT, and paid direct by SSAT, for the EFA work.
12. The Tribunal heard conflicting evidence as to what was said at the meeting. According to the Claimant, Mr Tate told her that he found the payment highly irregular and that in future payments would be made by the SSAT to the Respondent, the Claimant being entitled to payment by the Respondent of the "lions share" through the PAYE system. The Claimant said in evidence that there was no discussion as to what this "lions share" would be.
13. According to Mr Tate, he told the Claimant that she would not be paid any additional sums for carrying out the EFA work; that Leading Practitioners and other staff on the Leadership spine are not paid an additional sum for this kind of work. In evidence, Mr Tate said he told the Claimant that he thought the payments illegal, bordering on criminal. Mr Tate was of the view that payments should be made to the Respondent as reimbursement for the Claimant's time out of school and for which the Claimant was already paid salary. Again according to Mr Tate, the Claimant told him that for the first two term's work she had only claimed and been paid 50% of the fees by SSAT.
14. After the meeting, the Claimant informed the SSAT that forthwith payment should be made to the Respondent.
15. Mr Tate did not have sight of the Lead Practitioners Agreement or the Train the Trainer documents referred to above when he met the Claimant in September 2016.
16. In October 2016, the Respondent invoiced the SSAT in the sum of £1,400.00 for project fee work undertaken by the Claimant in the Summer term of 2016. Payment was made to the Respondent on 21 November 2016.
17. The Claimant continued with her work on the EFA project in the Autumn term 2016.
18. In December 2016, the Claimant presented her line manager, the Respondent's Vice Principal, with a "Claim for Overtime and Other Duties" which was said to be for visits to four schools at the rate of £350 per school. The claim was for £700.00 (50% of the full rate payable under the written agreement). Mr Tate declined to authorise the Claimant's claim and his decision was communicated to her.
19. The Claimant nevertheless continued her work on the EFA project during the Spring and Summer terms of 2017.
20. There was a dispute between the parties as to whether or not the Claimant was required to undertake the full duties of her employed role in addition to the EFA work or whether allowances were made so that she could do so.
21. On 14 June 2017, the Respondent invoiced the SSAT for the Claimant having undertaken EFA work in the Autumn 2016, Spring 2017 and Summer 2017 terms at the rate of £1,400 per term. The SSAT made payment to the

Respondent on 19 July 2017. In total therefore, together with payment for the Summer term of 2016, the Respondent was paid £5,600 for the work undertaken by the Claimant on the EFA project, the sum the Claimant now claims in the Tribunal.

22. On 18 July 2017 the Claimant presented an “expenses” claim to the Respondent in the sum of £5,600 (by implication a demand for fees referable to work on the EFA project). By letter to the Claimant dated 21 July 2017, Mr Tate said he was unable to pay the claim as it would in effect mean the Claimant was being paid twice. Mr Tate also informed the Claimant that she should submit any claims for travel, etc within the last three months and that they would be payable on receipt of details/receipts etc.
23. The Claimant’s employment with the Respondent ended on 31 August 2018.
24. Following receipt of a letter from the Claimant’s union representative querying her pay, Mr Tate wrote to the Claimant on 11 October 2017 informing her that as a member of the leadership group she was required to work “reasonable hours as necessary”, that the EFA work she had undertaken had been recognised in her salary and that no further payments would be appropriate “as I explained to you in September”.
25. The Respondent has an expenses policy in place (a document which was not placed in evidence before the Tribunal). The Claimant says she submitted receipts to the Respondent for the purchase of charity shop items; however, she accepts that not all the receipts were fully itemised. The Claimant is unsure of the requirements under the expenses policy but doubts that it requires fully itemised receipts. Mr Tate’s evidence was that he had not seen receipts, simply credit card slips and if purchases were not itemised they would be rejected as falling outside the policy requirements. The expenses remain unpaid.

### **Applicable law**

26. Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from the wages of a worker employed by him unless the deduction is required by statute, under a relevant provision in a worker’s contract, or the worker has previously signified her written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.
27. Although the Act provides a broad definition of wages, and includes any emolument referable to employment, whether payable under contract or otherwise, the complainant must show some legal entitlement to the sum in question; see: New Century Cleaning Company Ltd v Church 2000 IRLR 27, CA.
28. Section 27(2)(b) provides that expenses are not wages for the purposes of the deductions from wages provisions.
29. An employee can be taken to have impliedly agreed to a unilateral variation of contract: see for example: GAP Personnel Franchises Ltd v Robinson EAT 0342/07.

30. Money is not the only consideration which may move from an employer under

a contract of employment; see for example: Secretary of State for Business, Innovation and Skills v Knight 2014 IRIR 605. Continued employment, for example, and the duty of the employer to take reasonable care of an employee's health and safety, can amount to sufficient consideration.

31. In its submissions, the Respondent referred the Tribunal to the case of Patel v Mirza 2017 1 All ER 191 as to application of the doctrine of illegality. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim (b) to consider any other public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.
32. The Respondent has also referred in submissions to the cases of: Investors Compensation Scheme Ltd v West Bromwich Building Society 1998 1 WLR 895; Bank of Australasia v Palmer 1897 AC 540; and Oni v Unison 2017 UAEAT/0092/17. The Tribunal has not found it necessary consider the principles enunciated in those cases in reaching its decision.
33. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

## **Conclusion and further findings of fact**

### Credibility of witnesses

34. Where there is a factual dispute, the Tribunal prefers the evidence of the Respondent to that of the Claimant. Mr Tate's evidence during the hearing was wholly credible, clear and consistent. The Claimant's evidence less so: in particular her evidence as to why she did not declare the payments she had received from the SSAT to HMRC was both inconsistent and unconvincing. The Tribunal makes further observations as to the consistency of the witnesses' evidence in the following paragraphs.

### The alleged oral agreement between the Claimant and Mr Somers of the Respondent

35. The Claimant's case as pleaded appears to rely on "the agreement between the Claimant and SSAT" and makes no reference to any agreement between the Claimant and the Respondent. If the Claimant were to seek reliance upon the written agreement in that way then it is difficult to understand how the Respondent might be liable.
36. However, that is not the way the Claimant argued her case before the Tribunal. The Claimant's case before the Tribunal was that she had entered into the written agreement on the Respondent's behalf (presumably as an authorised agent although this was not articulated as such) and entered into an oral



agreement with the Respondent through Mr Somers that she would carry out the SSAT work in accordance with the terms of the written agreement - but be permitted to claim fees direct from the SSAT and retain them. The Claimant relies upon the oral agreement with Mr Somers as the basis for her claim.

37. As to whether or not the Claimant entered into an such oral agreement with Mr Somers (who was called by neither party to give evidence to support the allegation or rebut it), Mr Tate candidly told the Tribunal that whilst he thought any such agreement of importance would have been committed to writing, he was unable to say what might have been agreed before he was employed by the Respondent.
38. At this stage in its reasoning, without making any factual findings as to whether such an oral agreement had been concluded between the parties, the Tribunal shall assume that such an agreement had been reached.

### Illegality

39. Given what the Claimant had to say about not declaring the SSAT payments to HMRC the Tribunal invited the parties to make submissions on the question of illegality. Apart from informing the Tribunal that the Claimant had now notified HMRC of the payments made to her by the SSAT, and that she would declare to HMRC any award made to her by the Tribunal, the Claimant has not made any submissions in this regard. The Respondent invites the Tribunal to find that if there was a pay term forming part of the Claimant's contract of employment then it is void by reason of the Claimant's failure to declare the payments to HMRC thereby rendering the contract illegal in performance.
40. Neither party has put forward evidence or made detailed submissions to support the legal basis for the propositions that the monies received by the Claimant should have been disclosed to HMRC or that they could be exempt as the Claimant suggested might be the case where income is referable to training (although, as noted above, the Claimant's evidence in this regard was highly unsatisfactory). In the Tribunal's view, there was insufficient evidence for the Tribunal to determine whether the Claimant had in fact participated in a tax fraud. The Tribunal takes judicial notice that the duty to make deductions through PAYE for work undertaken for the employer rest with the employer and it is at least arguable that the Respondent, through Mr Somers, might have been partly responsible for any failings. The Tribunal must also bear in mind that punishment is a matter for the criminal courts and penalties for failing to disclose income can be imposed by HMRC. Balancing the respective positions of the parties, in taking into account the lack of detail about possible illegality, in the Tribunal's view it would be neither appropriate nor proportionate in this case to disbar the Claimant from pursuing her claim under the illegality doctrine on the basis that the contract relied on was rendered illegal in its performance.

### Variation and its terms

41. The Tribunal finds that the terms of any oral agreement, which has been assumed for the purposes of the Tribunal's reasoning, would in any event have been varied during the discussions between the Claimant and Mr Tate in September 2016. The reasons are as follows:

- 41.1. The Tribunal prefers Mr Tate's evidence as stated above. The Tribunal does not accept the Claimant's evidence that Mr Tate told her she would be entitled to the "lion's share". Indeed, the Claimant's claim to the Tribunal for the sum of £5,600, the total fee, is inconsistent with her own evidence that Mr Tate told her she would be entitled to the "lion's share".
- 41.2. Mr Tate's letter of 21 July 2017 that he would not make payment of the Claimant's claim of December 2016 is wholly consistent with his evidence that he had informed the Claimant in September 2016 that no further payment would be made.
- 41.3. The terms of Mr Tate's letter of 11 October 2017 to the Claimant, that the SSAT work was recognised in her salary and no other payments would be made, is similarly consistent with his evidence to the Tribunal that he informed the Claimant of this in September 2016.
- 41.4. The fact that the Claimant rendered an invoice in December 2016 for 50% of the total fee is consistent with Mr Tate's evidence that she told him she had originally charged the SSAT for 50% of the work done.
- 41.5. Mr Tate's rationale for disallowing further payment is both sound and logical: the Claimant was paid a salary commensurate with her position as a Leading Practitioner, the terms of her contract requiring her to work such reasonable hours as may be needed to enable her to effectively discharge her professional duties. The Tribunal accepts Mr Tate's evidence that it would be expected for staff on a leadership scale to undertake projects as part of their duties without extra pay.
- 41.6. As to whether or not the Claimant fulfilled her classroom duties in addition to her EFA project work, the Tribunal prefers Mr Tate's evidence that the Claimant worked on a reduced timetable. It is highly relevant in any event that the Claimant undertook some EFA work visiting schools and those were days when she could not have been working for the Respondent; Mr Tate's concern that if paid for EFA work she would be paid twice is understandable and consistent with the Respondent's position. Whether or not the Respondent incurred the cost of covering for the Claimant's absence is not highly relevant: if the Claimant was not working for the Respondent on a particular day, the Respondent did not have the opportunity to benefit from her presence at school. The Tribunal's view as to the soundness of Mr Tate's rationale is supported by what is said in the SSAT/TEEP document about the school receiving funding for the release of a teacher. It clearly assumes that release would mean a cost for the school and provides for reimbursement; there is no reason why, as a matter of logic, this should not also apply in a situation where EFA work is being carried out.
- 41.7. The terms of the assumed agreement as varied, namely that the Claimant should not invoice the SSAT directly and would thereafter receive no extra pay for EFA work, were sufficiently clear and certain.
- 41.8. The Tribunal finds that the variation was impliedly accepted by the

Claimant by reason of her continued to work for the Respondent, including work on the EFA project, for no less than four further terms after September 2016. She did not raise a grievance or make any complaint about non-payment of the “lions share” which, if that had been agreed, she might have reasonably expected to be paid around the dates set out in the SSAT document.

- 41.9. Nor, after the Respondent’s refusal to pay her December 2016 claim, did she seek further payment until her employment was ending. The Claimant’s evidence that she made her expenses claim to the Respondent for £5,600 after the Respondent had received a bulk payment was unconvincing: firstly, the Respondent had received the first payment on 21 November 2017; secondly, the Respondent received the last three payments on 19 July 2017 (which might be considered the bulk payment) whereas the Claimant had already sought to claim the sum from the Respondent the day before: 18 July 2017.
- 41.10. The Tribunal concludes that the Claimant’s conduct in continuing to work in those circumstances can only be referable to having accepted the changes the Tribunal finds were communicated to her in September 2016 by Mr Tate. As for the Claimant’s claim of December 2016, the Tribunal accepts the Respondent’s submission that it is likely the Claimant was seeking to do so “under the radar” by submitting her claim to her line manager at a time when Mr Tate was away. The Claimant’s continued work for the Respondent, and willingness to continue carrying out EFA duties, amounts to sufficient consideration for the variation.

If the Respondent breached the terms of the assumed oral agreement, did the Claimant nevertheless affirm the breach?

42. Alternatively, if the Claimant had not impliedly accepted the variation, she nevertheless acquiesced in the breach and affirmed the oral agreement between her and Mr Tate on the Respondent’s behalf for the reasons set out above.

Did the Respondent make deductions of wages properly payable to the Claimant?

43. The Tribunal concludes that the Respondent did not make deductions of wages properly payable to the Claimant. The Claimant has failed to establish a legitimate basis upon which to found her claim that the sums claimed were wages properly payable.

Expenses

44. Expenses are excluded from the definition of wages which can be claimed as unlawful deductions from wages under section 27(2)(b) of the Employment Rights Act 1996. Accordingly, the Claimant’s claim for expenses as unpaid wages must fail.
45. The Tribunal has nevertheless considered whether the Respondent’s failure to pay the Claimant the expenses claimed amounts to a breach of contract. The burden of showing a breach of contract rests on the Claimant. The Claimant

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has failed to provide sufficient evidence that she had a contractual entitlement to be reimbursed the expenses claimed. To the extent that it was a term of the Claimant's contract that expenses would be paid in accordance with the Respondent's expenses policy, which the Tribunal finds likely given the references in the Respondent's expenses claim form template to a claimant's requirement to comply with the expenses policy, the Tribunal prefers Mr Tate's evidence that the Claimant's failure to itemise purchases mean they fall outside the policy requirements.

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Employment Judge Pritchard

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Date 23 May 2018