EMPLOYMENT TRIBUNALS

Claimant: **Ms N Ruban**

Respondents: **(1) British Study Centres Limited**
(2) Secretary of State for Business, Energy and Industrial Strategy

Heard at: **Bristol** **On:** **2 October 2020**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondents: Did not attend

A JUDGMENT dated 2 October 2020 having been sent to the parties on 22 October 2020 and written reasons having been requested on 25 October 2020, these Reasons are now provided

REASONS

1. **The claim**

1.1 By a claim form dated 31 January 2020, the Claimant brought the following complaints;

1.1.1 Unpaid holiday pay under the Working Time Regulations 1998;
1.1.2 Breach of contract under the Extension of Jurisdiction Order 1994;
1.1.3 Unlawful deductions from wages under the Employment Rights Act 1996;
1.1.4 A failure to comply with a statutory request to undergo training under s. 63D Employment Rights Act 1996.

1.2 On 8 September 2020, the Second Respondent was joined to the proceedings.

2. **The issues**

2.1 The following issues were clarified at the start of the hearing;

2.2 The Claimant's complaint of unpaid holiday pay concerned 4 days of unpaid and untaken holiday entitlement which she had at the conclusion of her employment. The claim had been included in her assessment of her claim of unlawful deductions from wages (see below).

2.3 The breach of contract claim concerned a bonus of £3,000, liability for which the First Respondent had conceded.

2.4 The complaint of unlawful deductions from wages (also brought as a further

breach of contract claim) which concerned extra work that the Claimant had undertaken which had earned her TOIL (time off in lieu) and which she had not had the chance to take as TOIL by the end of her employment. She claimed that she was entitled to recover the financial sum to reflect the hours owed under the Act and/or the Order. She claimed 19 weeks of TOIL, being £11,875.

2.5 The First Respondent was in voluntary liquidation. It had warned of its financial position by an email dated 12 July 2020 and it then indicated that it would not seek to actively defend the claim by further email on 21 September 2020.

2.6 The Second Respondent should not have been joined because it would only become liable if a subsequent claim to it was either unpaid or underpaid (s. 188 of the Act). Accordingly, the claim against it was dismissed (see paragraph 3 of the Judgment of 2 October 2020).

3. **The facts**

3.1 The Claimant gave evidence in support of her case and produced a number of documents. The Judge took into account the contents of the remaining Respondent's Response. The following factual findings were reached on a balance of probabilities and were limited to matters which were necessary for a determination of the issues in the case.

3.2 The Respondent is an educational establishment which provides training for foreign language students and teachers. The Claimant was employed between 13 May 2010 and 31 October 2019 as the Head of Administration at its Swindon office. Mr Simmonite was her line manager.

3.3 The Claimant had a contract of employment which was provided to her in 2010. It included the following relevant provisions;

> "***Hours of Work***
> *As a full-time employee your normal hours of work will be 37.5 hours per week…*
> *You may be required to work hours in addition to your normal 37.5 hours per week if instructed to do so by your manager on reasonable notice or whenever necessary to meet the needs of the business. You will not receive any additional payment for hours worked in excess of your normal hours of work but you will be permitted to take an equivalent amount of time off in lieu…*
> ***Variation***
> *The Organisation reserves the right to make reasonable changes to any of your terms and conditions of employment. You will be notified of minor changes of detail by way of general notice to all employees, and any such changes take effect from the date of the notice. Where any change affects or alters any of the information contained in this document you will be given individual written notice of such changes at least 4 weeks before the change takes effect.*"

3.4 According to the Claimant, there had been a proposal to replace the contract with another one in 2019, but no new contract did ever replace the 2010 version. The Claimant confirmed that she never signed or agreed any new terms. HR had sent her a new draft but she had had issues with it.

3.5 In January 2019, the Claimant alleged that she was promised training which would have led to a CELTA qualification (Certificate of Training English to Speakers of Other Languages). Such training never came to fruition.

3.6 Also in 16 January 2019, the Claimant received a text to say that she would be awarded a £3,000 bonus in September if she stayed with the Respondent until

then (Mr Simmonite's text was part of the documentation which the Claimant relied upon at the hearing). As stated previously, this element of the claim was accepted by the Respondent (paragraph 12 of its Response).

Bonus/TOIL

3.7 The Claimant complained that the owners of the business had attempted to introduce a new IT system called 'Schoolworks'. She alleged that the system was flawed and caused her to undertake a significant amount of additional work in 2019. She asserted that she had attempted to resign in May, but she had been persuaded not to do so. Between March and 10 August, she undertook 95 additional days of work which were recorded as TOIL (95.09 days according to the Claimant's TOIL timesheet). In previous years, she had had a habit of working overtime during the busiest part of the Respondent's year between March and September and she then took time off in lieu when the business was quieter. She often took her TOIL by returning to her native Ukraine, although she continued to undertake some work there.

3.8 The Claimant sent emails about of overtime to Ms Harris, the Chief Operating Officer, and Mr Simmonite in 2019. Nothing was done. On 5 September 2019, she then raised a grievance about issues of bonus and the TOIL which she had accumulated. The Respondent responded on 7 October, saying that the Claimant had worked additional hours and that her role sometimes required such work.

3.9 On 10 October 2019, the Claimant was informed that she was at risk of redundancy. A week later, she was informed of the closure of the Swindon office and her dismissal was confirmed on the 30th of that month.

4. Conclusions

Unpaid holiday pay

4.1 The Respondent did not present evidence to refute the Claimant's in respect of her outstanding holiday pay. An award was made in her favour in that respect.

Breach of contract

4.2 The Claimant was entitled to the agreed sum of £3,000.

Unlawful deductions from wages

4.3 The Respondent's case in respect of the claim for TOIL was set out between paragraphs 3 and 8 of its Response. It agreed that, in the past, with the natural ebb and flow of work during the year, staff were expected to work longer hours during the busier times and would be allowed to 'take back time' when it was quieter. That broadly accorded with the Claimant's evidence.

4.4 The Respondent alleged that, in early 2019, it introduced a new overtime/TOIL policy which allegedly stated that all overtime had to be approved by a line manager in advance. That policy was not produced in evidence or proved by the Respondent.

4.5 Nevertheless, it was still entitled to rely upon the contractual terms which had been agreed between the parties at the start of the Claimant's employment, as set out above. That contract provided for overtime to have been worked upon a manager's instruction on reasonable notice *or* whenever there was a business need. Accordingly, management approval was not a prerequisite for overtime to have been worked under the contract. But if it *was* worked in the case of business need, what were the consequences? Did the employee receive pay?

4.6 The contract specifically excluded the right for the Claimant to have received additional payment for any overtime hours worked. The only benefit gained under

the contract was an ability to take TOIL; "*an equivalent amount of time off in lieu*."

4.7 Accordingly, on a simple interpretation of the contract, there was no entitlement to a financial equivalent to TOIL. The Claimant could not therefore argue that, by not paying her for TOIL at the end of her employment, she suffered an unlawful deduction from her wages either.

4.8 Case law supported the position. In *Ali-v-Christian Salvesen Food Services Ltd* [1997] ICR 25, CA, the Court had to consider the position of an employee who worked a 40 hour week but whose contract allowed him to be paid for overtime once he had worked over 1,824 hours in a year. The contract was silent in respect of the position if his employment was terminated part through a year. The Claimant argued that he was entitled to receive a payment for overtime because, on a pro rata basis, he had worked more than the proportion of 1,824 hours over the period of the year which had passed. The Court of Appeal rejected the argument; the contract contained express terms which were not capable of being subjected to variation through implication. Similarly, in *Vision Events (UK)-v-Paterson* EATS 0015/13, the Employment Appeal Tribunal in Scotland held that there was no implied right to the payment for accrued overtime on termination.

Detriment following a request for time to train

4.9 This part of the case was simply not developed in evidence by the Claimant and there was insufficient evidence upon which the Tribunal could find that she had made an application which complied with s 63D (3) and (5) and/or that she was covered by sub-section (6) and was not excluded under sub-section (7). Although it seemed clear that the Respondent was not an exempted 'small employer' under the Apprenticeships, Skills, Children and Learning Act 2009 (less than 250 employees) because its Response referred to a workforce of 280 (box 2.7), this was not a complaint that the employer had failed to consider an application for training under ss. 63D and 63IE, or had failed to consider it properly. Rather, it was a complaint that training which *was* approved/granted was not actually provided (see paragraph 6 of the Claim Form). The complaint under s. 63D therefore failed.

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Employment Judge Livesey

11 November 2020

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JUDGMENT & REASONS SENT TO THE PARTIES ON

.....17 November 2020.....

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FOR THE TRIBUNAL OFFICE