



EMPLOYMENT TRIBUNALS

Claimant: Mr TERRY CRIPPS

Respondent: POWYS COUNTY COUNCIL

Heard at: Mold **On:** 05.02.2021

Before: Employment Judge David Hughes

Representation

Claimant: In Person

Respondent: Thomas Rushton (counsel)

JUDGMENT having been sent to the parties on 12.02.2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the claimant Mr Terry Cripps brings a claim against Powys County Council. His claim concerns his employment by the respondent at Brynllwarch Hall school. This is a school near Newtown in Powys, and was referred to before me by Mr Evans, the Respondent's Senior Employment Services officer, as a special school. Its students are young people with special educational needs.
2. The claimant's claim form was received on the 24th February 2019. The claim form was accompanied by early conciliation certificate from ACAS. On his claim form the claimant ticked "no" in answer to the question, "do you have a ACAS early conciliation certificate", and left the number for the box for the insertion of the number blank. However, at other points in his claim form, for example 5.2, he does include at least part of the reference

number on his early conciliation certificate. The case has twice come before employment judges, Employment Judge Powell in September 2019 and Employment Judge Beard, as he then was, in June 2020. Neither of those judges mentioned the issue of the early conciliation certificate number in the orders that they made. It may well be that they averted to the issue but did not address it for the reason I will discuss in a moment.

3. Para 12(1)(d) of the [Employment Tribunals \(Constitution and Rules of Procedure\) Regulations 2013/1237](#) provides as follows:

12.— Rejection: substantive defects

(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

...

(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;

4. Para 12 (2ZA) of the same Regulations provides as follows:

The claim shall be rejected if the Judge considers that the claim is of a kind described in sub- paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

5. As I have noted, the claim has already been before 2 employment judges. In September 2019 Employment Judge Powell held a hearing that appears, from the face of his order, to have been listed for a hearing on liability. In the course of that hearing Employment Judge Powell identified the issues that I have considered today. He recorded those issues in his order.

6. It does not appear that any point regarding the early conciliation number was taken at either that hearing, or the later hearing before Employment Judge Beard. It appears to me that this case falls squarely within the provisions of paragraph 12 (2ZA) of the Regulations. I consider that the Claimant has made a mistake in relation to the early conciliation number and that it would not be in the interests of justice to reject a claim that has progressed this far, having been considered before today by two employment judges in hearings.

7. Paragraph 14 of the order of September 2019, Employment Judge Powell says as follows:

In discussion it became apparent that Mr Cripps asserts three claims which are as follows;

a) the respondent failed to pay the claimant for work done on the 2nd and or third September 2017

b) on termination of his employment in October 2018 the respondent failed to pay to the claimant notice pay which the claimant asserts would equate to one school terms notice

c) that the respondent failed to pay to the claimant a sum equivalent to the special educational needs allowance of £2700 per annum.

8. On 4th June 2020, the case came before Employment Judge Beard for a case management hearing. Paragraph 6 of Employment Judges Beard's order is headed "the issues", and reads as follows:

"the issues between the parties to be determined by the tribunal are a set out in the order of Employment Judge Powell dated the 10th September 2019".

9. At the start of today's hearing, I referred the parties to the issues as identified by Employment Judge Powell. I canvassed whether there were any issues regarding those identified issues. The Claimant identified an error in the date, in that he contended that the first issue should relate to the 4th and 5th of September 2017, not the second and third. Mr Rushton,

counsel for the Respondent, took no issue with this. At this point, no additional issue was raised. After the conclusion of the evidence, the Claimant sought to raise with me another issue, regarding what he claims to be unpaid days that he had worked in the course of his time in the school.

10. I heard submissions from the parties on whether or not Mr Cripps should be able to raise that issue. The issue does feature in his statement. In his statement he alleges that he can identify 32 days of pay due to him, the worth of which he calculates at being around £6,500. That is a significant sum of money. He contended that, until he received a spreadsheet which was referred to in the bundle of papers before me, and which he received, he told me, in June 2020, he could not have known of the issue of these unpaid days.

11. Mr Rushton made three points in response. Firstly he said that the Claimant should have been able to identify any days for which he was not paid when money went into his bank account, or when he received his pay slips. Secondly he says that this not having been an issue identified in Employment Judge Powell list of issues, the Respondent would need time to respond to this issue. It would need to consider obtaining evidence from the school. Thirdly, Mr Rushton queried the merit of the underlying allegation.

12. It is right that this issue is mentioned in the Claimant's witness statement. I do not wish to be unkind to the Claimant when I observe that his statement is at times possibly rather rambling and not particularly well focused on the issues identified by Employment Judge Powell. It would be unfair to read too much into this. The Claimant is not represented, and he's doing his best to put his storey before the tribunal. That said, because he is not legally trained and is telling his storey with imperfect focus on the issues identified beforehand, it would be wrong to assume that he wished to raise this issue as an issue to be considered in this hearing merely because he mentions it in his statement.

13. I have to consider the overriding objective, which requires me to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

14. I did not consider that it would be consistent with the overriding objective to allow the Claimant to raise this issue. Going backwards through the reasons that Mr Rushton gave, I do not think it would be appropriate for me to go deeply into the substance of the issue. It is right that the Claimant's witness statement on this question is less than clear, but it would be unfair to hold that against him.

15. Mr Rushton's second and third points seemed to me to be much stronger. The Respondent did not come to today's hearing prepared to deal with this issue, understandably so given that it did not feature in Employment Judge Powell's list of issues.

16. It is right to observe that the Respondent's paying of the Claimant has been something of a mess. I was told in evidence that pay slips were sometimes received very late. That said, they were received. The Claimant told me that the units worked column on every pay slip should have shown, on virtually every occasion, that he had worked 5 units. It was plain that not all of the pay slips did show him having worked 5 units. However late he got the pay slips, he should have noticed that. Moreover when money was paid to him, even if it was paid late, one would have expected him to notice significant shortcomings in his pay. I think that it is not right to say that the Claimant could not have known

about these alleged unpaid days until June 2020. He could and should have known about them much earlier than that.

17. I therefore concluded that the claimant should not be allowed to raise this issue at this late stage and explained my reasons before hearing closing submissions.

Issue 1

18. The issue here seems to me to be twofold . Firstly as a matter of fact, did the Claimant attend at the school and do work on the 4th and 5th September 2017. Secondly, if he did so, is he entitled to be paid by the Respondent for that.

19. I find that the Claimant did attend the school and do work on the 4th and 5th September 2017. Although he was at times prone to ramble, I accept the Claimant's evidence on this point. Mr Rushton realistically acknowledged that he could not offer a positive denial of this point, and focused his arguments on the question of whether the Claimant was entitled to be paid. Mr Rushton contended that Powys could not be liable for an employment relationship of which they had no knowledge.

20. I queried with Mr Rushton whether this was so. The evidence before me was that the eteach online platform was used by supply teachers to indicate when they were available for work, but the decision as to whether a teacher who offered to work any particular date was hired to do so lay with the school. Although the school would need to inform the Respondent so that the Respondent could pay the teacher concerned, it does not seem to me that Powys would have knowledge of a teacher being hired before that teacher was hired.

21. In this case, the Claimant told me that he had been in contact with the head teacher of the school through the summer Holidays. He had been asked to come in on the 4th and 5th September, and had done so. In the course of the penultimate session of the afternoon of the 5th, the

deputy head had asked the claimant to attend the headteacher's office. The Claimant did so, and was told that his EWC registration needed to be sorted out.

22. The documents are of assistance on this point. There is a letter dated the 15th September 2017, addressed to the Claimant. It reads in part as follows:

“thank you for completing the forms that will allow you to become a Supply teacher with Powys County Council. I have now received all the relevant information that is required and your name will be included on the web based eteach supply database.”

23. There is also an application form filled in by the Claimant. On page 2 of that application form, there is a section that reads, *“if you are teaching in Wales it is a requirement that you are registered with the EWC”*. The claimant has circled the answer “yes” to the question, *“please confirm if you are registered with the EWC”*, and gives his date of registration as 2015. The Claimant was not examined about this in the hearing.

24. He told me during the hearing that he had not been registered with EWC during previous employment at another school in Wales, and he appears to have believed that it was the responsibility of the school to register him with the EWC. I am prepared to accept that he was confused on this point. However, the application form makes clear that registration is required. The application also refers to DBS checks and similar, and includes a declaration that the applicant gives his or her consent for cheques to be carried out in DBS records, HR personnel records and other Powys County Council databases.

23. I find that it was clear to the Claimant that, when he made his application to be a teacher with the Respondent, he knew that working for the respondent as a teacher was dependent upon registration and certain checks being carried out. I further find that as of the 4th and 5th September 2017, he had not been notified that such checks had successfully been

carried out. I think it likely that he attended at the school and performed work on the 4th and 5th September 2017, possibly in the hope that doing so would help him achieve some employment there. I do not think he was employed there on those dates. I do not accept that he could reasonably have believed himself to be employed there on those dates, because I find that he was aware that any employment as a teacher with the Respondent was dependent upon the successful completion of checks, the successful completion of which had not been notified to him as of that date.

24. I therefore find that the claimant is not entitled to be paid for those two days;

ISSUE 2

25. This issue depends on whether the claimant was Employed as a supply teacher, or on a fixed term contract. In his evidence, the Claimant said that he had been told by employees of the Respondent that he should have been placed on a fixed term contract. I have considerable sympathy with him on this point. I heard evidence from Steve Evans, the Respondent's Senior Employment Services Officer. Mr Evans' evidence was that, where it was foreseen that a teacher was likely to be absent for a term or longer, cover should be obtained by offering a fixed term contract, both for reasons of cost and for other reasons. I do not know, and do not need to find, whether or not it was foreseen that the Claimant's services would be required for longer than a term. They were as a matter of fact required for longer than a term.

26. All that said, seems to me to amount to no more than that the Claimant had a legitimate hope that he would be put on a fixed term contract. In his evidence, he accepted that he was not on a fixed term contract.

27. I was referred to an email, apparently dated the 3rd August 2018, in which one Suzanne Owen wrote to the Claimant and said,

“Hi Terry I have now spoken to the school and an advance is being issued for you today, it should be with you by the end of the day. Please contact us in September if you haven't been given a fixed term contract.”

27. The Claimant's evidence on this point that he had been indicated that he should be on a fixed term contract, and that the head teacher of the school had indicated to him that there would always be a job for him at the school. The latter point, I think the Claimant himself did not take literally, as he also spoke about being able to work at the school for a time should anything happen. Asked in cross examination if he was always on a supply teacher contract, however, the Claimant answered, “yes”.

28. I think that the Claimant was right on this point. Much as he may well have had a legitimate grievance about not being offered different arrangements, I find that he was not offered different arrangements, and that throughout his time at the school he worked as a supply teacher, he was not offered a fixed term contract and did not have a fixed term contract.

29. The parties accepted that whether or not the Claimant had a fixed term contract or a supply contract was determinative of the second issue. On this issue I find for the Respondent.

Issue 3

30. On the third issue, the parties referred me to a document entitled “*School teachers' pay and conditions document 2017 and guide on school teachers' pay and conditions*”. The parties agreed that this document was determinative of the issue of whether or not the Claimant was entitled to an SEN allowance.

31. Section 21 of this document is entitled special educational needs brackets Essen close brackets allowances. Part 21.2 reads as follows:

“the relevant body must award an SEN allowance to a classroom teacher:

- a) *in any SEN post that requires a mandatory SEN qualification and involves teaching pupils with SEN;*
- b) *in a special school;*
- c) *who teaches pupils in one or more designated special classes or units in a school or, in the case of an unattached teacher, in a local authority unit or service;*
- d) *in any non-designated setting (including any pupil referral unit) that is analogous to a designated special class or unit where the post*
 - i) *involves a substantial element of working directly with children with SEN;*
 - ii) *requires the exercise of a teacher's professional skills and judgement in the teaching of children with SEN; and*
 - iii) *has a greater level of involvement in the teaching of children with SEN than is the normal requirement of teachers throughout the school or unit within the school or in the case of an unattached teacher the unit or service".*

32. The parties were in agreement that the resolution of this issue depends on whether the conditions in 21.2 to be read conjunctively or disjunctively.

33. I find that they are to be read disjunctively

34. It is right that the sub-conditions a), b), c) and d) are separated with neither conjunctive nor disjunctive words. Neither "or" nor "and" are there. The sub-elements of d) do include the word and after ii).

35. I do not accept Mr Rushton's contention that this means that the other elements under 21.2 are to be read conjunctively. I think it means that the component elements of d) are to be read conjunctively. I do not think it necessarily follows however, that a), b) and c) are to be read disjunctively.

36. It seems to me that condition b), "*in a special school*", and condition c), "*who teaches pupils in a one or more designated classes or units in a school or, in the case of an unattached teacher, in a local authority unit or service*", do not sit well together if read conjunctively. Whilst I accept that it is not entirely without ambiguity, it seems to me that it is at least possible that a local authority unit or service, which appears from c) to be something other than a school, would not necessarily be in a special school. If a conjunctive interpretation is right, in order to be eligible for an SEM allowance, a teacher would need to work both in a special school and in one or more designated classes or units in a school or in the case of an attached teacher in a local authority unit or service. To require that a teacher work both in a special school and in a local authority unit or service, which appeared to me to be at least possibly not in a school, does not suggest that a conjunctive interpretation is the correct approach.

37. I also note that D) iii) reads "*has a greater level of involvement in the teaching of children with SEN than is the normal requirement of teachers throughout the school or unit within the school or in the case of an unattached teacher the unit or service*". Read conjunctively, this would mean teachers in a special school are only eligible for an SEN allowance if their level of involvement in the teaching of children with special educational needs is greater than that of then that normal in their particular special school. That again does not seem to me to favour a conjunctive approach.

38. For these reasons, I find that the Claimant was entitled to an SEN allowance. It was common ground before me that the Claimant did fulfil at least one of the sub-requirements of paragraph 21.2, but did not fulfil all of them.

39. Mr Evans assisted me with the calculation of the correct amount of the SEN allowance due on my findings. Based on gross earnings of £39,000 per annum, the net figure that I was provided with was £1,851.46, and that is the sum I awarded.

Employment Judge David Hughes

Date 08.02.2021

REASONS SENT TO THE PARTIES ON 9 March 2021

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FOR THE TRIBUNAL OFFICE