EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr B Alexander		**Secretary of State for Education**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 8 – 11 June 2021

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Mr D Bunting (Counsel)**
For Respondent: **Ms C McCann (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

1 Pursuant to Section 12(2)(a) of the Employment Rights Act 1996, upon the claimant's reference to the tribunal pursuant to Section 11(2) of that Act, the particulars of employment provided to the claimant by the respondent on 29 March 2019 are confirmed.
2 Pursuant to Section 24 of the Employment Rights Act 1996, the claimant's complaint pursuant to Section 23 of that Act is not well-founded and is dismissed.

REASONS

(The Judgment with Full Reasons was delivered orally on 11 June 2021. The claimant requested the provision of written Reasons, which are set out below.)

Introduction

1 The claimant in this case is Mr Brayden Alexander who has been employed by the respondent, the Secretary of State for Education, since 1 April 2019. The claimant's employment is continuing. The claimant's period of continuous service commenced on 9 September 2015 when he was appointed as a Transition Manager with BAE Systems Applied Intelligence Ltd. On 1 April 2018, the claimant's employment transferred to BAE Systems Plc; this was a relevant transfer for the purposes of the Transfer of Undertakings Protection of Employment Regulations 2006 (TUPE), Henceforth, I will refer to both of the above named companies simply as BAE. All 1 April 2019 the claimant's

employment then transferred to the respondent and again this was a relevant transfer for TUPE.

2 The claimant is concerned that, following the transfer of his employment to the respondent, certain elements of his contract are not being honoured. On 27 June 2019, the claimant presented his claim form seeking a declaration as to the terms and conditions of employment and, pursuant to the terms and conditions contended for, a claim for unlawful deduction from wages and for an award making good the deductions.

3 The employment tribunal does not have jurisdiction to enforce an employment contract. The contractual jurisdiction of the tribunal is limited to that given in the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994; and, significantly the tribunal has no contractual jurisdiction whilst the employment is continuing.

4 At a Closed Preliminary Hearing conducted by Employment Judge Woffenden on 29 June 2020, and following argument during the course of this hearing, the nature of the claims have been clarified (and possibly amended by consent) to the following: -

(a) The claimant makes a reference pursuant to Section 11(2) Employment Rights Act 1996 (ERA) to the effect that the statement of employment particulars provided to him by the respondent on 29 March 2019 inaccurate
(b) Pursuant to Section 12(2) ERA the claimant seeks the amendment to or substitution of the particulars given.
(c) Pursuant to Section 24 ERA, on the basis of such an amendment it is the claimant's case that there has been an unlawful deduction from wages contrary to Section 13 ERA. He seeks a declaration to that effect; but, at this stage, does not seek an award.

5 The claimant is seeking a declaration from the tribunal not merely amending or substituting the particulars given by the respondent on 29 March 2019 but also declaring that these particulars have contractual force. The respondent's position is that, as a statement given pursuant to S1 or S4 ERA can (and often should) include both contractual and non-contractual provisions, it is outside the jurisdiction of the tribunal to declare which of the particulars given are contractual in nature and which are not. This would amount to the tribunal interpreting the terms of the contract. Accordingly, Ms McCann's case is that even if the tribunal were to grant the remedy sought by the claimant by amending or substituting the particulars this may not be sufficient to achieve the relief he seeks. It may be necessary for him to go to the civil courts to enforce his contract. This is something to which I will return if necessary.

6 The amendments/substitutions sought by the claimant are set out in Paragraph 95 of Mr Bunting's skeleton argument:

(a) An annual salary review and an annual increase: "*the word 'reviewed annually' should be replaced with 'reviewed annually and, insofar as the employee's colleagues on the same grade and are given a pay rise and subject to the employee's satisfactory performance, increased by the same amount as said colleagues".*
(b) This amendment would result in a current annual salary of £56,400 – *this figure should be inserted.*
(c) Working from home two days per week - *instead of the word 'Coventry', the clause should say 'the DfE's Coventry site, but the employee is permitted to work from home two days per week, on Mondays and Fridays'*;
(d) Finishing work at 2pm on Fridays – *instead of 37 hours per weeks, the figure should be 34 hours per week and, instead of 'communicated to you separately by the person to whom you report', the clause should say '9 to 5 Monday to Thursday and 9 to 2 on Fridays'*.

Essentially there are two parts to this final amendment. The particulars given to the claimant require him to work 37 hours per week exclusive of lunch breaks. The claimant contends that he is only required to work 32 hours per week (I think the 34 hour figure provided by Mr Bunting is erroneous). He also contends that within those hours he is entitled to finish work at 2pm on Fridays.

The Evidence

7 The claimant gave evidence on his own account he did not call any supporting witnesses. In the context of this case, I find his failure to call supporting evidence somewhat surprising.

8 The respondent relied on the evidence of three witnesses: Mr Paul Schofield - Head of Employee Relationships for BAE; Ms Emma Moulden - HR Business Partner for the respondent; and Mrs Louise Smith - Head of Pay and Reward for the respondent.

9 Mr Schofield; Ms Moulden; and Mrs Smith were all reliable witnesses whose evidence remained consistent throughout. It was consistent with their witness statements; and consistent with contemporaneous documents.

10 The claimant was a less satisfactory witness. He has been inconsistent throughout the process. When giving evidence before the tribunal, he added an important embellishment to his evidence for the very first time – namely, the suggestion that certain promises were made to him at interview with BAE which by implication should be incorporated into his contract. It is clearly unsatisfactory

for important evidence such as this to emerge for the very first time when oral evidence is given. This provides the respondent with no opportunity to investigate. I treat that evidence with considerable caution.

11 But there are other inconsistencies: for example, the claimant contends for a contractual entitlement to finish work at 2pm each Friday – but he made no mention of this during the grievance process with Mr Schofield. The first mention of this came after the transfer was effective.

12 The 32 hour working week was not mentioned in the claimant's claim form or at any earlier stage. The claim emerged for the first time in the claimant's witness statement.

13 Where there is a factual conflict between the evidence given by the claimant and the evidence given by the respondent's witnesses, I prefer the evidence given by the respondent's witnesses.

14 In addition to the oral evidence, I was provided with an agreed hearing bundle running some 466 pages. I have considered those documents from within the bundle to which I was referred by the parties during the hearing.

The Facts

15 The relevant facts of the case are set out in an agreed chronology provided to me by the parties. I have heard a great deal of evidence regarding the consultation process prior to the transfer from BAE to the respondent. None of this is actually relevant: the particulars contained in the 29 March 2019 statement corresponds fully with the particulars provided to the claimant by BAE on 20 July 2015 - shortly after the commencement of his employment. These particulars were affirmed when the claimant transferred within BAT on 23 March 2018. The issue therefore is whether, immediately prior to the transfer, these particulars were accurate as at the time of the transfer. The effect of the transfer is to preserve and not to enhance the claimant's terms and conditions of employment. In one respect, the claimant contends that the particulars should have been updated pursuant to Section 4 ERA; in other material respects his case is that the particulars given have been inaccurate from the outset. I will briefly deal with the relevant facts:

16 BAE provided services to government departments: principally the current respondent. The claimant was part of the organised grouping of employees providing such services; he was mainly deployed to the contract with the current respondent; although for a period of his employment he was deployed to a contract with the Foreign & Commonwealth Office (FCO) based in Milton Keynes. The respondent decided that, from 1 April 2019, its contract with BAE would be terminated: it would henceforth take the services in house. Accordingly, at that

time there was a transfer of the claimant's employment. At the time of the transfer the claimant's annual salary with BAE was £55,020.

Annual Pay Review

17 Paragraph 7.3 of the particulars given to the claimant by BAE on 20 July 2015 provides: "*The rate of your reference salary will be reviewed annually, the first such review to take place with effect from 1 April 2016*." There is no reference to an entitlement to an annual salary increase.

18 On 1 April 2016, the claimant salary was increased by 2%; on 1 April 2017, his salary was increased by 2.2%; and on 1 April 2018; his salary was increased by 1.5%. When the claimant transferred to the respondent on 1 April 2090 is salary reference salary was £55,020. From BAE the claimant also received annual bonuses. He agrees the bonusses were discretionary; he does not contend for any contractual entitlement to receive bonuses post-transfer.

19 Upon transfer, the respondent graded the claimant's role as a Senior Executive Officer (SEO). At the time of transfer, the national SEO pay-band for the respondent was £35,497 – £39,114. Thus the claimant's reference salary considerably exceeded the maximum for the relevant pay band. The respondent protected the claimant salary at £55,020. This was expressed as comprising two elements: a basic salary of £39,114 and a marked time allowance of £15,906 together making the total of £55,020. It was explained that the claimant's salary would not be reduced to match the respondent's pay-bands. And his total salary of £55,020 would be protected until the maximum for the SEO pay-band reached that figure. In the event of a salary increase for civil servants at SEO level, the claimant's basic salary would increase appropriately; but there would be a corresponding decrease in the marked time allowance - keeping the total at £55,020. On this basis, it could be many years before the claimant sees an actual increase in his total salary.

20 This is not to say that the claimant has been wholly excluded from the benefit of salary reviews post transfer. When an employee's salary exceeds the pay-band maximum and is protected as the claimant's is, the respondent's practice is nevertheless to allow such employees a non-consolidated lump sum payment at the time of the salary review equivalent to the value of any increase applied to the mid-point of the appropriate pay-band. For 2019, the claimant received a lump sum of £746; for 2020 he received a lump sum of £715. There was no pay increase or non-consolidated lump sum payment for 2021 - because of HM Government's announcement of a public sector pay freeze.

Place of Employment

21 Paragraph 6.1 of the particulars given to the claimant by BAE on 20 July 2015 provides as follows: "*Your normal place of work will be Coventry. The Company may from time to time require you to work at other locations either on a permanent or temporary basis as necessary to meet the needs of the business, in which case appropriate relocation support will be available*." From the outset the claimant's place of employment was understood to be the respondent's Coventry site at Cheylesmore House, 5 Quinton Road, Coventry. And until February 2017 the claimant attended work at that address on a daily basis unless required to work elsewhere.

22 In February 2017, the claimant was temporarily redeployed to work at FCO at its site in Milton Keynes - further away from the claimant's home than Coventry. As part of the redeployment arrangement, BAE agreed to pay the claimant's travelling expenses to Milton Keynes; the cost was passed on to FCO under the contract. For mutual convenience, the three parties to the arrangement, the claimant; BAE; and FCO, agreed that the claimant would work from home on Monday and Friday each week; only travelling to Milton Keynes on Tuesday, Wednesday and Thursday. This reduced the claimant's travelling time also reduced cost.

23 In August/September 2018, the claimant's work for FCO was reduced to 2 days per week. He resumed work for the respondent on the other three days. Again, for mutual convenience, the precise arrangements were that the claimant worked for FCO from home on Mondays and Fridays; and travelled to the respondent's Coventry site on Tuesdays, Wednesdays and Thursdays.

24 In October 2018, the claimant's FCO work ceased altogether. He resumed full-time work for the respondent. He was however permitted to continue working from home on Monday and Friday each week. Accordingly, the arrangement whereby the claimant was working for the respondent, based at its site in Coventry, but permitted to work from home on Mondays and Fridays each week was in place for approximately six months prior to the transfer.

25 Since the transfer, the claimant has continued working from home on Mondays and Fridays. The difference between the parties is that the claimant claims that this is now an entitlement; part of his contract; and it should therefore be reflected in his written particulars. The respondent's case is that the claimant's place of work is properly described in the particulars as Coventry (more precisely respondent's site in Coventry); and that the arrangement to work from home is an informal arrangement in place for so long as it is *mutually* beneficial. It is not a contractual right; or entitlement - it has no place in the employment particulars.

Hours of Work

26 Paragraph 8.1 of the particulars given to the claimant on 20 July 2015 provides as follows: "*You are required to work a minimum 37 hour week, subject to compliance with the Working Time Regulations 1998 (as amended). Your normal hours of work will be communicated to you separately by the person to whom you report. Lunch breaks will be unpaid and subject to local arrangement. The Company reserves the right to vary your working hours as necessary to meet the changing needs of the business.*"

27 It is the claimant's case before the tribunal that, at interview prior to being offered employment with BAE, he was told that there was a tradition whereby employees finished work on Fridays at 2pm. Further, his case is that his lunch breaks were paid and included within the 37 hours. The claimant's case therefore is that his working hours at BAE were: Monday - Thursday 9am – 5pm (8 hours); and on Friday 9am – 2pm (5 hours) - a total of 37 hours including a paid 1 hour lunch break each day thus reducing the actual working hours to 32 hours per week.

28 When giving evidence, the claimant readily conceded that the interview took place before he was offered employment with BAE - and therefore, before he was provided with the particulars of employment on 20 July 2015. When asked why it was that he had not queried the differences between those particulars and what he had been told at interview, the claimant's response was simply that "*he trusted them*".

29 The 20 July 2015 particulars were confirmed when the claimant transferred within BAE on 1 April 2018. The claimant did not query those particulars or suggest that they were different from what he was promised at interview or from his actual working arrangements.

30 Once the claimant was in scope for transfer to the respondent, during the consultation process, he became aware of the particulars of his employment which were provided to the respondent by BAE. For the first time he questioned them. In an email dated 25 February 2019 to BAE, he raised seven points of dispute. These did not include the 2pm finish on a Friday; the 32 hour working week; or the two days per week working from home.

31 On 1 March 2019, claimant raised a formal grievance against BAE relating to the particulars being given to the respondent. Mr Schofield investigated and determined the grievance following a meeting with the claimant on 18 March 2019. The grievance was not upheld: Mr Schofield's findings were as follows: -

Working from Home

(a) Mr Schofield found that there was no contractual term for the claimant to work from home two days per week this was a concession which had been introduced for the parties mutual benefit and could continue so long as both parties wished to however the arrangement was entirely discretionary

Annual Pay Increase

(b) Whilst Mr Schofield agreed that the claimant was entitled to an annual salary review there was no agreement express or implied the claimant would always receive a salary increase.

32 Mr Schofield did not deal with the 32 hour working week or the 2pm finish on a Friday. These matters had not been raised by the claimant. In evidence he confirmed that he was quite satisfied that the that the claimant was contracted to work 37 hours per week excluding lunch breaks. The precise working hours (including for example an early finish on a Friday) were matters of local discretion. He was not aware of any widespread practice or tradition within BAE to finish early on Fridays.

The Law

33 **The Employment Rights Act 1996 (ERA)**

Section 1: Statement Of Initial Employment Particulars
(*The section is set out as it applied at the relevant time – prior to legislative changes introduced with effect from 6 April 2020*.)

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and employee,
(b) the date when the employment began, and
(c) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,
(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
(c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours),
(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
(ii) incapacity for work due to sickness or injury, including any provision for sick pay, and
(iii) pensions and pension schemes,

(e) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,
(f) the title of the job which the employee is employed to do or a brief description of the work for which he is employed,

(h) either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer.

Section 4: Statement of Changes
(*The section is set out as it applied at the relevant time – prior to legislative changes introduced with effect from 6 April 2020*.)

(1) If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the employee a written statement containing particulars of the change.

Section 11: References to Employment Tribunals

(1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment

tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where—

(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to a worker, and
(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or the worker may require the question to be referred to and determined by an employment tribunal.

Section 12: Determination of References

(1) Where, on a reference under section 11(1), an employment tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the worker a statement in which those particulars were included, or referred to, as specified in the decision of the tribunal.

(2) On determining a reference under section 11(2) relating to a statement purporting to be a statement under section 1 or 4, an [employment tribunal] may—

(a) confirm the particulars as included or referred to in the statement given by the employer,
(b) amend those particulars, or
(c) substitute other particulars for them,
as the tribunal may determine to be appropriate; and the statement shall be deemed to have been given by the employer to the [worker] in accordance with the decision of the tribunal.

34 It is a well-established principle of contract law that express terms take precedence over implied terms. In ***Johnson v Unisys Ltd*** **2001 ICR 480 (HL)**, the House of Lords held that implied terms can supplement the express terms of a contract, but cannot contradict them. An express term can be subject to an implied term. For example, see ***St Budeaux Royal British Legion Club Ltd v Cropper*** **EAT 39/94**, in which a club steward's hours and pay were reduced under an express term that entitled the employer to make such a variation. In that case, the express term allowing the employer to reduce the employee's hours was subject to the implied duty to maintain mutual trust and confidence. employer's duty not to breach trust and confidence.

35 In ***CSC Computer Sciences Ltd v McAlinden and Others*** **2013 EWCA Civ 1435 (CA)** an employment tribunal found that a term entitling the claimants to annual pay increases corresponding to any increase in RPI was implied into their contracts based on custom and practice. In the Court of Appeal, which upheld the tribunal's decision and dismissed CSC's appeal, Lord Justice Underhill held that the principles governing the implication of terms by custom and practice that were reviewed by him in the context of enhanced redundancy benefits in ***Park Cakes Ltd v Shumba and Others*** **2013 IRLR 800 (CA)** applied.

36 In ***Park Cakes***, it was confirmed that what matters is not what the employer actually intended but what intention its words or conduct would reasonably communicate to the employees. The focus is on what the employees reasonably understood or should have understood from the employer's conduct and words, applying ordinary contractual principles. Underhill LJ went on to list some of the circumstances that will typically be relevant when considering what, objectively, employees should reasonably have understood. These included:

(a) The number of occasions / the length of the period over which the benefit have been paid.
(b) Whether the benefits were always the same.
(c) The extent to which the benefits have been publicised.
(d) How the terms are described; what is said in the express contract.
(e) The equivocalness of the employer's actions.

37 In this case it is common ground that the burden of proof is upon the claimant to establish the incorporation of terms and conditions by implication. In order to do so, he must satisfy the tribunal that the term to be implied is "*reasonable, notorious and certain*" and that it has been followed because there is an acknowledged legal obligation to do so rather than because of a discretion or policy. (***Devonald v Rosser & Sons*** **[1906] 2 KB 723 (CA)**; ***Quinn v Calder Industrial Materials Ltd*** **[1996] IRLR 126 (EAT)**; ***Solectron Scotland Ltd v Roper*** **[2004] IRLR 4 (EAT)**; ***Park Cakes***)

38 In ***Noble Enterprises Ltd v Lieberum*** **EAT 67/98**, the EAT upheld a tribunal's finding that there was an implied term based on custom and practice that the claimant would receive an annual bonus, despite very little documentary evidence of any such entitlement.

39 In ***Dean and Dean Solicitors (a firm) v Dionissiou-Moussaoui*** **2011 EWCA Civ 1331 (CA)**, it was held that the 'parol evidence rule', that extrinsic evidence is not admissible to help interpret a written contract, is not applicable in cases where it is alleged that the written agreement contains a mistake that should be rectified. A statutory statement of particulars is not conclusive

evidence of terms and can be rebutted by other evidence as to what the contractual terms are -***System Floors (UK) Ltd v Daniel*** **1982 ICR 54 (EAT)**.

40 It is common ground between the parties that, applying the authority of ***Southern Cross Healthcare Co Ltd -v- Perkins*** **[2010] EWCA Civ 1442 (CA)**, the Employment Tribunal's breach of contract jurisdiction under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 was confined to claims arising or outstanding on the termination of the contract and was not available during the subsistence of the contract. While the Employment Tribunal, in exercising its jurisdiction under Section 12(2) ERA, would have to identify the terms of a contract in order to see that the statutory statement of particulars correctly reflected them, it had no jurisdiction to interpret those terms. The only forum with jurisdiction in relation to construction of the contract is the ordinary civil court.

41 the position is different as between the Employment Tribunal's jurisdiction under Section 12 ERA and that under Section 23 ERA in the determination of a claim for unlawful deductions from wages. Under the latter jurisdiction, an Employment Tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Section 13 ERA was "properly payable" within the meaning of Section 13(3). This includes an issue as to the meaning of the contract of employment - ***Agarwal v Cardiff University*** **[2018] EWCA Civ 2084 (CA)**. Further that case held that there is no conflict between that position and the position on a claim under Section 12(2) ERA to determine what ought to have been included in a statement of employment particulars, where an employment tribunal has no jurisdiction to interpret the contract of employment, since the two provisions differ in their origins and purpose.

42 Both parties, for different reasons, purport to rely on the case of ***Born London Ltd v Spire Production Services Ltd*** **[2017] IRLR 493 (EAT)**. The case under appeal was litigation between the transferor and the transferee following a relevant transfer under TUPE. The transferee was alleging a breach by the transferor of its obligations under Regulation 11 TUPE to provide information relating to transferring employees. The transferor had provided details of a Christmas bonus paid to employees - but stated that this was non-contractual. The transferee argued that in fact the bonus payment was a contractual entitlement and should have been stated to be such in the Regulation 11 particulars. The EAT upheld the tribunal's finding that the transferor did not breach its Regulation 11 duty - even if it had wrongly volunteered that the bonus payment was non-contractual. This is because the particulars to be provided under Regulation 11 replicates the particulars to be provided to an employee under Section 1 ERA which do not require the identification of contractual as opposed to non-contractual rights and obligations. Mr Bunting relies on the fact that there was a parallel case involving the transferee and the transferring employees in which the tribunal purported to declare the bonus payment to be a

contractual entitlement. He relies on the fact that the EAT noted this fact without criticism. Significantly, that tribunal decision was not under appeal as both parties to that claim were contending for the contractual status of the payment. I am unable to identify the EAT decision in ***Born*** as authority for the proposition that it is for the tribunal declare the contractual status of particulars given under Section 1 ERA.

The Claimant's Case

Annual Salary Increase

43 The claimant's case is that it is to be implied into his contract that he is entitled to an increase in salary every year and that this entitlement should have been included in the particulars provided to the respondent and, indeed by BAE. He argues that the entitlement to an annual increase is to be implied by "custom and practice" because he received salary increases on three consecutive years (2016, 2017 and 2018). Mr Bunting submits that the argument for implied term by custom and practice is strengthened by the fact that the three years for which the claimant did receive an increase in salary represent the entirety of the claimant's employment with BAE.

44 Mr Bunting submits that an implied term entitling the claimant to an annual increase in salary does not conflict with or contradict the express term entitling him to an annual salary review.

45 Finally, Mr Bunting submits that the express term is subject to the implied term of mutual trust and confidence. And that for the respondent now to deny the claimant an effective salary increase for a number of years, would be to undermine that implied term.

46 The claimant acknowledges that the amount of the salary increase received each year varied. There is no formula by which it could be predicted. He contends that the amount of the increase was to be determined by the increased market value of the claimant's role.

Working from Home

47 It is the claimant's case that, after his deployment to Milton Keynes, the fact that he was allowed to continue working from home two days per week means that has become an express contractual arrangement and should be included in the particulars. Alternatively the claimant 's claims that the entitlement to work from home two days per week is to be implied into his contract by custom and practice.

Hours of Work

48 The Claimant does not accept that there was an express term to the effect that he worked 37 hours per week. Although a contractual document was sent to the claimant which suggested that was the case, the claimant did not sign that document and, instead, he immediately commenced working 9 - 5 on Monday - Thursday and 9 - 2 on Fridays. This equates to 32 hours per week excluding lunchtimes or 37 hours per week including lunchtimes.

2pm Finish on Friday

49 The claimant's case is that, at interview, he was told of the traditional 2pm finish on a Friday and that, accordingly, this was an express term of his contract which should necessarily be included in the Section 1 ERA particulars notwithstanding the absence of such a term in the particulars provided to him on 20 July 2015 and the absence of any challenge thereto. Alternatively, the claimant claims that the right to finish work at 2pm on Fridays has now been incorporated into his contract by custom and practice and this should now be reflected in the particulars of his employment.

Unlawful Deduction from Wages

50 On the basis that he was entitled to a salary increase on 1 April 2019 and on 1 April 2020 (and on 1 April 2021 but this date postdates the presentation of the current claim), the claimant's case is that the respondent's continued payment to him of a salary of £55,020 per annum represents an underpayment of wages since 1 April 2019. And that this underpayment is an unlawful deduction. In presenting his case, the claimant has given no credit for the non-consolidated lump sums paid to him in 2019 or 2020 - Mr Bunting stating in argument that the payment of these sums is not relevant to the claim.

The Respondent's Case

Annual Salary Increase

51 The respondent's case is that the express particulars provided by BAE on 20 July 2015 and affirmed on 1 April 2018 are clear and require no embellishment by reference to implied terms or the conduct of the parties. The claimant is entitled to an *annual pay review* he is not entitled to an *annual pay increase*. The claimant was employed by BAE for less than four years during which time his salary was reviewed on three occasions. On each occasion, his salary was increased - but the amount of increase varied. The respondent submits that on the basis of three increases in salary it is simply not reasonable to imply an entitlement to an increase every year. There is no document

anywhere acknowledging, or even suggesting, an obligation to award an annual pay increase.

Working from Home

52 Ms McCann submits that the historical basis upon which the working from home arrangement started makes the position very clear. Whilst the claimant was deployed to Milton Keynes the arrangement was of mutual benefit. Thereafter, for about six months only prior to the transfer, the claimant has continued working from home by concession - as it remained mutually convenient for him to do so. This concession was not afforded to the claimant in pursuance of any legal obligation. Ms McCann submits that, at any time prior to the transfer, BAE could have required the claimant to resume working in the Coventry office. Accordingly, there is no basis to suggest that the working from home arrangement should be incorporated into the claimant's employment particulars. The particulars are accurate; the claimant's contractual place of work is the respondent's Coventry office.

Hours of Work

53 The particulars given on 20 July 2015 and affirmed on 1 April 2018 are clear that the claimant is required to work 37 hours per week. The precise make-up of those hours are to be agreed with line managers (and could well accommodate at 2pm finish on a Friday). The respondent's case is that, if these particulars were inaccurate in July 2015, it is inexplicable that the claimant did not challenge the written particulars provided to him. If they were accurate and not open to challenge in July 2015 then they remained accurate on 1 April 2019.

Discussion & Conclusions

General Considerations

54 For the avoidance of doubt, I make clear that there is no question of my finding that a particular working practice was contractual or non-contractual simply on the say-so of BAE. I have considered the evidence relating to salary reviews; working from home; and hours of work to determine what were the properly agreed arrangements between the claimant and BAE immediately prior to the transfer. The principal source of this evidence comes from the claimant himself: I have carefully analysed his evidence in reaching my conclusions. The claimant makes certain assertions which are difficult for the respondent to disprove – although they make clear that the claimant's assertions are not accepted. But, simply because the respondent is not position to call positive evidence in contradiction of what the claimant says, does not mean that I must accept his evidence uncritically.

55 Further, I make clear that I have to consider whether the particulars provided to the claimant are correct. It is no part of the exercise of the tribunal's jurisdiction under Section 12(2) ERA to consider whether, in a particular set of circumstances, the arrangements are fair.

56 For the avoidance of doubt I also make clear that, in reaching the conclusions I have, I take no account of the fact that the claimant expressly opted-in to the respondents terms and conditions of employment having been given the opportunity to remain on BAE terms. Although the respondent adduced evidence with regard to this; and cross-examined to the claimant on it. Ms McCann did not submit in her closing submissions that the claimant had in any way waived as employment rights at BAE. I accept Mr Bunting's submission that such waiver would inevitably be void pursuant to Regulation 4(4) TUPE.

Annual Pay Increase

57 In my judgement it is frankly impossible to conclude that an obligation to *review* salary each year becomes an obligation to *increase* salary every year simply on the basis that there have been salary increases for three consecutive years. I asked myself what the claimant's position on this would have been if, in each of his first three years of employment with BAE, his annual salary review had resulted in a *decrease*. In my judgement, it is inconceivable that he would then argue that his employer was contractually bound to decrease his salary each year. An employer intending to commit to an annual increase in salary could easily say so in the employment particulars. An employee genuinely believing he had such an entitlement would insist on this being included in his employment particulars.

58 Further, by his suggestion that the application of the express terms, the respondent now undermines the implied term of mutual trust and confidence, what the claimant is essentially asking the tribunal to do this is to enforce his employment contract during the currency of the employment relationship - for which, the tribunal has no jurisdiction. The question of the implied term of mutual trust and confidence will only arise within the jurisdiction of the Employment Tribunal if the claimant were to resign and bring a claim for constructive dismissal.

59 The contended for implied term, in my judgement, is not *reasonable* or *notorious* or *certain*. No reasonable employer would commit to increasing salary every year whatever the circumstances. As to notoriety, the claimant's evidence is limited to the fact that he received a pay increase for three consecutive years: he has produced no evidence beyond that to suggest any such commitment from BAE. The only other voice which the tribunal heard from within BAE was that of Mr Schofield - he simply does not recognise the suggestion that any such commitment was made to, or understood by, the workforce. Even if the evidence

of three years increases was sufficient, the amount of the increase varied and the claimant produced no evidence as to how it would be calculated; his case is that the increase would be determined by reference to by the increased *market value* of the claimant's role. This pre-supposes an increase in the market value of the claimant's role: who is to determine what that market value is? And based on what criteria? And, as with any market, values can increase; decrease; or remain static.

60 My judgement is that the arrangement between the claimant and BAE was that he was entitled to an annual salary *review* he has no entitlement to an annual salary *increase.* The correct position is reflected in the employment particulars provided to the claimant by the respondent on 29 March 2019.

Working from Home

61 The circumstances under which the claimant started working from home two days per week are clear: it was to accommodate his temporary deployment to FCO. It was for mutual benefit to save him travelling time and to save expense for FCO. Considering only the claimant's evidence, it is abundantly clear that, at the time of its inception, the working from home arrangement was intended to be temporary during the claimant's FCO deployment.

62 When the claimant's FCO work reduced to 2 days per week, it remained mutually beneficial the claimant to undertake those two days from home. Again this benefited the claimant by reducing his travel time and it saved costs for FCO. In my judgement, there would clearly be no reason or expectation that the arrangement would be permanent; or that it would continue beyond the claimant's temporary FCO deployment.

63 When the FCO deployment ended in October 2018, the claimant returned to work full-time on BAE's contract with the respondent. He continued working two days per week from home. The claimant's evidence on this is interesting: he states "*There was never any suggestion from DfE or BAE that I ought to return to working from the office on Mondays and Fridays*". What is clear is that there was no express agreement that the claimant could continue working from home on Mondays and Fridays. Still less, any express agreement that such an arrangement could be permanent. The claimant was simply permitted to continue. The essential question for me is - what would have been the position at that time if the claimant had been required to return to the office full-time? In my judgement, there can be no realistic assertion that such a requirement by BAE would have been a breach of contract.

64 So, that leaves the question as to whether the passive arrangement permitting the claimant to work from home on Mondays and Fridays each week for a period of six months from October 2018 - March 2019 is sufficient to

establish a variation of the contract by implication. In my judgement, these circumstances come nowhere close to establishing a variation of the contract such that the working arrangements become permanent. What is clear to me, even on the claimant's own evidence, is that BAE had no compelling reason to require the claimant's return to the office on Mondays and Fridays – thus, as a concession, they allowed him to continue working from home. But, I am quite clear that if at any time during that period circumstances had changed such that he was needed in the office, then it would have been within the terms of the claimant's contract with BAE to require him to attend the office every day.

65 Accordingly, I am satisfied that the employment particulars provided to the claimant by the respondent on 29 March 2019 are accurate. The claimant's contractual place of employment is the Coventry office. Any arrangement to work from home is by concession only. The claimant has never been permitted to work from home in pursuance of a contractual entitlement.

Hours of Work

66 The particulars provided to the claimant on 20 July 2015 and affirmed on 1 April 2018 clearly state that the claimant was required to work 37 hours per week excluding lunch breaks. The particulars also state that the precise working hours are to be agreed locally with the claimant's line manager. It is the claimant's case that, since the commencement of his employment he has only actually worked 32 hours and that is the requirement which should be reflected in his employment particulars. In my judgement however, the claimant's own evidence as to how this arrangement came to be fundamentally undermines his case.

67 It is the claimant's case that these working hours were promised to him at interview. The interview took place before the offer of employment; and before the provision of the employment particulars. And yet, when the claimant was provided with particulars requiring 37 hours per week of work, he did not query the discrepancy. When asked during cross-examination why he didn't query this, his reply was "*because I trusted them*". I find this answer to be quite extraordinary: why would the claimant trust an organisation which makes certain representations during interview and then imposes quite different requirements in the employment particulars? In my judgement, the only credible explanation for his silence is that the claimant well knew that the local working arrangements were informal; they could not be reduced to writing; and it was in his interests not to ask questions or draw attention to what he had been told interview. The claimant has not explained why he did not raise his concerns about this in his grievance or at any time whilst he remained in BAE's employment.

68 My judgement is that, if at any time due, to a change of management, or a developing business need, BAE had insisted on the full 37 hours of work, they could have done this quite lawfully without being in breach of the claimant's

employment contract. Accordingly, the particulars provided by BAE to the respondent were accurate; and the particulars then provided to the claimant by the respondent on 29 March 2019 were likewise accurate.

2pm Finish on Friday

69 The particulars provided to the claimant by BAE on 20 July 2015 do not exclude the possibility of a 2pm finish on a Friday. They make clear that the precise working hours are to be agreed with line management - but, in compliance with the working hours required, 37 hours of work would nevertheless be required before the 2pm finish on Friday. Again, it is the claimant's case that the 2pm finish was promised to him at interview; again he did not query the absence of this entitlement when he received the employment particulars. My findings with regard to this are set out at Paragraph 66 above. Further, I note that the claimant is a senior employee: at all material times earning in excess of £50,000 per annum; I find it implausible that an employee of such seniority would be permitted *as of right* to cease work at 2pm on Friday regardless of what tasks may be outstanding.

70 As to the claimant's assertion that the 2pm finish on Friday was a companywide tradition and therefore a lawful expectation, the claimant is a lone voice; he has not called any evidence to support his assertion which is directly contradicted by the evidence of Mr Schofield. Mr Schofield was unaware of any such tradition.

71 Accordingly, it may well be that, by arrangement with his line manager, the claimant's working hours can be arranged such that he can cease work at 2pm on Fridays. But, in my judgement, there is no express right to finish at such time. The claimant's managers at both BAE and the respondent, in consultation with him, and in accordance with business need, may require him to work until later. In any event, a 2pm finish on a Friday could only be accommodated if the full 37 hours work requirement had been completed.

72 I therefore conclude that there would be no basis to include an entitlement to cease work at 2pm on Friday within the claimant's statement of employment particulars. The particulars provided to the claimant on 29 March 2019 are accurate.

Unlawful Deduction from Wages

73 In the light of my findings with regard to the claimant's entitlement to an annual pay increase (Paragraphs 57 – 60 above), I find that there has been no unlawful deductions from the claimant's wages.

Conclusion

74 Accordingly, and for these reasons, pursuant to Section 12(2)(a) ERA, I confirm the statutory particulars of employment provided to the claimant by the respondent on 29 March 2019. And I find, pursuant to Section 23 ERA, that the claimant's claim for unlawful deduction from wages is not well-founded and it is dismissed.

Employment Judge
24 June 2021