IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No: 4100321/2020 (A) Heard at Edinburgh before a full Tribunal on the Cloud Based Video Platform ("CVP") on 28th and 29th October 2020

Employment Judge J G d'Inverno
Tribunal Member Ms J Chalmers
Tribunal Member Mr A Ward

Ms W Rowbotham	**Claimant** **Represented by** **Mr McLaughlin - Solicitor** **per Unionline Scotland**
Fife Health Board	**Respondent** **Represented by** **Mr A Watson - Solicitor** **per NHS Central Legal Office**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims are dismissed.

REASONS

1. This case called, at Edinburgh, for Final Hearing on the Cloud Based Video Platform (CVP) before a full Tribunal on 28th and 29th October 2020.

2. Each party enjoyed the benefit of professional representation; for the claimant Mr McLaughlin, Solicitor and for the respondent Mr Watson, Solicitor. In

compliance with the Tribunal's directions, the parties had lodged and there was before it at Hearing:-

(a) a Joint Bundle of Documents, numbering some 181 pages, to some of which reference was made in the course of evidence and or submission

(b) witness statements of Helen Caithness and Carrie McKnight, for the respondent and of Wendy Rowbotham, the claimant, all of which stood as evidence in chief.

(c) an Agreed List of Issues,

(d) a Joint Statement of Agreed Facts relevant to the determination of the issues; and

(e) a List and bundle of authorities to be referred to.

(f) in addition all 3 witnesses gave evidence on oath or on affirmation, adopting their respective witness statements as their evidence in chief and, answering questions put in cross examination, re-examination and by the Tribunal

3. In the course of cross examination the claimant's representative asked a number of questions of the respondent's witnesses designed to establish whether the internal decision makers in the claimant's grievance and internal appeal were still employees of the respondent. The respondent's representative intervened seeking clarification of the purpose of the line of questioning and in particular of whether it was the claimant's representative's purpose to imply that those individuals should have been led in evidence by the respondent. In responding Mr McLaughlin confirmed that he did intend, when making submissions, to found upon the fact that the evidence of the

internal grievance decision taker and internal appeal against grievance decision taker was not before the Tribunal. He stated that, in his experience it would be unusual for the Tribunal not to be provided with such evidence. He drew comparison with the evidence of a decision taker in the case of unfair dismissal and of the individual who determined any internal appeal against a decision to dismiss.

4. With a view to avoiding a situation in which the Tribunal was placed, after the conclusion of evidence, of having to deal with a lacuna of evidence which one or other of the parties then went on to submit would have been relevant, the Chair asked parties' representatives to each confirm whether either of them intended to lead the individuals in evidence or, the Hearing having commenced, intended now to make any application in respect of the same.

5. For the respondent Mr Watson stated that he had not and did not consider the evidence of those witnesses to be relevant to the determination of the issues before the Tribunal. He rejected as inapposite the comparison with section 98(4) Unfair Dismissal. He stated that he took exception to any implication, if it was the claimant's representative's intention to make the same, that in deciding not to lead those individuals he, the respondent's representative, had behaved in some way improperly. The case was one in which the use of witness statements had been authorised. Parties had been aware from an early stage who each other's proposed witnesses were to be. No issue had been raised with him by Mr McLaughlin as to the attendance of those individuals as potential witnesses. It would have been open to Mr McLaughlin to seek their attendance on his own behalf but he had not done so.

6. For his part Mr McLaughlin confirmed that he had not asked the individuals to attend to give evidence nor had made any application for a Witness Order in respect of them. While restating that in his consideration the evidence of those witnesses would be relevant, in answer to an express inquiry made by the Employment Judge he stated that it was not his intention to make any

application regarding their attendance now on the first day of Hearing albeit that there remained a second day listed.

The Claims

7. In terms of the claims given notice of the claimant seeks a declaration, under section 172 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), that her complaint is well founded and that the Tribunal make a declaration to that effect and further make an award of compensation to be paid to her with particular reference to the failure to pay the employee in accordance with section 169 which is quantified in the sum of £460.

8. Read short, the claimant asserts that she attended relevant Trade Union training, with the permission of the respondent, on 10 days in respect of which the respondents paid her, in respect of training, only for the number of hours spent training (7 hours on each day) whereas, in the claimant's assertion, she normally worked 11.5 hour shifts (3 per week totalling contracted for part-time hours of 34.5 weekly hours) and in respect of all of which, that is 11.5 hours per day), she asserts she should have been paid, in respect of training, resulting in a monetary claim of £460 being (10 x 4.5 (45 hours) x an effective hourly rate of pay of £10.23).

9. In the face of the above, the respondent asserts that the claimant's contracted for hours were 138 across a 4 week period and were not expressed in terms of 3 x 11.5 hr shifts/week. The respondent asserts that the claimant also worked half shifts or 6 hr shifts.

Agreed List of Issues

10. In advance of the Hearing parties submitted a List of Issues requiring investigation and determination by the Tribunal as follows:-

> "**(First)** Was the time off requested, for training, during the claimant's working hours?

(Second) What permission was granted by the respondent?

(Third) Has the respondent been reasonable in terms of the permission which has been granted, in terms of section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A")

(Fourth) Has the respondent failed to pay any part of the amount required to be paid under section 168/169 of TULR(C)A (having only paid for 7 hours as opposed to 11.5 hours)?

11. **List of Agreed Facts**

"(1) The claimant works 138 hours over a 4 week rota (averaging out at 34.5 hours per week). Her shifts, each week, are variable; sometimes comprising three 11.5 hour shifts and at other times there will be 6 or 5.5 hour shifts (rotas on page 33-42) *of the bundle*.

(2) The claimant completed a Form on or around 19th August 2019 to request attendance at Trade Union training (page 63).

(3) During a discussion with Helen Caithness (Senior Charge Nurse, the claimant's Line Manager) in late August 2019 or early September 2019 the claimant was advised that each training day would amount to 7 hours, of her contracted hours, and that she would have to complete additional shifts to make her time up. An additional shift was arranged for the 28th of September 2019 for these purposes. Helen Caithness signed the Trade Union training request form on 10th September 2019 (page 68). Helen Caithness changed the nurse rota to accommodate the training (page 80).

(4) Carrie McKnight confirmed to Benny Rankin on 19th September 2019 that the claimant would be paid for the time of training only (page 87).

(5) The dates/time for the Trade Union training were as follows:

(i) 24/25/26 September 2019 – 3 days (9 am to 4.30 pm, with a 30 minute lunch);

(ii) 4/5/6 November 2019 – 3 days (9 am to 4.30 pm, with a 30 minute lunch);

(iii) 9/10/11/12 December 2019 – 4 days (9 am to 4.30 pm, with a 30 minute lunch).

(6) The claimant was given 7 hours paid time off per day to attend the training. The claimant was asked to fulfil her contracted working hours by making up the time, and worked on other dates in order to do so.

(7) The claimant submitted a grievance on 11th October 2019 (pages 90-92). A stage 1 grievance hearing took place on the 16th of December 2019, chaired by Karen Nolan (Hospital Services Manager, East Division), with Judith Lindsay (HR Advisor), the claimant and Annette Drylie in attendance.

(8) The claimant stated that she should be paid 11.5 hours for each of the days that she attended Trade Union training.

(9) The grievance outcome (pages 95-98) was that:-

(i) The authorisation of 7 hours per day paid time off to attend the 10 days of Trade Union training was reasonable;

(ii) Where time off with pay had been approved, the payment due will equate to the earnings the employee would otherwise have received had they been at work and the claimant has therefore been paid appropriately.

(10) The claimant appealed against the stage 1 grievance outcome. A stage 2 hearing took place on 4th of June 2020, chaired by David Heaney (Divisional General Manager, East), with Karen Laird (HR Officer), the claimant and Benny Rankin in attendance. The appeal was not upheld (outcome letter at pages 107-113)."

Findings in Fact made

12. On the documentary and oral evidence presented the Tribunal unanimously made the following essential Findings in Fact, restricted to those necessary for the determination of the Issues.

13. The claimant's working hours were, in terms of section 173 of TULR(C)A, any time when, in accordance with her Contract of Employment she is required to be at work that is to say in the particular circumstances of the claimant's Contract of Employment, any time during which she was rostered to work.

14. The claimant's training did not take place during working hours. The September training took place on days upon which the claimant was rostered not to be working, that rostering having been made before she submitted her request for training. The training in November and December, although not weeks in respect of which the roster had, as at the time of the claimant's request, yet been constructed, took place on days which the claimant herself rostered as non-working days for her.

15. The training undertaken by the claimant and in respect of which she sought and was granted and permitted "time off", was training which did not take place during "working hours" for the purposes of sections 168, 169, 170 and 173 of TULR(C)A.

16. The time taken off in respect of which the claimant requested and was granted permission by the respondent, did not fall within the terms of section 168, 169, 170 and 173 of TULR(C)A.

17. The claimant requested to be permitted time off to undertake Trade Union training. In answer to the respondent's request that she provide specification of the length of the training to be conducted and in respect of which she was seeking time off, the claimant confirmed 10 x 7 hours training sessions.

18. The claimant sought permission for time off to attend 10 x 7 hours training sessions.

19. The respondents granted the claimant time off to attend 10 x 7 hours training sessions.

20. The claimant was an employee whose remuneration for the work she would have ordinarily have been doing in that time (had that time been during working time), does not vary with the amount of work done.

21. Had the time taken off and in respect of which permission was granted by the respondents been time which was "during working hours" (which the Tribunal has found it was not) the claimant would have been entitled to be paid, in terms of section 169(2) as if she had worked at her normal work for the whole of those 7 hours x 10 training sessions.

22. The time off requested by the claimant and in respect of which permission was granted by the respondent was regulated by the respondent's Policy on Facilities Arrangements which makes separate contractual provision for payment for time spent in training which goes beyond or falls outwith working hours.

23. The respondent's Policy provides that in respect of attendance at training by Trade Union representatives outwith their normal working hours in respect of

which permission is given by the respondents that appropriate payment will be made or equivalent time off granted.

24. The 7 hours per day x 10 days in respect of which the claimant sought permission to attend Trade Union training and in respect of which the respondent gave permission fell within the terms of paragraph 7.4 of the respondent's Policy and attracted an entitlement to "appropriate payment at the claimant's normal rate of pay or equivalent time off".

25. The claimant requested permission and (paid time) to attend 10 x 7 hour training sessions. The respondents granted that permission in those terms.

26. At paragraph 7.5 of the respondent's Policy, upon its proper construction in Law and attaching to the words their normal English language meaning, provides that the payment due to the claimant will equate to the earnings which she would otherwise have received had she been at work during the time spent for training.

27. The ACAS Code of Practice on Time Off for Trade Union Duties and Activities, upon a proper construction and according to the words used their normal English language meaning provides that the employer must pay the employee either the amount that the Union representative would have earned had they worked during the time taken off … and again at paragraph 19 there is no statutory requirement for time off where the duty is carried out at a time when the Union representative would not otherwise have been at work … in all cases the amount of time off must be reasonable".

28. The claimant requested permission to attend, on a paid basis, 10 x 7 hour training sessions in relation to her Trade Union duties.

29. The respondents acceded to the claimant's request and granted permission for her to attend, on a paid basis, 10 x 7 hour training sessions.

30. The claimant was notified in advance of her attendance that she would only be paid for 7 hours in respect of each training session.

31. An additional shift was arranged in September and thereafter shifts were rostered in November and December such as to allow the claimant to work the balance of her contracted 138 hours in each 28 day period.

32. In each of the relevant 28 day periods the claimant worked the balance of her contracted hours net of the 7 hours per training session for which she was paid.

33. The claimant suffered no loss of earnings in any of the 28 day periods earning, across them, the same pay as she would have earned had she not been engaged in training.

34. The claimant's request, made retrospectively in terms of her grievance and before the Tribunal was that having requested time off to carry out training and permission having been granted by the respondents in respect of the time off during which she would be carrying out training, namely 7 hours per training session x 10 days and the claimant having carried out and being paid for 7 hours training per session, was that she be paid for 11.5 hours that is to say paid for 4.5 hours on each day on which she carried out training and being 4.5 hours during which she was neither carrying out training nor working.

35. The claimant's policy of granting permission and paying employees in respect of time spent carrying out training is a policy that is capable of being applied across all working scenarios.

36. The time granted to the claimant for the carrying out of training, including training in relation to Trade Union duties, whether the same falls to be regarded as "time off" during working hours or whether in respect of training which falls outwith working hours, was reasonable in the circumstances, both in terms of the amount of time off in respect of which permission was granted

and in terms of the amount of time in respect of which payment was made namely, in the case of both, the time spent engaged in carrying out the training.

Submissions

Submissions for the Respondent

37. In the course of his submissions Mr Watson for the respondent relied upon the following authorities and references:-

(a) The Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A") section 168 and 169, section 173

(b) Harvey at paragraphs [2003] to [2013.01] inclusive

(c) The respondent's Policy On Facilities Arrangements (page 174 of the bundle section 7.4, 7.5 and 7.6)

(d) The ACAS Code of Practice on "Time Off for Trade Union Duties and Activities" paragraphs 18 and 19 (page 24 in the bundle of authorities)

(e) The case of **Hairsine v Kingston Upon Hull City Council** [1992] I.C.R. 212,

(f) **Howlett v Royal Mail Group Limited** UKEAT/0368/13/DA EAT

38. Under reference to the above the respondent's representative submitted that the claim given notice of before the Tribunal and, for that matter, the complaint which was the subject of internal grievance prior to litigation, each related to the amount, that is to say the number of hours in respect of which, the claimant had been paid in respect of training, she having been granted 7 hours "off" in respect of each training session. That time off permitted was the length of the training session, under deduction of a 30 minute break,

which she, the claimant, had advised the respondents of in the course of making her request. She had been paid by the respondents for the 7 hours spent training on each occasion that is on each of the 10 days upon which she had undertaken training. She nevertheless maintained that she should have been paid for 11.5 hours, in respect of training on each of those days asserting that 11.5 hours is the number of hours which she would have worked (and therefore would have been paid for) but for the training.

39. Under reference to the statutory provisions, the respondent's representative submitted and acknowledged:-

(a) That an employer "shall permit an employee to take time off during working hours for the purposes of undergoing training in aspects of industrial relations" (section 168 of TULR(C)A)

(b) "That the amount of time which an employee is to be permitted to take off … are those that are reasonable in all the circumstances" (section 168)

(c) That the above is to say that the effect of section 168 is that an employer is to allow an official of a recognised Trade Union reasonable "having regard to the Code of Practice issued by ACAS" time off during working hours to attend the relevant training (the added emphasis in this and the succeeding sub paragraphs is that of the respondent's representative)

(d) An employer who permits an employee to take time off under [section 168 or 168A] shall pay him for the time taken off pursuant to the permission (section 169)

(e) Where the employee's remuneration for the work he would ordinarily have been paid during that time does not vary with the amount of work done, he shall be paid as if he had worked for the whole of that time (section 169)

(f) That "Harvey" makes clear that pay is for the time off allowed. The legislation has an emphasis on the permission granted (section 169(1)). It was accepted by the claimant, and not in dispute between the parties, that the permission granted (i.e. the time off allowed), in the present case was 7 hours per day (paragraph 7 in the Agreed Facts)

(g) That it was further a matter of agreement between the parties that the claimant's circumstances sit within section 169(2) of TULR(C)A that is to say that it was a matter of agreement between the parties that the claimant was an employee whose remuneration for the work which she would ordinarily have been doing during that time did not vary with the amount of work done and thus an employee who was to be paid as if she had worked at that work for the whole of that time (let it be assumed that the time off in respect of which permission was given was time off during working hours) which, in the respondent's representative's submission it was not

(h) Under reference to section 173(1) of TULR(C)A that "for the purposes of sections 168, 168A and 170, the working hours of the claimant were to be taken to be any time when in accordance with his Contract of Employment she is required to be at work

Respondent's Policy and ACAS Code

40. Under reference to section 173 of TULR(C)A, to the claimant's evidence and to the copy rosters produced in the bundle, the respondent's representative submitted:-

(a) that the claimant's training was not during "working hours",

(b) given that the claimant was not rostered to work when the training was to fall due in September and that thereafter the claimant was allowed to self-roster for November and December to ensure that the training days did not interfere with any times when she was expected to work and which she did.

(c) In the respondent's representative's submission therefore there was no statutory claim for payment in the current case.

(d) Rather, the claim fell to be regarded in terms of the Respondent's Policy on Facilities Arrangements (page 174 of the bundle, paragraph 7.4, 7.5 and 7.6), which made separate contractual arrangements for payment in these circumstances, in making provision for payment for training going beyond working hours:

41. In relation to the respondent's Policy and the ACAS Code, the respondent's representative submitted as follows:-

(a) Where meetings called by management (and training) … where Trade Union/professional organisation representatives have to attend outwith their normal working hours, <u>appropriate payment will be made or equivalent time off granted</u>

(b) The respondent had agreed to the time off on the basis that it would account for (or be paid for as) 7 hours of the claimant's working hours for each training day.

(c) Paragraph 7.5 of the Policy (page 174 of the bundle) provides – "where time off with pay has been approved, the payment due will equate to the earnings the employee would otherwise have received <u>had they been at work</u>

(d) The ACAS Code of Practice states at paragraph 18 and 19 (page 24 in the bundle of authorities)

> "An employer who permits union representatives time off for trade union duties must pay them for the time off taken. The employer must pay either the amount that the union representative would have earned had they worked during the time off taken or, where earnings vary with the work done, an amount calculated by reference to the average earnings for the work they are employed to do
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> 19. There is no statutory requirement to pay for time off where the duty is carried out at a time when the union representative would not otherwise have been at work ….. in all cases the amount of time off must be reasonable"

(e) Under reference to Harvey that the natural reading of the provisions of the ACAS Code of Practice and of section 7.5 of the respondent's Policy in relation to the claimant was the same namely that she should be paid as if she was working for the time spent undertaking the Trade Union training. Had the claimant worked those 7 hours instead of undertaking Trade Union training, she would have been paid for 7 hours.

42. Turning to the case law, the respondent's representative submitted that in the case of **Hairsine v Kingston Upon Hull City Council** [1992], the EAT:-

(a) had rejected the employee's proposition that as he had been given a "day off" to attend the course and having put in a day attending the course he was entitled to his full working day off with pay whereas he had only been paid by his employers for the time spent engaged in training.

(b) The EAT further highlighted that the statute gave the employee no entitlement to pay for the remainder of his working day beyond the time spent in training because it was not time off "allowed" by the employer; and,

(c) that the case emphasised the importance of the permission granted by the employer and that time that is not time permitted by the employer for the purposes of attending a training course carries no entitlement to pay.

(d) That in the present case, were the Tribunal to consider that the time in question was "working time", which the respondents denied, then the time beyond the strict timings of the training course was not time that had been permitted by the respondent for the purpose of attending the training and accordingly would attract no entitlement to pay.

(e) The **Hairsine** case had concerned predecessor legislation. That legislation, however, also referred to being paid "as if [the employee] had worked at that work for the whole of that time" and that it was therefore a case in point.

(f) That the **Hairsine** case also emphasised the element of reasonableness in the legislation. The legislation may not deal with every permutation of facts and circumstances but it is underpinned by reasonableness. Reasonableness is said, by the EAT, to relate to the amount of "time off", or to payment in respect of it, or to both.

43. In **Howlett v Royal Mail Group Limited UKEAT/0368/13/DA EAT** had dismissed the claimant's claim holding at (paragraph 6 of the Judgment):-

> "The crucial point which came out of Regulation 4(2) and Schedule 2 [the predecessor legislation] is that the Regulations focus on the *time off* which has been given by the employer to enable the health and safety representative to perform his functions. What they require is that he is paid for the time off or paid what he would have earned during that time."

44. Under reference to the case of **Hairsine** the respondent's representative submitted:-

(a) that the legislation is not to be approached as loosely by Tribunals as to simply substitute a day's training for a day's pay (whatever the latter might mean).

(b) that any hours outwith the time that the claimant was actually attending the course were not hours for which she was given time off for the purpose of attending training, and thus those hours do not fall within the scope of section 168 (let it be assumed that the time off was during working hours which is denied by the respondents). As such, however;

(c) they were not in any event hours in which the claimant would have been entitled to payment under section 169 of TULR(C)A, that proposition being one which was supported by the wording of the ACAS Code and separately by the wording of the respondent's Policy.

45. The respondent's representative further submitted that relevant to the determination of the issues were the following matters of fact which in his submission were either the subject of agreement or alternatively were in respect of which he invited the Tribunal to make Findings in Fact on the evidence adduced:-

(a) The claimant had been notified in advance of undertaking the training by her Line Manager Helen Caithness that she would only be paid for 7 hours for each training day that being the time which she, the claimant, had confirmed she would actually be engaged in training and in respect of which she made her request.

(b) An additional shift was accordingly arranged for 28th September 2019 to allow her to make up her time (her contracted hours across the 28 day period) which shift she worked.

(c) The claimant's request form was signed and permission granted on that basis (page 68 of the bundle) and the rota adjusted accordingly (page 80).

(d) The respondent's witnesses had confirmed that the respondent's practice, in accordance with its policy, is to pay for the length of the training course in such situations. It was clear that it is the length of the training course and not the otherwise working hours, that determines the time paid for or to be attributed to the training.

(e) The claimant did in fact work shifts to make up the balance of her working time which was not spent in training and there was accordingly no difference in her pay for the months of September, November and December 2019. She had in fact suffered no loss of pay.

(f) The claimant worked hours other than 11.5 hour shifts (she also worked half day shifts all as agreed between the parties and binding upon the Tribunal in terms of the Statement of Agreed Facts. Accordingly there was no proper basis on which to assert or upon which the Tribunal should hold that "a day's pay" for the claimant equated to 11.5 hours.

(g) It had been the conclusion and view of all Managers and HR Officers who considered the matter, within the respondent's organisation, that the approach taken of paying for the time actually spent was reasonable (see outcome letters of internal grievance and appeal at pages 95-98 and 107-113 of the bundle).

46. In the respondent's representative's submission the respondent's policy that employees be paid for time spent in training as if they were at work and working for that time while arrangements also be made to allow them to work any shortfall in what would otherwise be their contracted hours, was both reasonable and applicable across all working scenarios. In contrast, the claimant's proposition namely that she be paid 11.5 hours for any day in which she attended training and did not in addition carry out any work, regardless of whether the training attended lasted for only 7 hours or even 3 hours was not. It could equally be seen to be unreasonable to apply such a policy of being paid for " a day's work" regardless where an employee who attended a 3 or 4 hour training course normally worked a 7 hour day. In the respondent's representative's submission, in order to be reasonable, any policy given effect to by the respondents in permitting time off for training would have to address such anomalies.

47. In the respondent's representative's submission the legislation, guidance and policy all seek to acknowledge that suitably trained Trade Union representatives play an important role in the workplace by providing that attendance at relevant training is paid. That approach ensures that individuals do not lose out financially but, in his submission it cannot have intended that there be given to such individuals a "windfall" of the type envisaged in the claimant's claim. She was seeking an award of £460 being an amount which she related to pay in circumstances where she had already received her full pay through a combination of hours worked and paid time off allowed for training.

48. Mr Watson concluded by inviting the Tribunal to hold that the claimant had not established any statutory claim for payment nor that the payment that had been accorded to her for the time off permitted in respect of Trade Union training, and by implication the time off permitted *per se*, was anything other than reasonable and that which she was properly entitled to. He invited the Tribunal to dismiss the claim.

Submissions for the Claimant

49. For the claimant, Mr McLaughlin outlined the statutory framework within which the complaints were advanced these being section 168, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 confirming, in addition, the claimant's reliance upon the ACAS Code Number 3, revised in 2010 "*Time Off for Trade Union Duties and Activities including Guidance on Time Off for Union Learning Representatives (2010)*" and in particular paragraph 18 and 19 thereof, providing at:-

> "18 An employer who permits Union representatives time off for Trade Union duties must pay them for the time off taken. The employer must pay either the amount that the Union representative would have earned had they worked during the time off taken or, where earnings vary with the work done, an amount calculated by reference to the average hourly earnings for the work they are employed to do."

and at paragraph 19 of the Code provides:

> "There is no statutory requirement to pay for time off where the duty is carried out at a time when the Union representative would not otherwise have been at work unless the Union representative worked flexible hours such as night shift ….. . Staff who work part time will be entitled to be paid if staff who work full time would be entitled to be paid. In all cases the amount of time off must be reasonable."

50. He referred separately to and relied upon the respondent's own contractual policy set out at page 173 of the Bundle which provided variously, at paragraph 7.4 for "reasonable time off" and at paragraph 7.5 for payment in respect of sums which the employee would otherwise have received had they been at work during that time.

51. Turning to the primary issue for determination, Mr McLaughlin focused it by reference to the calculation which, in his assertion, the respondents had themselves effectively done and which identified a period of 45 hours, across the 10 days on which the claimant attended training, in respect of which she had had to work in order to be paid, the same being the balance of time worked by her in the relevant 4 week periods during which she had been paid for a total of 7 hours per training session, i.e. the time which she had identified to the respondents, in the context of her request for time off over which each training session would last (after deduction of a 30 minute break) and separately being the amount of time in respect of which the respondent gave permission.

52. Mr McLaughlin submitted that the respondents should be taken as having identified the 45 hour period by proceeding on the basis of assuming that, but for her undertaking training the claimant would have worked an 11½ hour shift on each of the days during which she spent 7 hours training and, there being a total of 10 such days, by multiplying the difference between 7 hours and 11.5 hours namely 4.5 hours by 10.

53. In Mr McLaughlin's submission, the effect of the respondent not paying the claimant automatically for those 45 hours and without a requirement that she work them, had resulted in the claimant requiring to work on 3 additional days which, in his submission should be regarded as not reasonable.

54. In relation to the evidence of Ms McKnight, Mr McLaughlin submitted that her evidence should be disregarded where it strayed into the category of opinion evidence as to what was or wasn't reasonable. He separately submitted that

when providing an explanation of why she considered it reasonable that the claimant not be paid in respect of the 45 hours in circumstances where she had neither worked them nor spent them in training, Ms McKnight should be regarded as expressing, on behalf of the respondent, an unnecessarily restrictive approach which undervalued Trade Union training and took no account of the amount of concentration, diligence and perseverance which those undertaking it required to apply. That was an approach which, if allowed to stand, would potentially act as a detriment to those considering volunteering to undertake Trade Union duties and be trained in respect of them.

55. In Mr McLaughlin's submissions it would be unreasonable not to pay the claimant and those undertaking training for more than the duration of the course but not only that, the payment made must be reasonable and fair in relation to each set of individual circumstances.

56. In paying the claimant only for the time spent engaged in training and requiring her to work the balance of her hours, the respondents had failed to value Trade Union activities in the manner in which, at paragraphs 4.1 to 4.4 of their Policy produced at page 170 of the Bundle.

57. Mr McLaughlin submitted further that:-

(a) Trade Union activity and training was of significant importance not only in the workplace but in society and that good training and education in respect of good industrial relations should be regarded as sitting in a different category from all other training because of its particular benefits to the employer; and,

(b) that special value had been overlooked by the respondent in restricting payment to the time in respect of which permission

was granted being the time actually spent in carrying out the training.

58. Turning to case law, Mr McLaughlin stated that there was a dearth of case law on the points at issue in the case and that both he and the respondent's representative made reference to the case of Hairsine v Kingston Upon Hull City Council [1992] IRLR 211 [1992] ICR 212, EAT.

59. In relation to Hairsine Mr McLaughlin submitted variously that it should be distinguished on its facts and thus the Tribunal should not regard it, as invited to do by Mr Watson for the respondents, as authority for the proposition that the legislation is not to be approached so loosely as simply substituting a day's training for a day's pay regardless of the number of hours spent training on the one hand or working on the other. He so submitted on the grounds that the case of Hairsine was "not relevant to the issues to be determined in the present case". He separately commended to the Tribunal, notwithstanding, the approach taken by the EAT in Hairsine, relying in particular upon what was said at the foot of page 62 letters (g) and (h); viz

> "… the application of rigid rules has no place in this situation. The length of "time off" is not necessarily the same as the hours spent enabling the employee to attend a course. In considering reasonableness it must also be relevant to take into account not only the physical ability to attend, but also the importance of being able to benefit from the course itself. All these aspects would be relevant for an Industrial Tribunal if the issue was whether the terms of the permission granted were reasonable"
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> And again at page 63 letter (e):-
>
> > "There may be occasions when there is the odd hour overlap one way or the other and an employer quite sensibly and reasonably does not require that hour to be worked. Indeed it may be taken up in travelling time. The ACAS Code of

> Practice envisages many different workplaces and patterns of work and it is impossible to expect that the hours spent on a course will necessarily take time out of the hours during which a shop steward is contracted to attend "at work." (f) the employee might have argued to an Industrial Tribunal that to expect him to work for the whole of the evening shift was unreasonable, but he did not do so. He submitted that the Tribunal should regard the respondent's policy which prescribed that the time off in respect of which permission was granted and in respect of which the employee would be paid, in lieu of working, but at his normal rate would be restricted to the time spent engaged in training was unreasonable and overly restrictive."

60. In relation to the Schedule of Loss and the quantification of the claim, Mr McLaughlin acknowledged that the claimant had not lost any wages, in the sense that having been paid for the hours spent on training and having worked the balance of her contracted hours across each of the 4 week periods, she had in effect received the same pay as she would have received had she been working and not training. When pressed by the respondent's representative to explain, in that context, what the compensation sought was or was for, Mr McLaughlin confirmed that what in essence the claimant was maintaining was that her engaging in training for 7 hours should be regarded as equal in value to her working for 11.5 hours and therefore she should receive remuneration in the same amount as she would have received for working 11.5 hours in compensation for engaging in training for 7 hours.

61. In conclusion Mr McLaughlin again made reference to the absence, before the Tribunal, of the evidence of the internal grievance and internal appeal against grievance outcome, decision makers. He again stating that in his experience and opinion it was unusual that such evidence had not been produced. He did not invite the Tribunal to do anything in particular in that regard nor did he expand upon how if at all he considered that the absence of

such evidence should impact upon the Tribunal's determination of the issues before it.

Respondent's Reply

62. The respondent's representative when exercising a right of reply in this emphasised, and asked the Tribunal to note, that the respondent had at no point in its discussions with the claimant or in the course of evidence, indicated that that was how they had calculated the 45 hours which the claimant had still required to work; and neither had they proceeded on the basis that the claimant always worked an 11.5 hour shift, because she sometimes working half shifts or 5 hour shifts. Rather, submitted Mr Watson, the respondents had approached the matter by starting with the claimant's contracted for hours namely 138 hours across a 4 week period which averaged 34.5 hours per week from which they had deducted 3 x 7 hours, that is 21 hours (the time spent by the claimant in training).

The Law

63. The relevant statutory framework in respect of the granting of permission for time off during working hours for the purposes of undergoing training and aspects of industrial relations, is set out in sections 168, 169, 170 and 173 of the Trade Union and Labour Relations (Consolidation) Act 1992.

64. Of relevance also is the ACAS Code of Practice on "Time Off for Trade Union Duties and Activities" paragraphs 18 and 19. To the above can be complemented useful commentary to be found in Harvey on Industrial Relations [2011] to [2013.02] inclusive and, helpful guidance in the case authority to which the Tribunal was referred by parties' representatives viz

Hairsine v Kingston Upon Hull City Council [1992] ICR 212 and
Howlett v Royal Mail Group Limited UKEAT/0368/13/D/A

65. Although not authoritative, of relevance also because incorporated into the claimant's Contract of Employment and relied upon by the respondents, is the respondent's "Policy on Facilities Arrangements" paragraphs 7.4, 7.5 and 7.6 thereof (produced at page 174 of the bundle).

66. The terms of the statutory provisions, authorities and references were not in dispute between the parties and the relevant sections having been set out variously in the note of parties' submissions and in the Findings in Fact, they are not further rehearsed here.

67. The legislation creates a statutory right to payment in respect of time off granted during working hours to carry out relevant training. It creates no right to payment in respect of training carried out outwith working hours.

Discussion and Disposal

68. The claim presented to the Employment Tribunal by the claimant is one which concerns the amount of pay that was allocated to her in respect of time off sought by her and permitted by the respondent for the undertaking of Trade Union related training. The amount of time so permitted was not a matter in dispute between the parties and was 10 x 7 hours training sessions that is 70 hours. Nor was it in dispute that the claimant was paid at her normal rate of pay by the respondents in respect of those 70 hours, that is at the same rate of pay that she would have received had she worked those 70 hours instead of undertaking training during them.

69. That that is the nature of the claim and complaint presented and given notice of is clear from the terms of the initiating Application ET1 viz:- in the paper apart to the ET1:-

- At paragraph 3 *"in terms of section 169 of the 1992 Act an employer who permits an employee to take time off under section 168 shall pay him for the time taken off pursuant to the permission where the employer's remuneration for the work he*

would ordinarily have been doing during the time does not vary with the amount of work done and he shall be paid as if he worked at that work for the whole time".

- At paragraph 4 of the paper apart under reference to the respondent's Policy – *"At section 4.5 of the respondent's facilities arrangements with the GMB Trade Union it is stated that where time off with pay has been approved payment due will equate to the earnings the employee would otherwise have received had they been at work".*

- At section 7 of the Policy it is stated *"Where time off with pay has been approved for Trade Union/professional organisation duties, activities or training the payment due will equate to the earnings the employee would have received had he been at work".*

- At paragraph 5 of the paper apart *"In terms of paragraph 34 of the ACAS Code of Practice … it is stated that an employer who permits a Union representative for Union learning activities time off to attend relevant training must pay them for the time taken off".*

- At paragraph 11 of the paper apart *"The position of the respondent was that the authorisation of 7 hours per day paid time off to attend the 10 Trade Union training [sic sessions] was reasonable. Where time off with pay has been approved the payment due will equate to the earnings the employee would have received had they been at work".*

- At paragraph 14 of the paper apart *"In terms of section 170 of the 1992 Act that the respondent failed to comply with the requirements of section 170 of the 1992 Act [in] that as the claimant had been permitted time off in section 168 of the 1992 Act for the purposes of carrying out Trade Union activities that*

consequently in terms of section 169 the claimant had to be paid in accordance with the provisions of that section and that the respondent has failed to comply with their statutory obligations …." and,

- at paragraph 15 of the paper apart *"in terms of section 172 of the 1992 Act the claimant seeks a declaration that her complaint is well founded and that the Tribunal make a declaration to that effect and make an award of compensation to be paid to the claimant with particular reference to the failure to pay the employee in accordance with section 169 [emphasis added].*

70. The explanatory note attached to the claimant's Schedule of Loss, separately, makes clear that the compensatory award of £460 sought is arrived at by multiplying 4.5 hours x 10 the same being the difference between the 7 hours spent by the claimant engaged in training and paid for by the respondent on the one hand and what the claimant asserts would have been 11.5 hours worked by her had she been at work on each of the days in which she was engaged in training.

71. The claim given notice of is not one which in its terms, relates to the amount of paid "time off" in respect of which permission was granted, the same being the amount of time actually spent by the claimant engaged in training. That was the time in respect of which the claimant requested time off and was the time in respect of which the respondent granted permission.

72. Neither is the claim advanced in respect of wages lost, it being a matter accepted by the claimant that her working time was rostered, notwithstanding her undertaking of the training, such that across the relevant 28 day periods she received full pay for her contracted 138 hours that comprising the permitted paid number of hours spent on training plus the balance worked in the normal way.

73. Rather, the claim is advanced on the proposition that the claimant should be paid for 45 hours across the 10 days upon which she was engaged in 7 hour training sessions being hours upon which she was neither engaged in training nor was she working. That proposition is in turn predicated upon a contention that there should be an equiperation of 7 hours spent in training with 11.5 hours spent working in the discharge of nursing duties. That is to say, in the contention of the claimant's representative, the respondent, and the Tribunal should attribute to 7 hours spent by the claimant in industrial relations training, the same value as they and it should attribute to the claimant spending 11.5 hours working in the discharge of her nursing duties; the same because of what is proponed to be the relatively greater value that good industrial relations has, both in the hands of the respondent and of society, over that of the discharge of nursing duties in the hands of the respondents, and by implication, in society.

74. While the court in **Hairsine** did identify the relevance of taking into account not only the physical ability to attend a course but also the importance of being able to benefit from the course itself it fell far short of supporting any such proposition going to relative value. It stated, also at page 62 letter (h) *"The application of rigid rules has no place in this situation. The length of "time off" is not necessarily the same as the hours spent enabling the employee to attend a course".* Thus, for example, in relation to the amount of time in respect of which a request is made an employee might relevantly and reasonably ask that there be allowed not only the time to be actually spent in training but also journey time to and from the course, where that was significantly greater than their normal journey time to and from work. No such complaint, however, forms part of the case given notice of and before the Tribunal.

75. The claimant submitted a request for unspecified amounts of time to attend the training. The respondent asked that she provide specification of the length of the training courses. The claimant provided information which disclosed that the time that she would spend in training would be 7 hours per session. The respondents granted permission for 7 hours paid leave to be

spent in training per session while also advising that arrangements would be made to allow the claimant to work the balance of her rostered contractual time with a view to ensuring that she suffered no loss of pay. The claimant took no issue with that permission at the time of its being granted and, she undertook both the 7 hours training sessions and worked the balance of her contracted time in a shift arranged for that purpose. She subsequently raised an issue of being paid for more than the time in respect of which permission had been granted for the "time off".

76. In relation to whether the time off was granted "during working time" the Tribunal preferred the submissions of the respondent to those of the claimant's representative in relation to both the evidence on that matter and the construction of the relevant statutory provision. The Tribunal has found in fact that the time off in respect of which permission was granted was not time off during working hours, it being time which occurred when the claimant was not rostered to work or to be working. The Tribunal accordingly accepted the respondent's representative's submission that the time in question fell outwith the scope of section 168 and that no statutory claim for payment arose but rather, that the matter fell to be considered in terms of the respondent's applicable contractual policy in the context of the ACAS Code of Practice.

77. The Tribunal unanimously considered, and has found in fact, that the entitlement arising under the Policy was to be paid for the time actually spent undertaking training and in respect of which permission had been granted, at the same rate at which the claimant would have been paid for those hours had she spent the time in the discharge of her nursing duties as opposed to training.

78. The respondent's policy is said to be drawn in acknowledgement of the guidance contained in the ACAS Code of Practice which, echoing the statutory wording requires, at paragraph 19, that "In all cases the amount of time off must be reasonable".

79. The respondent's policy of paying employees for the actual time spent by them undergoing training (including training in industrial relations) is one which is capable of being applied across, all working scenarios. While this is not a case in which there has occurred any reversal of the burden of proof the Tribunal unanimously considered that such a policy, could not be said, to be in its terms, unreasonable and, that there had not been placed before it evidence upon which a Finding in Fact that the paid time off allocated to the claimant in application of the policy was not reasonable could properly be made. While, as observed by the court in **Hairsine**, any individual case may attract circumstances which might justify the allocation of some additional paid time, for example for travelling, no such request was put by the claimant to the respondent and nor was any such given notice of in the written pleadings, nor was such a point argued before the Tribunal.

80. The Tribunal separately considered that no evidence had been placed before it which could sustain a Finding in Fact that there existed, in the case of the claimant, an equiporation or equivalence of the value of 7 hours spent in industrial relations training with 11.5 hours spent in the discharge of her nursing duties, the same being the basis upon which the claim for compensation of £460 is advanced.

81. The Tribunal unanimously disposes of the issues as follows:-

Issue (First) Was the time off requested, for the training, during the claimant's working hours?

The Tribunal holds that the time off requested, for the training, was not during the claimant's working hours.

(Second) What permission was granted by the respondent?

The Tribunal holds that the respondent granted permission for 7 hours paid time per training session during which the claimant

would be undertaking training which was outwith her working hours, x 10 training sessions

(Third) Has the respondent been reasonable in terms of the permission which has been granted in terms of section 168 of the TULR(C)A 1992?

The Tribunal has held that the permission granted relating to time outwith the claimant's working hours was not granted in terms of section 168 of TULR(C)A but further and separately holds that had the request been in respect of training to be conducted during working hours that the respondents, in granting permission in respect of the time to be spent undertaking the training, would have granted what was, in the circumstances reasonable time off in terms of section 168 of TULR(C)A.

(Fourth) Has the respondent failed to pay part of the amount required to be paid under section 168/169 of TULR(C)A (having only paid for 7 hours instead of 11.5 hours)?

The Tribunal held that the respondent had not so failed to pay, either in terms of the statutory provisions, or in terms of its policy, it having paid the claimant 7 hours per training session and, across each of the relevant 4 week periods during which training occurred, having rostered the claimant having allowed the claimant to roster herself to work and having paid the claimant for working, the balance of her contracted for hours not spent in training.

82. On the documentary and oral evidence presented and upon the submissions made, the Tribunal unanimously held that there had not been established before it grounds justifying either the declaration or the financial remedy sought by the claimant and the claim is dismissed.

Employment Judge: Joseph d'Inverno
Date of Judgment: 16 November 2020
Entered in register: 23 November 2020
and copied to parties

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