# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Munira Mohammed

**Respondent:** The Government Body of Pudsey Grangefield School

**Heard by** Remote video link (CVP) **On:** 21 May 2021 and 13 September 2021

**Before:** Employment Judge D N Jones

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Miss H Perry

# JUDGMENT

1. The respondent shall pay to the claimant the sum of £2,774.66 for untaken leave to which she was entitled at the termination of her employment.

2. The respondent shall pay to the claimant the further sum of £552.72, being two weeks' pay, for failing to provide the claimant with written particulars of employment before she issued the proceedings.

3. There shall be no decrease of the award as a consequence of the failure of the claimant to comply with the ACAS Code of Practice on Discipline and Grievance Procedure.

# REASONS

1. In this case the claims which remain to be decided are for holiday pay and for an award under Section 38 of the Employment Act 2002 for a failure to provide a statement of particulars. It is agreed in this case that the claimant was employed by the respondent as a Teacher on a fractional basis of 0.4 from 2009 until her employment ended on 31 December 2019.

2. Between September 2016 and the end of her employment the claimant was absent on sick leave. This case concerns the claimant's entitlement to holiday pay during that period. She received no holiday pay for any of it.

3. The case concerns the application of Regulations 13 and 13A and Regulation 14 of the Working Time Regulations 1998. By Regulation 13 a worker is entitled to four weeks paid annual leave and by Regulation 13A a further 1.6 weeks of paid leave. Regulation 14 provides for payment to which a worker is entitled for leave which is untaken at the date of termination of their employment part way through a year leave.

4. In this case the issues were what was the holiday year of the claimant for the purpose of calculating her entitlement under Regulation 13 and 13A and what was the appropriate weekly rate of pay.

<u>The holiday year</u>

5. The respondent draws my attention to a document provided by the respondent headed "leave of absence and annual leave". It is from the school handbook. It states the annual leave year ran from 1 April to 31 March. That document does not appear to have been one to which the claimant has ever expressed her agreement. On 29 June 2009 Mr Cornforth, the Principal of the Pudsey Grangefield School, wrote to the claimant to confirm his verbal offer to the post of part time teacher in Mathematics commencing on 3 September 2009. I am satisfied the claimant received that letter and Mr Cornforth asked for her P45 so that her details could be sent to the payroll department. I have no doubt the claimant did send it back because it contained her details and enabled the respondent to process her pay.

6. In addition, a letter was written on 30 July 2009 which confirmed the appointment and also enclosed the main terms and conditions of employment. It included a requirement for the claimant to return a signed copy of the statement of main terms and conditions but the document in the bundle includes an unsigned copy of the main terms and conditions. I will address in due course what happened to this letter but I am satisfied that it did encapsulate the main terms and conditions and indeed it is relied upon by the claimant in respect of the rate of pay which she says applied for the purpose of the Working Time Regulations. That document does not refer to any annual leave year and nor I am told does the Burgundy Book which is the collective agreement which was incorporated into this contract of employment and is referred to in those terms and conditions. It makes no reference to the school handbook which I have referred to and which the respondents rely upon.

7. In respect of when the holiday year commenced, Regulation 13(3) of the Working Time Regulations provides *a worker's leave year, for the purpose of this regulation, begins (a) on such date during the calendar year as may be provided for in a relevant agreement; or … (b)(ii) if the worker's employment began after 1 October 1998 on the date on which that employment begins and each subsequent anniversary of that date*. A relevant agreement is defined in Regulation 2: *a workforce agreement which applies to the worker, any provision of a collective agreement which forms part of the contract between*

*him and his employer or any other agreement in writing which is legally enforceable as between the worker and employer*.

8. I am not satisfied that the document published by the school, the school handbook, which refers to the annual leave year, was a relevant agreement within that definition. Although the Burgundy Book refers to sick pay entitlement and the year's commencement and end in respect of that, it does not include reference to a holiday year. In the circumstances Regulation 13(3)(a) does not apply. The appropriate holiday year is defined by the anniversary of the claimant's commencement which will be the beginning of September of each year, pursuant to Regulation 13(3)(b)(ii).

The claimant's rate of pay

9. The statement of terms and conditions refers to a salary of £30,842 per annum. For staff working less than full time hours the salary is calculated on a pro-rata basis and, as the claimant was on 0.4 fractional terms, her salary was stated to be £12,360.80.

10. The payment is expressed to be by twelve instalments over each calendar month.

11. Under the heading *Hours of work and leave*, the claimant's normal hours of work are said to be as set out in the schoolteacher's pay and conditions document. Annual leave is stated to be determined in accordance with the provisions of the School Teachers Pay and Conditions Document and subject to statutory national minimum requirements. "*The weekly hours will be 13. The proportion of a full time post that you hold is 40%. (Based on the full time equivalent of 32.5 hours over 39 weeks)*".

12. The claimant argues that this means that her salary for the purpose of the Working Time Regulations should be calculated by reference to a divisor of 39 weeks, so that her annual salary should be divided by 39 to give the appropriate weekly rate of pay. She refers me to the cases of **Gilbert and others v Barnsley MDC EAT/674/00** and **Agard v Westminster Kingsway College UKEATPA/0767/SM** which concerned the calculation of weekly pay for redundancy. At one point it appeared that the case of **The Harper Trust v Brazel and Unison [2019] EWCA Civ 1402** might have been relevant, but neither party thought it applied to this case at the resumed hearing and I am satisfied it does not. That is because that concerned a worker who was on a zero hours contract. Selecting the appropriate method, by time frame or averaging or both, fairly to reflect her entitlement under the Regulations was difficult; yet to be finally determined pending a hearing in the Supreme Court. That problem does not apply in the case of an employee on a permanent part-time contract such as the claimant.

13. I am not satisfied that the case of **Gilbert** and **Agard** assist the claimant. By the way their contracts were construed, they were engaged to work during and remunerated only for term time and not the periods between terms. In those circumstances it is appropriate to calculate their weekly rate of pay by reference to the times they are working because their pay is referable to that period.

14. The claimant is not in that situation. She is engaged on a standard teacher's terms and conditions for the whole year and is paid over the 12 months, each month equally. It is true that the contract includes a paragraph about hours of work and leave which states that her pro rata working week will be 13 hours, with a comment in parenthesis that the full-time equivalent was 32.5 hours over 39 weeks. It follows, by default, that the claimant's leave shall be taken in the the balance of 13 weeks when she is not requires to discharge teaching duties for the employer.

15. That led the claimant to argue that her claim for unpaid holidays should be for 13 weeks per year, not 5.6 or 4. Whether or not the claimant was contractually entitled to 13 weeks of leave, which is not conceded as there is nothing in the teacher's standard terms and conditions about leave entitlement, this is not a claim brought at common law for breach of contract. That is because there is no entitlement under the contract to be paid for leave not taken in a year and no right to carry over untaken leave. If a teacher is off sick the contractual right is to sick pay not holiday pay. That is no doubt why the claim is brought under the Working Time Regulations, with the additional statutory entitlements for holiday pay regardless of absence on sick leave, carry over of holiday pay and payment for untaken leave part way through a year when the employment ends, as interpreted by the European Court of Justice.

16. I am not satisfied that the claimant is correct in saying that the appropriate devisor of her annual salary should be 39 weeks. In her case, the salary was an annual salary to be paid in twelve monthly instalments. Although there was reference to 13 weekly hours work over the 39 weeks of term later in the contract, her pay was not paid by reference to when she did that work. This is a contract which falls within Section 221(2) of the Employment Rights Act 1996 (ERA) for the purpose of calculating a week's pay: *"if the employee's remuneration for employment in normal working hours (whether by hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week"*. The claimant was a part time worker whose pay did not vary depending on the number of hours worked. She was paid whether or not it was term time under that section of her contract entitled "Pay". That is to be contrasted with a term time worker who is only paid during the term. Their pay does vary by reference to when the work is done under their contract. That was what the EAT construed the contract to mean in ***Gilbert*** "*as the reality*", para 39. That is not how I construe this contract, because the contractual section about pay is very clear and does not purport to relate to the later section. As Ms Perry points out, if the claimant's submission were correct it would have the peculiar, and unfair, consequence that a teacher who left part way through the year would be paid at a higher rate for not taking the holiday than a teacher who remained and did take the holiday. That cannot have been the intention underlying regulation 14. I therefore come to the conclusion that the appropriate divisor of the annual salary is 52 as argued by the respondent.

17. It is agreed that the rates of pay respectively were £15,061.56 for the year 2019 to 2020, £14,658.36 for the year 2018 to 2019 and £14,370.84 for the year 2017 to 2018. The appropriate rate of weekly pay was £289.65, £281.89 and £276.36. It is agreed that the claimant is entitled to the appropriate proportion of 5.6 weeks for the last year which is 1.87 weeks, the claimant having been in employment for a third of the year. That gives rise to £541.65.

18. For the earlier years, the right to carry over is of four weeks for each year for up to eighteen months before the commencement of the final year on 1 September 2019, see **Plumb v Duncan Print Group Limited [2016] ICR 125** and **Sood Enterprises Ltd v Healy [2013] ICR 1361**. The additional 1.6 weeks of leave under Regulation 13A cannot be carried forward. Four weeks' pay for the year 2018 to 2019 is £1,127.56 and the same for 2017 to 2018 is £1,105.45.

Written particulars of employment

19. The respondent states that it is likely that the letter which included the terms and conditions and has the claimant's name and address on it was sent and I should infer she received it. That is the letter of 30 July 2009. Ms Perry says the claimant has never raised the point that she had never received her written terms and conditions before, either in the grievance hearings or indeed in her claim form. (That is not a bar to the claimant bringing a claim under the provisions of Section 38 of the Employment Act 2002 which mandate the Tribunal to consider making an award if there was a breach, regardless of whether or not the matter is raised, albeit the respondent must be allowed an opportunity to address the Tribunal on the point).

20. Ms Perry says that the school is very concerned about deleting data so as to be compliant with the GDPR and so no inference should be drawn that there is no copy of the claimant's signed terms and conditions.

21. The claimant says to me that the respondent would have been likely to have chased her for a reply if it had ever sent the letter. She suggested that it has been concocted solely for the purpose of these proceedings.

22. I do not find it has been prepared for the purposes of these proceedings. It contains information which the claimant herself relies upon and I am satisfied was likely to have been written at the time. I am satisfied that it would be sufficient to give it to the claimant, for the purpose of section 1 of the ERA, if it was posted to her address. I think it is probable an administrative oversight occurred whereby the letter was not sent. If it had the claimant would have been likely to have signed it and returned it. Notwithstanding what is said about the GDPR, I think good administrative and human resources practices would have meant the respondent would have retained a signed copy, had the claimant signed and returned it. Of course, the claimant could have forgotten to send a reply, but on balance I accept her evidence that she never saw this document until after the proceedings were issued when she was corresponding with Ms Perry. I note that the document which is unsigned includes the date the claimant's employment started and I think it unlikely, in those circumstances, that a signed copy of that document has been weeded for the purpose of data protection compliance.

23. So on balance I am satisfied the claimant was not provided with terms and conditions in accordance with Section 1 of the ERA. I must increase the award by two weeks unless it is just and equitable in all the circumstances to increase the award by four weeks, under section 38(3) of the Employment Act 2002. By section 37(5) I need not make any award if there are exceptional circumstances which would make an award unjust or inequitable, but Ms Perry, realistically, did not suggest this was the case.

24. I do not consider it just and equitable to award the higher amount so I shall award two weeks' pay for the breach. This was an oversight, an administrative error and had it been a major concern, the claimant would have raised it during her employment or during the grievance procedures. She did not. I am not satisfied that this document has been fabricated for the purposes of these proceedings.

25. The claimant invited me to increase the award by up to 25% as a consequence of the respondent's unreasonable failure to comply with the ACAS Code of Practice for Discipline and Grievance Procedures. Ms Perry pointed out that the claimant had not raised the subject of this claim in the grievances she had raised and so section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 could not apply to them. I agree. However, the fact the claimant did not raise this as a grievance meant that the respondent could argue I should reduce the award by up to 25%. The point rather backfired on the claimant.

26. However, although the claimant did not raise a grievance in respect of holiday pay and it was unreasonable of her not to do so, I do not reduce the award. She has awaited the holiday payment for a very considerable time after it was due. I have not awarded interest and consider it would be unduly punitive for her to be subject to a reduction of the award of up to 25%, in the light of that.

Employment Judge D N Jones

4 October 2021