EMPLOYMENT TRIBUNALS

Claimant: Mr T. Turner

Respondent: East Barnet School

Heard at: Watford (hybrid hearing) **On:** 28, 29 and 30 September 2021

Before: Employment Judge McNeill QC (at the Tribunal)
Mr A. Kapur (by CVP)
Mr S. Bury (by CVP)

Appearances

For the Claimant: In person (at the Tribunal)
For the Respondent: Mr K. Wilson, Counsel (at the Tribunal)

JUDGMENT

1. The Respondent must pay to the Claimant the sum of £1,689.44. This sum includes the sum claimed by the Claimant in his Schedule of Loss for unauthorised deductions/holiday pay for the period to 1 September 2019 (£1,240.59) and a sum in respect of pension contributions for the same period (£295.26), a total of £1,535.85. The Respondent conceded that these amounts were due to the Claimant. The sum further includes an uplift of 10% (£153.59) pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

2. The Claimant's further claim for unauthorised deductions/holiday pay in the sum of £86.90 is not well-founded and is dismissed.

3. The Claimant's claim for indirect discrimination relating to his religion is dismissed.

REASONS

(1) The Claimant, who works as a part-time "term time" member of staff at the Respondent school, brought claims against the Respondent for unauthorised deductions/holiday pay and indirect religious discrimination. He claimed that any compensation awarded to him should be uplifted in accordance with section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992

(TULR(C)A) by reason of the Respondent's failures in dealing with a grievance that he brought.

(2) A substantial part of the Claimant's claim related to unauthorised deductions/arrears of holiday pay dating from 1 September 2014 (the commencement of the Claimant's employment) to 31 August 2019. Very shortly before the hearing, on 24 September 2021, the Respondent conceded that claim which was in the sum of £1,240.59. During the course of the hearing, the Respondent further conceded that pension contributions on this sum were payable in the sum of £295.26. The total sum that the Respondent therefore accepted was due to the Claimant was £1,535.85.

(3) The Claimant had given considerable time and care to examining and analysing that element of his claim and the terms as to payment that applied to him and others and he wished to argue the matter before the Tribunal as "a point of principle". It was explained to the Claimant that, as the claim had been conceded, there was no outstanding dispute for the Tribunal to consider and that the Tribunal could not hear argument on a point that was one of principle only.

Issues

(4) In view of the Respondent's concession, the outstanding issues for the Tribunal to determine were:

(i) whether the Claimant was owed a sum of £86.90 (plus a small sum for pension contributions) in respect of unauthorised deductions/holiday pay from 1 September 2019 to 31 August 2020;
(ii) whether the Respondent indirectly discriminated against the Claimant in relation to his religion; and
(iii) whether any compensation awarded should be uplifted in accordance with section 207A of TULR(C)A by reason of any failure by the Respondent to comply with the Acas Code of Practice: Disciplinary and grievance procedures.

(5) The first issue turned on the question of whether the Claimant's contract of employment from 1 September 2019 incorporated terms as to the calculation of the Claimant's pay collectively agreed with the recognised trade union, Unison in November 2019. Those terms contained a formula for calculating the Claimant's *pro rata* salary that included an enhancement for holiday pay. The formula differed from that in the Claimant's original contract of employment ("the Barnet Formula"), which applied from the commencement of his employment on 1 September 2014 and did not meet the minimum statutory entitlement. The new formula was by reference to a 52.1429 week year, calculated on the basis of 365/7 days (the Claimant contended that 52.18 would have been a more accurate denominator to include leap years but this had no material impact on his claims).

(6) The annual leave entitlement for full-time workers under the new arrangement was 29 days plus 8 bank holidays. Annual leave for part-time staff (including

Term Time staff) was pro-rated. Term-time staff were required to take leave during the school holidays. Other full-time and part-time staff were normally required to take time off during school closure periods and had to take three or four days annual leave during the Christmas period. Staff were paid an annual leave enhancement in their salary. In the Claimant's case, this was based on 195 working days together with 32.2530 days' holiday, the latter figure being based on the days' annual leave which accrued each working day for a full-time employee, pro-rated to reflect that the Claimant was working term time only.

(7) If the terms collectively agreed with Unison in 2019 were incorporated in the Claimant's contract, the Claimant alleged that he was slightly less well paid than he would otherwise have been as from 1 September 2019, although elsewhere in his evidence he referred to a *"slight increase in salary"* which brought his holiday pay to the level of the statutory minimum. The issue for the Tribunal was not whether he was paid less or more following 1 September 2019 but whether he was paid the amount to which he was contractually entitled. The Claimant did not advance or develop any argument before the Tribunal that the new terms involved any breach of the Working Time Regulations 1998 (WTR), indeed he made it clear in his witness statement that from 1 September 2019 the Respondent was meeting its obligations under the WTR. He referred in his witness statement to a possible breach of the Part-time Workers Regulations 2000 (PTWR) but this argument was not developed in relation to the period from 1 September 2019 and it was difficult to see how there could be such a breach when the same formula for calculating holiday pay was applied to all workers, whether part-time or full-time. In a document annexed to his Agenda for the Case Management hearing, the Claimant made it clear that his claim relating to the period from 1 September 2019 (described as his "4th claim") was a claim for breach of his contract of employment.

(8) The Claimant alleged that he did not agree to the terms collectively agreed with Unison; in the alternative, the new contract did not apply until 11 March 2020. He said that he did not make any claim beyond 1 September 2020 because he now worked only 7.5 hours a week and any shortfall was trivial.

(9) If either of the Claimant's allegations succeeded, further explanation would be required as to how he arrived at his calculations. Given that the contractual question was key, the Tribunal considered that question first.

(10) In relation to the second issue, the key issues were whether the application of the Respondent's policy and practice ("provision criterion or practice" (PCP)) in relation to the granting of paid holidays for official religious holidays and festivals led to group disadvantage to Christians and personal disadvantage for the Claimant. If so, was the PCP justified in the sense that it was a proportionate means of achieving a legitimate aim? If the Claimant were successful in this claim, he made it clear that he did not seek to recover any compensation for discrimination..

(11) The third issue related to the Acas Code and whether there should be an uplift on any compensation awarded to the Claimant because of failures by the Respondent in the operation of its grievance procedure.

Evidence

(12) The Tribunal heard evidence from the Claimant and from Ms Leann Swain, Headteacher and Ms Helen Chamberlain, Business Leader, at the Respondent school. We were taken to a number of documents in a 608 page bundle and read the documents to which we were referred by the parties.

Findings of Fact

(13) There was little if any dispute of fact between the parties and the matters set out under this heading were largely uncontentious.

(14) The Claimant has been employed at the Respondent school as a Science Technician (support staff) since 1 September 2014. The school became an Academy in 2011.

(15) The Claimant is a practising Christian. On appointment, his terms and conditions of employment were contained in a document issued on 17 July 2014 (the "original contract").

(16) By clause 7 of the contract, and under a heading "Conditions of Service", it was stated as follows:

> *"During your employment with East Barnet School your terms and conditions of employment will be accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government Services (set out in the Scheme of Conditions of Service commonly known as the "Green Book" and the agreements of the Greater London Provincial Council (GLPC) as amended from time to time by East Barnet School and supplement by local and collective agreements reached with Trade Unions recognised by East Barnet School and by the rules of the School".*

(17) Paragraph 8 of the contract set out the provisions on rates of pay *"negotiated annually by the relevant bargaining bodies".* Paragraph 11 set out the provisions in relation to holiday, applying to term time only staff, including an enhanced rate of pay reflecting payment for basic annual leave and bank holidays. There was an additional five days' annual leave after five years' continuous service, which involved working five fewer days a year.

(18) Conditions would be negotiated and agreed with Unison, as the recognised trade union at the school.

(19) The Respondent had two Leave of Absence policies which applied over the relevant period. The first policy, which applied from the commencement of the Claimant's employment, was updated by a second policy, adopted by the Governing Body of the School on 5 June 2017.

(20) At all times, the policy was a discretionary policy. Staff could ask for special leave for a variety of reasons and, when such leave was granted, it was generally paid leave. Under both policies, it was stated that requests should be dealt with *"fairly and sensitively".* The second policy made reference to the Respondent's commitment to *"promoting staff health, well-being and attendance".*

(21) There were identical provisions on religious holidays in the two policies which read as follows:

> *"Leave of absence will be granted for official religious holidays and festivals relating to the staff member's religious belief and observances. On appointment, members of staff should notify the school of the desire to take leave for religious observance and should do so annually at the start of each academic year. Staff will be notified about the decision of each request. The staff member would be expected to attend work before and/or after the observance has been fulfilled, if the religious observance is not for a whole day".*

(22) Under the policy any member of staff could make any number of requests for special leave and there was no cap on what could be granted. Although the words *"will be granted"* were used in the policy, these words were used for all forms of leave and it was clear that any requests were subject to a decision from the Respondent. The grant of leave under the policy was clearly discretionary.

(23) From September 2018, when Ms Swain became Headteacher, her practice was to consider every request on an individual basis, taking into account business need and budget, the particulars needs of the individual and fairness as between different members of staff. She created an online calendar, tracking the number of people off at any one time and the reasons for absence. She would look at this when making her decisions.

(24) Ms Swain received quite a few requests for absence for religious holidays. The religious breakdown in the school is predominantly Christian. There are about 200 members of staff, including about five Hindu members of staff, six Jewish members of staff and six to eight Muslim members of staff.

(25) Ms Swain did not receive any requests for religious holidays from Christian members of staff, including the Claimant. All requests for religious holidays were from members of minority religions. The requests were almost always granted unless this would create some inequity between employees in similar circumstances. For example, on one occasion two employees requested holiday for the same religious festival: one requested one day's holiday and one requested two days' holiday. Ms Swain grated one day's paid holiday to both on the basis that this was fair and equitable as between the two.

(26) The number of religious absences between 2014 and 2019 were between 26 and 41 days a year (we did not include 2019/20 because of the distortion to the statistics created by the impact of Covid). Out of the 200 staff

employed at the school, between 16 and 18 requested absence for religious holidays each year. The number of days granted averaged out at just over two days' per individual per year. The granting of leave made little if any impact on the school's budget. The school sought to cover absences internally as far as possible. Following her appointment, Ms Swain had led the school out of a position of budget deficit. She was very much alive to the impact of her decisions on the business needs of the Respondent school.

(27) Ms Swain sought to grant all types of special leave on a paid basis where she felt she could. She wanted to support staff with their work/life balance and to enable them to enjoy important events, celebrations and holidays without forfeiting their pay. She was proud of the fact that the Respondent has recently won an award related to the way in which it takes into account the mental health and wellbeing of staff and students.

(28) From the start of his employment, the Claimant questioned the calculation of his *pro rata* salary. There were several discussions over the years of his employment between the Claimant and the Respondent about this calculation and, in particular, the formula for calculating pay for term time only workers and how an enhancement for holiday pay was calculated. In March 2018, after giving careful consideration to the wider issue of pay, he compiled and presented a substantial report on these issues to the then Head of the School and Bursar.

(29) The Claimant followed up on issues relating to the report in May 2018 and during that late spring and summer contacted various outside bodies and internal staff with his concerns. He put in a grievance relating to the formula applied for the calculation of his holiday pay, which he contended led to payment below the minimum legal requirement, on 20 July 2018, the last day of the summer term. His grievance was raised to Mr Ireton, Chair of Governors, and notified to Ms Swain. It was agreed between Mr Ireton and Ms Swain that the Respondent would contact the Claimant in September, after the end of the school holidays.

(30) Ms Swain met with the Claimant in about late September 2018 and again, together with the Respondent's HR advisers, Strictly Education, in early October 2018. Strictly Education required more time to consider the holiday pay question.

(31) Ms Swain was keen to resolve matters but was receiving conflicting information from the Claimant, the Bursar and HR Advisers, Strictly Education.

(32) On 21 November 2018, the Claimant wrote to Mr Ireton and Ms Swain clarifying his grievance. For the first time he raised the issue of religious discrimination and the application of the Leave of Absence policy.

(33) Ms Swain arranged for her Associate Deputy Headteacher to investigate the grievance but he was unable to identify whether there were any errors in the formula. The Claimant was informed of this in February 2019. Ms Swain then engaged the assistance of the Chair of the Finance Committee, Ms Brazier. Ms

Brazier met with the Claimant on 28 February and on 7 March 2019. Ms Swain then met with the Claimant again on 14 March and 22 March 2019.

(34) The issues were seen as complex and the Claimant was putting forward tables of calculations and appendices which the Respondent and their advisers found difficult to understand. The Respondent discussed the matter with other local authorities to find out how they calculated holiday pay for term-time staff. In short, the progress of the grievance was slow.

(35) The meeting on 22 March 2019 was a formal grievance meeting. It was attended by Ms Swain, Ms Brazier, a representative of Strictly Education and the Claimant. On 4 April 2019, Ms Swain wrote to the Claimant, in large part upholding the grievance, but declining to agree that any underpayments should be backdated as the Claimant had requested. Ms Swain recognised flaws in the approach to annual leave and holiday pay. In relation to the complaint about religious holidays, Ms Swain upheld the Claimant's grievance and said that she was in the process of addressing the matter by amendment to the policy.

(36) In relation to the religious holiday issue, Ms Swain was acting on advice from Strictly Education. She believed that there was substance to the Claimant's complaint and that the policy should be amended.

(37) After reaching her decision on the discrimination grievance, Ms Swain spoke to other schools, a network of Headteachers and to Hannah Wilson at Diverse Educators. She then changed her mind about the application of the policy on religious holidays. Having spoken to others, she reached the view that it was correct to pay for religious holidays.

(38) Ms Swain was aware of the guidance from Acas advising against offering paid special leave for time off for religious holidays because of not discriminating in favour of a particular religion. She was also aware of the EHRC Employment Code. She took the view that she should look at matters in the context of a school, where the school calendar is structured at least in part around the Christian calendar so that staff have no choice but to take holiday as designated on the main Christian holidays. The Acas guidance applied generally and not to the specific circumstances relating to schools. She reached the conclusion that religious holidays should continue to be paid holidays, always exercising her discretion in a fair and consistent manner.

(39) The Respondent was not satisfied with the advice and service from Strictly Education and elected to replace them with other consultants.

(40) The Claimant did not receive a grievance investigation report which he should have received in accordance with the Respondent's grievance policy.

(41) The Claimant was not happy with the outcome of his grievance, in particular the decision not to backdate the term-time pay claim, and appealed to Mr Ireton on 29 April 2019. The appeal was acknowledged and next steps explained to the Claimant. Although further discussion took place between the

Claimant and the Respondent, the appeal was never formally considered or any outcome arrived at.

(42) During 2019, there was consultation with Unison in relation to support staff terms and conditions, including the calculation of holiday pay for part-time (including term-time) workers.

(43) Following consultation, agreement was reached between the Respondent and Unison as to the formula to be applied to holiday pay and this was notified to the Claimant on 26 November 2019. The Claimant was sent further proposed terms and conditions on this date; the salary calculation was explained; and he was told that the new formula, *"as agreed"*, would be *"backdated to 1 September 2019, ahead of the finalisation of the Ts and Cs"*.

(44) Shortly before this, on 18 November 2019, the Claimant had been informed that his original contract would apply until the new terms and conditions had been confirmed.

(45) In December 2019, Ms Swain and Ms Chamberlain met with all staff and explained the offer. All affected staff accepted the offer made save for the Claimant. The Respondent has since tried to resolve the issue with the Claimant but no agreement has been reached.

(46) The Claimant was sent a copy of a new contract, incorporating the new formula agreed with Unison, on 28 February 2020. The contract, which applied to permanent, fixed-term, temporary full-time, part-time and term-time staff, referred to revised provisions on annual leave, including an entitlement of 29 days' annual leave plus eight Bank Holidays. Annual leave for term-time staff was calculated according to a formula which took into account the member of staff's *"normal working pattern".*

(47) On 11 March 2020, the Claimant notified the Respondent that he did not accept the new contract. He gave four reasons which included (i) that he did not accept that the contract could be retrospective and (ii) that signing might affect his claim to the Employment Tribunal. He did not challenge the formula in the new contract or suggest that it was unlawful.

(48) Although, because of the pandemic and the periods of lockdown, the Claimant did not work at the school between 20 March 2020 and 2 September 2020 when the school reopened, the Claimant continued in employment and was paid enhanced pay in accordance with the new contract. His revised holiday pay was backdated to 1 September 2019 and included in his salary for November 2019. He continues to be paid in accordance with the formula in the new contract, albeit he is now working much reduced hours.

(49) When the Claimant refused to accept the new terms and conditions, Ms Swain, on advice, did consider whether she should terminate his employment and then offer him re-employment ("fire and re-hire") but she felt that this would be unfair. The Respondent rather relied on the new contract constituting an

agreement that was binding on the Claimant by reason of the terms of his original contract.

Relevant Legal Principles

(50) The relevant legal principles are well-established.

Unauthorised deductions

(51) In accordance with section13 of the Employment Rights Act 1996 (ERA), the Claimant was entitled not to suffer any deduction from the wages *"properly payable"* to him. Generally, and unless the contractual rate of pay is in contravention of any statutory or regulatory obligation, what is payable is determined by the contract of employment.

(52) Pay may be determined by collective agreement. Section 178(1) of TULR(C)A provides that:

> *"In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and "collective bargaining" means negotiations relating to or connected with one or more of those matters."*

The specified matters include terms and conditions of employment and the definition applied to *"arrangements"* as well as formal written agreements. The key question is whether or not, following negotiation, there was an agreement between the trade union and the employer.

(53) Terms of a collective agreement in relation to pay are frequently incorporated into individual contracts of employment. Where contractual terms provide for incorporation of existing and future collective agreements, the terms of a new collective agreement that replaces an older one will automatically be incorporated into the individual contracts of employment. This is the case even when the old agreement was a national agreement and the new agreement is a local agreement: **Mawson and anor v Exel Logistics Ltd** *EAT 227/96."*

Indirect religious discrimination – s.19 Equality Act 2010 (EqA)

(54) **Section 19 of the EqA** provides that:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

(55) The burden of proof in a claim for indirect discrimination lies primarily on the Claimant, and the reversal of the burden does not operate in the same manner as in respect of a direct discrimination claim. *Per* Langstaff P in **Dziedziak v. Future Electronics Ltd [2012]** UKEAT/0270/11/ZT at [42]:

> *"In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification."*

(56) The salient features of indirect discrimination claim include: (i) the absence of any requirement to show a reason why a PCP places one group at a disadvantage when compared with others; (ii) the absence of any need to show a causal link between the less favourable treatment and the protected characteristic; (iii) the reason for the treatment need not itself be unlawful or under the control of the employer but the PCP and the reason for the disadvantage are "but for" causes of the disadvantage; (iv) the PCP need not put every member of the group sharing the protected characteristic at a disadvantage; (v) statistical evidence is normally necessary to show group disadvantage; (vi) a respondent may show that the PCP is justified: **Essop v. Home Office** [2017] ICR 640 SC Baroness Hale at [23]-[29].

Identification of pool / group disadvantage

(57) The appropriate pool for testing group disadvantage should comprise all employees affected by the PCP in question so that the appropriate comparison can be made between the impact on the group who share the claimant's protected characteristic and those who do not: **Essop.** Pursuant to section 23 of the EqA, the comparison required is of people in the same relevant circumstances.

Particular disadvantage

(58) The **EHRC Employment Code** makes clear that *"disadvantage"* broadly means (following the House of Lords' decision in **Shamoon v. Chief Constable Royal Ulster Constabulary** [2003] ICR 337):

> *"…something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience*

actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."

Objective justification

(59) A claim under **section 19 EqA** is only made it out if, *per* **section 19(2)(d)** *"[the respondent] cannot show [the PCP] to be a proportionate means of achieving a legitimate aim"*. The burden is on the respondent.

(60) The proportionality test is essentially a balancing exercise. It was summarised, by reference to the leading EU case of ***Bilka-Kaufhaus GmbH v Weber von Hartz*** [1986] IRLR 317, by Mummery LJ in ***R. (Elias) v. Secretary of State for Defence*** [2006] 1 WLR 3213 at [151] as follows:

"…the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

(61) What that balancing act requires was expressed slightly more fully by Sedley LJ in **Allonby v. Accrington and Rossendale College** [2001] ICR 1189 at [29]:

"…at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter."

(62) The Supreme Court confirmed in **Homer v. Chief Constable West Yorkshire Police** [2012] ICR 704 at [22] that *"[t]o be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so." Per* Pill LJ in ***Hardy & Hansons Plc v. Lax*** **[2005] ICR 1565** at [32]:

"It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary." [emphasis added]

(63) In **Hensman v. Ministry of Defence** [2014] UKEAT/0067/14/DM, Singh J referred to the above passage and stressed at [44] that in applying this approach the Tribunal: *"must have regard to the business needs of the employer."* As noted by the Supreme Court in **Essop** at [32]: *"the less the disadvantage suffered by the group as a whole, the easier it is likely to be to justify the PCP".*

(64) An employer cannot rely on a measure imposed in pursuance of an intrinsically laudable and otherwise reasonable policy, without reference to the business needs of the employer – see **Greater Manchester Policy Authority v. Lea** [1990] IRLR 372 at [24].

(65) In considering whether there are alternative non-discriminatory means of achieving the legitimate aim, the legitimate aim itself must be the focus; a non-discriminatory alternative will not defeat a defence of justification if it defeats the legitimate aim: **Chief Constable West Midlands v. Blackburn** [2009] IRLR 135 at [25]-[26]. This is reflected in the **EHRC Code, 4.31**. It is not open to a Tribunal to reject a justification defence on the basis that the respondent should have pursued a different aim that would have had a less discriminatory impact – **Chief Constable of West Midlands Police v. Harrod** [2017] ICR 869 at [41].

Discussion and conclusions

Unauthorised deductions

(66) The Claimant's contract agreed at the commencement of his employment specifically provided for the amendment of his contractual terms by the Respondent and the supplementing of his contractual terms by local and collective agreements with the recognised Trade Unions.

(67) The Claimant knew that collective agreements applied to his original contract of employment and that new terms, including in relation to pay, could be negotiated with Unison from time to time, amending and supplementing the terms of his contract of employment. The fact that the Claimant was not a trade union member had no relevance. The same terms and conditions applied to all employees, or categories of employees, irrespective of their trade union membership or otherwise.

(68) The terms and conditions agreed between the Respondent and Unison towards the end of 2019 in relation to pay and the formula applied to ensure that holiday pay was paid as an enhancement to pay amounted to a collective agreement within the meaning of section 178(1) of TULR(C)A. That agreement could have contractual force by virtue of the provisions of clause 7 of the Claimant's original contract, incorporating collectively agreed terms into his contract of employment.

(69) The Claimant was informed of the new formula to be used for calculating his pay on 26 November 2019. He also knew from the letter sent to him on that date that this formula would be used with backdating to 1 September 2019.

(70) When the Claimant was sent the new contract, he made it clear that he did not wish to accept it. Nevertheless, in view of the terms of his original contract, changes to his terms and conditions could be made without his specific and individual agreement to the changes and interpreting the contract in accordance with its terms, there was nothing to prevent changes having retrospective effect.

(71) We concluded that the Respondent and Unison agreed that the new formula would have retrospective effect and this was what was notified to the Claimant on 26 November 2019.

(72) The Claimant has continued to work for the Respondent, being paid according to the revised formula as collectively agreed with Unison since receiving the new contract in February 2020. His revised pay was backdated to 1 September 2019.

(73) In the circumstances, he has been paid in accordance with the terms of his contract of employment from 1 September 2019 and his claim for unauthorised deductions in relation to the period from 1 September 2019 fails.

Indirect discrimination

(74) The Claimant is a practising Christian. It was accepted by the Respondent that it applied a provision, criterion or practice (PCP) that staff could apply for special leave for religious holidays in accordance with the Respondent's Leave of Absence Policies and would, in practice, normally be paid for such holidays. The policy applied to all staff irrespective of their religion or whether or not they held any religious belief, even if in practice only those with a religious belief were likely to apply and the pool for comparison was all staff. This PCP differed from that defined at a case management hearing, where the PCP was simply defined as "operating a special leave policy". The Respondent's counsel expressed concern about "moving the goalposts" but accepted that the narrower formulation, relating to the policy and practice in relation to religious holidays, more accurately reflected what the Claimant was arguing. The Respondent was not prejudiced by the formulation of the PCP in this way.

(75) The Claimant alleged that that PCP put Christians at a disadvantage when compared with people who were not Christians. All staff, whatever their faith or whether of no faith, were paid their holiday pay as an enhancement to their salary on a monthly basis. That enhancement included payment for the main Christian holidays in the year, Christmas Day (or any substitute for Christmas Day) and Good Friday. Those days fell within the school holidays, and were automatically days of paid holiday for all staff, whether they were Christian, or of some other religion or had no religious belief.

(76) The Claimant alleged that the opportunity for employees who practised religions other than Christianity to have additional paid holidays pursuant to the Leave of Absence Policy created a disadvantage for Christian employees. The alleged disadvantage, which was explained by the Claimant during his oral

evidence, was that those practising other religions could take additional days of paid holiday that were not, in practice, available to Christian employees.

(77) The Claimant alleged that this placed him at a disadvantage because the paid holidays that he would, in practice, take were fewer than those taken by staff of other religious denominations, including Hindu, Muslim and Jewish staff, who asked for and were, in practice, granted time off for official religious holidays and festivals and were paid for that time off. The Claimant did not allege that colleagues of other religions should not be granted time off for religious holidays. He considered that they should be granted time off but that the holidays should be unpaid or the time made up on other days. Because there are no Christian holidays during term-time, a Christian would never have a requirement to ask for special leave for religious holidays.

(78) The Claimant contended that the PCP was not justified. He submitted that it was detrimental to students' education if they were not taught by their regular teacher of if practical work was reduced because Science Technicians were absent. It was an extra burden for staff if they had to cover for their colleagues. Supply teachers needed to be brought in which was an additional cost to the school. It was not necessary to pay staff for religious time off because there was ample opportunity to make up the time, for example on an inset day or during the holidays. Where staff worked part-time in a week they could swap their work days with others so as to be able to take religious days off. The consequence of the policy and practice of granting paid leave for religious holidays, the Claimant alleged, was that there was not "equal pay for equal work". The proportionate way of achieving "equal pay for equal work" was to grant special leave for religious reasons without pay. The Claimant referred to the Acas guidance that: "…whilst showing some consideration to a religious group during holy days and festivals can be beneficial, it is also important not to disproportionately favour that group to the disadvantage of colleagues with different (or no) religious beliefs. It is generally not advisable to offer paid special leave for such time off requests because an employer needs to ensure they do not discriminate in favour of a particular religion".

(79) The Respondent contended that there was no group disadvantage to Christians when compared with non-Christians. If there was any group disadvantage, there was no personal disadvantage. If there was group and personal disadvantage PCP was justified. The Respondent referred to the EHRC Employment Code in relation to disadvantage: "*something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently".*

(80) The Respondent contended that if the PCP created group disadvantage to those who were not Christians and personal disadvantage to the Claimant, the PCP was nevertheless a proportionate means of achieving a legitimate aim. The legitimate aims relied on were:

(i) To provide an inclusive environment for all staff irrespective of their religion or belief;
(ii) To allow staff to take leave for religious holidays, special occasions or any other personal circumstances not covered by the Respondent's other policies, particularly where these are not recognised as public holidays in the UK;
(iii) To comply with the public sector equality duty;
(iv) To allow staff to achieve work/life balance and participate in important life events without sacrificing pay or having to make up the time;
(v) To comply with the EHRC Equality Act 2010 Employment Statutory Code of Practice.

(81) The Respondent contended that the Acas guidance was not apt to apply in the context of a school where staff worked during the term time and automatically had the Christian holidays off as paid holiday.

(82) We first considered group disadvantage. We took into account that the application of the policy in practice meant that Christian employees were likely to have fractionally fewer days paid holiday than colleagues from minority religions at the school. On the other hand, in contrast to those of minority religions, who had to request holiday for their official religious holidays and festivals and had to depend upon a discretion being exercised in their favour, Christians automatically had paid holiday during the main Christian holidays, Christmas Day and Good Friday and, like all their colleagues, could request additional days if they wished to. The Respondent's employees who practised minority religions had no choice but to take holiday on Christian holidays and, in general, to apply for special leave for their own holidays.

(83) Talking those factors into consideration and looking at the pool as a whole and how the PCP impacted on the group as a whole (the pool), the Tribunal could discern no significant disadvantage to Christians as a group.

(84) In terms of any personal disadvantage to the Claimant, the Tribunal took into account the EHRC Code in relation to disadvantage. It noted that this was not a case of the Claimant saying that he would have preferred to be treated differently: rather he was saying that others, from minority religions, should be treated differently by not receiving payment for religious holidays taken.

(85) The Claimant has not made any application for religious holiday himself. He has enjoyed his own religious holidays as paid holiday. While he may feel disadvantaged when colleagues are absent because of religious holidays, short absences for a multitude of reasons, including sickness, are not uncommon in the workplace and staff adapt as required. The PCP created no interference with the Claimant's ability to practise his faith.

(86) We considered the Claimant's sense of grievance was real but unjustified. There was a multiplicity of reasons relating to good employment practice and the welfare and wellbeing of staff why staff should be allowed to take paid holiday for religious holidays. There was also a clear risk of complaints of discrimination if staff from minority religions were refused paid

holiday for religious holidays when their Christian colleagues received paid holiday for the main Christian festivals. There were also potential employee relations issues if pay for religious holidays was suddenly refused, contrary to well-established practice.

(87) We accepted that the Acas guidance referred to was not apt for application in a school where holidays are taken in school holidays and inevitably include the Christian holidays for all. If the Claimant's suggestion was acceded to, one perceived unfairness could lead to possible unlawful discrimination.

(88) We concluded that indirect discrimination was not made out because there was no group disadvantage, alternatively no individual disadvantage to the Claimant. In case we were wrong on either of these issues, we went on to consider objective justification.

(89) The aims relied on by the Respondent were legitimate aims. The Claimant did not contend otherwise.

(90) We considered whether the grant of paid special leave for religious holiday was a proportionate means of achieving those aims.

(91) Taking into account the number of religious holidays taken each year and Ms Swain's approach to the grant of religious holidays and cover for religious holidays, we did not consider that there was any significant business disadvantage to the operation of the school in granting those holidays. Cover could be achieved without creating any significant budgetary burden for the school. Staff could generally cover for each other during religious holidays just as in relation to any other short-term absence.

(92) Allowing paid time off was consistent with the aim of employees taking time off for significant life events or taking time off without losing pay or having to make up time. It was also good for employee relations in a diverse workforce serving a diverse London community. The Respondent risked being out of step with other schools in the area if it changed its policy and practice to take away the benefit of pay for religious holidays. That could have implications for the recruitment and retention of staff. The Respondent granted paid leave for a multiplicity of reasons that were important to their staff and it was proportionate to treat special leave for religious holidays in the same way as other type of special leave.

(93) The Respondent is subject to the public sector equality duty in section 149(2) of the EqA and a policy operated so as to make those of minority religions feel welcomed rather than tolerated was consistent with that duty. While the principle of "equal pay for equal work" had the ring of fairness and non-discrimination, if the Claimant's argument were followed to its conclusion, employees from minority religions might reasonably feel disadvantaged because their religious holidays were unpaid or because they were required to make up the time taken for religious holidays, when their Christian colleagues were paid for Christian holidays taken.

(94) In all the circumstances, the Tribunal concluded that the PCP was a proportionate means of achieving a legitimate aim.

(95) For all these reasons, the Claimant's claim for indirect discrimination is dismissed.

ACAS Uplift

(96) The Claimant's claims were claims to which the Acas Code of Practice: Disciplinary and grievance procedures applied. The Tribunal considered whether there were any unreasonable failures by the Respondent in complying with the Code, in particular in relation to the Claimant's grievance.

(97) There were significant delays in dealing with the Claimant's grievance. The grievance was, however, complex and the Respondent reasonably sought advice from experts, which caused further delay. The Tribunal did not consider that the delay was unreasonable.

(98) The Tribunal did, however, consider that there was an unreasonable failure to comply with the Code by the Respondent in not determining the Claimant's appeal. The Tribunal concluded that it was just and equitable to uplift the sum awarded to the Claimant for unauthorised deductions by 10%.

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Employment Judge McNeill QC

Dated: 6 October 2021

Sent to the parties on:

14/10/2021

For the Tribunal:

N Gotecha