EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101316/2020

Hearing in Glasgow on the 12, 13 and 15 April 2021

Employment Judge L Wiseman

Members I Ashraf

A McFarlane

Karen Shakespeare	**Claimant In Person**
Ayrshire College	**Respondent Represented by Mr N MacDougall, Advocate Instructed by: Ms J Forrest, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 4 March 2020 alleging there had been an unlawful deduction from wages in circumstances where it was asserted the respondent had failed to pay a sum agreed in a COT3 agreement which had been negotiated in settlement of a previous claim. The claimant also brought complaints of disability discrimination in terms of a failure to make reasonable adjustments and victimisation.

2. The respondent entered a response in which it accepted that one of the terms of a letter appended to the COT 3 agreement had referred to a "paid lunch break" but asserted this had been a typographical error in circumstances where the lunch break was unpaid. The respondent, in the alternative, argued the claimant had been paid correctly. The respondent denied the claims of discrimination.

3. The respondent subsequently conceded the claimant was a disabled person at the relevant time.

4. We heard evidence from the claimant; Mr Chris McDowall, the respondent's legal representative at the time the COT3 was negotiated and prepared; Ms Anne Campbell, Vice Principal of Curriculum and Ms Jane McKie, Vice Principal of People.

5. We were referred to a jointly produced folder of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

6. The respondent is a further education institution. The respondent was formed on 1 August 2013 when Ayr College, Kilmarnock College and James Watt (Kilwinning and Largs campuses) merged.

7. The claimant commenced employment with Ayr College on the 1 October 2006 as a Visual Arts and Media Lecturer. The claimant's employment transferred to the respondent in August 2013. The claimant subsequently elected to retain her legacy terms and conditions of employment which she had had with Ayr College.

8. The claimant is employed on a 0.25 contract of employment. The claimant worked 8 hours 45 minutes per week.

9. The claimant presented a claim to the Employment Tribunal in December 2017 in which she complained of alleged disability discrimination. This claim (and a subsequent claim made in May 2019) were resolved through a COT3 agreement in July 2019 and the claims were withdrawn.

10. The negotiations which led to the COT 3 being signed were lengthy and complex and focussed on the claimant's working pattern. The claimant wished to work all of her hours in one day (Monday), but the respondent had, up until that point, been resistant to that proposal.

11. The first written settlement proposal was sent by Mr McDowall in an email dated 10 May 2019 (page 222) to ACAS. The email confirmed the respondent was prepared to make the following (non-financial offer) to the claimant, the first bullet point of which read *"The claimant will continue in her role and her working hours will be 9am to 5pm on a Monday with one hour unpaid lunch break. This is the same for all College employees and will include 5 hours contact time. The balance of the claimant's hours (1 hour 45 minutes) can be completed by the claimant off campus at a time which suits her. This balance will include prep and discretionary time."*

12. The offer was put to the claimant and ACAS emailed Mr McDowall on the 17 May (page 225) attaching a copy of the claimant's response. The claimant wished confirmation her contracted hours would be maintained. There was no reference to the lunch break.

13. Mr McDowall met with the claimant on the 7 June 2019 to further discuss the terms of the settlement. The claimant, at that meeting, advised Mr McDowall that she wished to have a letter from the College confirming her future working arrangements since this had been an area of dispute between the parties in the past.

14. Mr McDowall and Ms Anne Campbell met with the claimant on the 1 July 2019. Ms Campbell became involved in the settlement discussions because of her curriculum expertise.

15. Mr McDowall, in advance of the meeting, sent the claimant an email (page 110) setting out the key points of the settlement proposal. Mr McDowall noted a letter would be issued to the claimant confirming her future working arrangements. The letter would be an addendum to the COT3 agreement and would confirm all of the five teaching hours would be performed in one day which was a Monday. The letter would also say that "you are required to take a one hour paid lunch break each Monday." The insertion of the word "paid" instead of "unpaid" was an error on the part of Mr McDowall.

16. The issue of a lunch break and whether it should be paid or unpaid had not been the subject of any settlement discussions or negotiations. The issue of dispute between the parties had been the claimant's desire to work all of her working hours on one day and the respondent's reluctance to agree to this because of health and well-being considerations. Mr McDowall considered it would be helpful to insert into the proposals that an unpaid lunch break should be taken, because this reflected the claimant's terms and conditions of employment and the national agreement governing such terms and conditions of employment.

17. The respondent did not authorise Mr McDowall to make any offer of a paid lunch break to the claimant; and would never have agreed to any such offer being made even if it had been raised with them.

18. The claimant requested Mr McDowall provide a draft settlement wording, including the proposed reference and letter from the respondent regarding her working hours. This was provided to the claimant by email of the28 June (page 109). The wording of the letter included the error regarding a "paid" lunch break.

19. The claimant subsequently proposed an amendment to the letter from the respondent regarding her working hours. The proposed amendment (page 122) was the insertion of the words "for clarity you are allowed to do all 8 hours 45 minutes in one day if desired". No comment was made regarding the lunch break. This proposal was rejected by the respondent.

20. The negotiations culminated in a COT 3 agreement being signed by the claimant and Mr McDowall, for the respondent, on the 4 July 2019 (page 77). The claimant also signed a letter withdrawing her claims from the Employment Tribunal (page 81). The COT 3 agreement, at clause 9, provides that the respondent shall, on headed notepaper, issue to the claimant a copy of the letter set out in Appendix 3 to this agreement. The letter at appendix 3 (page 83) set out the claimant's working hours and included the sentence that she was required to take a one hour paid lunch break.

21. The error in respect of the lunch break being described as "paid" instead of "unpaid" was not noticed by Mr McDowall orthose instructing him, prior to the signing of the COT 3.

22. The terms and conditions of Ayr College employees prior to the merging of the Colleges to create the respondent, were, in relation to working hours, that hours were worked exclusive of unpaid breaks (page 61). This means the one hour for lunch was unpaid. There have, following the merger, been negotiations to collectively agree new terms and conditions of employment (page 65). The claimant opted to retain her legacy terms and conditions of employment until the new national terms and conditions were agreed for the sector.

23. The national terms and conditions which were negotiated were produced at pages 70 - 76, and dated 1 August 2019. Page 73, section 2, deals with working hours per week and working arrangements. The clause provides that "… within a working week of 35 hours full time equivalent exclusive of a lunch break and inclusive of morning and afternoon breaks to be determined locally". So, a full-time lecturer on 35 hours per week would be paid 7 hours each day for working 9am to 5pm, because there is a one hour unpaid lunch.

24. The claimant contacted the respondent in September 2019 alleging there had been a breach of the COT 3. The claimant met with Ms Campbell on the 28 October, at which point she explained that in terms of appendix 3 she was entitled to a paid lunch break, which had not been paid.

25. Mr McDowall and Ms Campbell met with the claimant on the 29 November. The purpose of the meeting was to explain to the claimant there had been a typographical error in appendix 3 and that the lunch should be unpaid. The claimant refused to agree any change to the agreement.

26. A revised version of the appendix 3 letter was issued to the claimant on the 3 December 2019 (page 132), making clear the one hour lunch break was unpaid.

Notes on the evidence

27. The claimant sought payment of a one hour lunch break from the date the COT3 agreement was signed. The agreed sum for the lunch hour was £23.27 gross and £21 .32 net.

28. The claimant also brought a claim of failure to make reasonable adjustments. The provision, criterion or practice was said to be a failure to adhere to the COT 3 agreement. The reasonable adjustment would have been to adhere to the agreement.

29. The claimant also brought a victimisation complaint. The protected act was said to be the raising of a grievance or submitting the previous Employment Tribunal claim complaining of discrimination. The detriment was said to be the respondent's failure to pay for a lunch break.

30. There were no issues of credibility in this case. Much of the evidence was not in dispute.

Claimant's submissions

31. Ms Shakespeare submitted that she had been made an offer by the respondent to settle, and withdraw, her claims and she had accepted that offer. She had signed the COT 3 agreement in the belief she was going to get an additional hours pay as stated in appendix 3. There was a binding contract. Ms Shakespeare sought payment for 9 hours 45 minutes, being 8 hours 45 minutes plus one hour paid lunch break.

32. Ms Shakespeare rejected the respondent's suggestion that even if the lunch hour was paid, the wages properly payable were still 8 hours 45 minutes in terms of her contract. The claimant argued that if this interpretation was accepted it would mean she was being paid less than her hourly rate, which would be in breach of the national agreements.

33. Ms Shakespeare argued the national agreement referred to by Ms McKie had not come into being until the 1 August 2019, which post-dated the signing of the COT 3 agreement.

34. The claimant submitted she was a disabled person and therefore the duty on the respondent to make reasonable adjustments arose. The provision in place was a failure to adhere to the terms of the COT 3 agreement. This placed the claimant, as a disabled person, at a disadvantage. The reasonable adjustment which the respondent ought to make was to adhere to the terms of the COT 3.

35. The claimant submitted she had, when making her previous claims to the Employment Tribunal, done a protected act. The claimant had suffered a detriment through the refusal of the respondent to pay a one hour lunch. The claimant argued the reason why the respondent refused to make payment was because she had done the protected act.

Respondent's submissions

36. Mr MacDougall referred to section 13 Employment Rights Act which sets out the rights for employees not to suffer unlawful deductions from wages. Section 13(3) provides *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

37. The question of what wages are "properly payable" under section 13(3) is critical to determining whether an unlawful deduction has been made. The determination of what is "properly payable" on any given occasion will generally involve employment tribunals establishing what the worker is contractually entitled to receive by way of wages. It was submitted that tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages was properly payable to the worker on the relevant occasion.

38. Mr MacDougall noted the contractual provisions which the claimant relies upon to support the proposition that she is entitled to payment for 9 hours 45 minutes per week is appendix 3 of the COT 3 agreement (page 83), where it is stated "you are required to take a one hour paid lunch break on that day". The respondent's position is that the reference to "paid" lunch is a clerical error, which should have stated "unpaid". It was submitted the tribunal should apply the common law rules that govern clerical mistakes in contract to determine the matter.

39. Mr MacDougall submitted there was a mistake in appendix 3: a latent mistake and the tribunal should allow the respondent to lead extrinsic evidence of an agreement different from that expressed it the document. Mr MacDougall referred to the case of ***Krupp v Menzies 1907 SC 903*** where a contract had been drawn up entitling the pursuer to payment of "one fifth" of the profits. Both parties signed the contract. The defender then argued the reference to "one fifth" was a clerical error and it should have stated "5%" of the profits. In the Inner House the Lord President stated: *"This case seems to me to have nothing to do with the avoidance or reformation of the contract. The only question is whether proof is admissible that a document which in ordinary circumstances would be held to express the intentions of the parties does not in fact do so. I am clearly of the opinion that proof should be allowed".* Mr MacDougall submitted this case continued to represent good law.

40. The claimant's evidence was that there was no mistake in appendix 3. She thought the respondent was offering to pay her an additional hour to take lunch every Monday she worked. She thought this was some form of financial compensation for past acts of discrimination. Mr MacDougall invited the tribunal to reject that evidence as being incredible because (i) the claimant accepted in her evidence that at no stage during the negotiation process did she request to be paid a lunch hour; (ii) on the 10 May 2019 Mr McDowall expressly stated as part of the settlement that the claimant would be required to take a one hour unpaid lunch break (page 222). The claimant responded to that offer and did not take any issue with this (page 226); (iii) the reference to "paid" first appeared in an email from Mr McDowall on 25 June (page 110): the claimant did not recall any discussions in the interim, or making any request for such a change and (iv) being paid an additional hour would represent a 10% increase to the claimant's wages. That is a substantial increase and it would have been reasonable to expect it to feature prominently in the settlement negotiations: yet there was no evidence of it having featured at all in any discussions or negotiations. It was submitted that it was incredible to state that such a significant alteration to her contractual terms would be inserted without anyone discussing it during a lengthy negotiation process.

41. Mr MacDougall referred to Mr McDowall's evidence where he had provided a full and frank explanation of how the error arose. The error first appeared in the email of the 25 June, and was cut and paste into subsequent documents without being detected notwithstanding those documents being reviewed. Mr McDowall accepted he did not have instructions to offer a paid lunch hour. No instruction on this was sought because it was never requested by the claimant.

42. Ms Campbell's evidence was short but confirmed that at no point during her involvement in the negotiations was the matter of a paid lunch hour discussed. Ms Campbell also confirmed that no other employee of the respondent receives a paid lunch.

43. Ms McKie was authorised to provide instructions to Mr McDowall during the negotiations with the claimant. She approved the draft COT 3, but did not pick up on the error. Ms McKie also confirmed that the issue of a paid lunch had not been raised or discussed during the negotiation process. She explained that if it had been raised, it would have required "unique consideration" and would represent an "unparalleled departure" from nationally agreed terms and conditions of employment.

44. Mr MacDougall invited the tribunal to accept all of the respondent's evidence. He submitted the cornerstone of all contractual obligation is agreement and the parties did not agree the claimant would be paid a lunch hour because the matter was never discussed. Mr MacDougall further invited the tribunal to find the reference to "paid" lunch in appendix 3 was a clerical error, which did not reflect what the parties had agreed during the settlement negotiations. It was submitted that if the tribunal did accept the word "paid" was an error, the effect of that was that the word could be ignored for the purposes of these proceedings. The consequence of this would be that the wages properly payable to the claimant would continue to be 8 hours 45 minutes, meaning there was no unlawful deduction from wages.

45. Mr MacDougall acknowledged the claimant was a disabled person with dyslexia. The provision, criterion or practice relied upon by the claimant was the respondent's failure to adhere to the terms of the COT 3 agreement. Mr MacDougall submitted an alleged failure to adhere to the COT 3 could not constitute a provision, criterion or practice. He referred to the case of ***Taiwo v Oliaigbe EAT 0254/12*** where the EAT held that the mistreatment of migrant workers did not amount to a valid PCP because this gave rise to a circular argument. Where the issue was whether mistreatment had been caused to a person because of the application of a PCP, it was pointless to argue that the PCP was mistreating the person. The PCP must be the cause of the disadvantage: it cannot also be the disadvantage. This is what the claimant sought to rely on in this case. The alleged PCP is a failure to adhere to the terms of the COT 3; however, this is also the disadvantage that the claimant claims to have suffered.

46. Mr MacDougall did not make any further submissions relevant to the claim of failure to make reasonable adjustments because his submission erroneously identified the claim as one of indirect discrimination.

47. Mr MacDougall referred to section 27 Equality Act and accepted the bringing of the earlier proceedings would be a protected act, and the alleged financial loss arising from non-payment of a lunch hour would be a detriment He submitted the claimant was required to show that she was subjected to the detriment because she did the protected act. It was submitted that the essential question in determining the reason for the claimant's treatment was what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment. This will usually require an inquiry into the mental processes of the employer.

48. Mr MacDougall submitted that in the present claim the reason for non-payment of the lunch hour and therefore failure to adhere to the terms of the COT 3 was that the word "paid" had been included in error. The respondent was not aware of the error until the claimant made allegations of failure to adhere to the terms which ultimately resulted in these proceedings. There was no credible basis for suggesting the failure to pay a lunch hour was due to the claimant raising the initial proceedings.

49. Mr MacDougall invited the Tribunal to dismiss the entire claim.

Discussion and Decision

The wages claim

50. We firstly had regard to the terms of section 13 Employment Rights Act which sets out the right not to suffer unauthorised deductions from wages. The section provides that an employer shall not make a deduction from wages of a worker employed by him unless the decision is required or authorised to be made to virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

51. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction make by the employer from the worker's wages on that occasion.

52. The issue for this Tribunal to determine is the total amount of wages properly payable to the claimant each week. The claimant argued the wages properly payable to her were for 9 hours and 45 minutes (that is, 8 hours and 45 minutes work plus one hour paid lunch). The respondent argued the wages properly payable to the claimant were for 8 hours and 45 minutes (with an unpaid lunch). In order to determine this issue the Tribunal required to interpret the COT3 agreement reached between the parties to settle the previous claims made by the claimant.

53. There was no dispute regarding the fact the parties had entered into a COT3 agreement to settle the previous claims (page 77). The COT3 agreement provided, at paragraph 9, that the Respondent would, on headed notepaper, issue to the claimant a copy of the letter set out at Appendix 3. The letter at appendix 3 confirmed the claimant's future working pattern and confirmed *"All of your 5 teaching hours on your 0.25 contract of employment (8.45 hours) are to be performed in one day which is currently a Monday and that day will account for 7 hours (inclusive of preparation time) of your contracted hours. You are required to take a one hour paid lunch break on that day".*

54. We, in considering this matter, had regard to a number of points which we considered to be material. Firstly, the discussions held by the parties to settle the claims focussed on the claimant's working pattern, that is, how she was to work her contracted 8 hours and 45 minutes. There was no discussion regarding varying the contracted hours (8 hours and 45 minutes) and the issue of a lunch hour being paid or unpaid was not a feature of the discussions or negotiations.

55. Secondly, the collective agreements governing the terms and conditions of employment of the claimant (both in legacy terms and current terms) do not provide for a paid lunch hour. The claimant was contracted to work 8 hours and 45 minutes, with an unpaid lunch hour.

56. Thirdly, the first written settlement proposal on the 10 May referred to an unpaid lunch. This was accepted by the claimant (albeit implicitly). There had been no discussion regarding the issue of a lunch break prior to this, and there were no discussions regarding it after this date.

57. Fourth, the claimant noticed the lunch break changed from being unpaid to paid, but she did not query this with the respondent at the time. The claimant told the tribunal she thought this was the respondent making amends for the discrimination. We however doubted that explanation for five reasons: (i) the email from Mr McDowall dated 10 May, set out the proposed terms of the "non-financial" settlement (and this included an unpaid lunch hour; (ii) the COT3 agreement included a significant financial sum paid in full and final settlement of the claims; (iii) the claimant knew her conditions of service did not provide for a paid lunch hour; (iv) this was not something the claimant had asked for or raised previously and (v) the claimant agreed in cross examination that there had not ever been any discussion or suggestion of the respondent offering a paid lunch to make amends for the alleged discrimination. The claimant gives careful thought and consideration to everything said and written and we considered that she not only observed the change from unpaid to paid, but sought to take advantage of it by not querying it.

58. Fifth, it was important to the claimant to maintain her contracted hours. For example, in response Mr McDowall's settlement proposal dated 10 May, the claimant responded to say she welcomed the acknowledgement she could continue in her current role, and asked for confirmation that it included maintaining her contracted hours. The claimant's contracted hours were 8 hours and 45 minutes. The appendix 3 letter referred to the claimant having a 0.25 contract of employment: that is, 8 hours 45 minutes.

59. The Tribunal accepted Mr McDowall, on behalf of the respondent, made an error when he described the lunch break as being paid rather than unpaid. What is the effect of that error? We were referred to McBryde's The Law of Contract in Scotland. We noted that a contract is to be construed by considering the whole express terms of the contract and any admissible surrounding circumstances. It is recognised that mistakes can occur: for example, there may be a clerical mistake which is obvious, and the example given was of sums being added up wrongly. Mr MacDougall submitted there had been a clerical mistake in this case and he invited the tribunal to find the reference to "paid" lunch in appendix 3 was a clerical error. We, on the one hand, noted that on reading appendix 3 it would not be immediately obvious that the reference to a paid lunch was an error. On the other hand, however, the error becomes obvious when it is noted the claimant had a 0.25 contract of employment for 8 hours and 45 minutes. The letter at appendix 3 referred to Monday accounting for 7 hours (5 hours teaching and 2 hours preparation time), with the claimant being able to self-locate for the remaining balance of her contracted hours on the 0.25 contract, which is 1.45 hours made up of preparation and discretionary time.

60. The claimant cannot, within her contracted time, work for 8 hours and 45 minutes and have a paid lunch, because that equates to 9 hours and 45 minutes. There was never any discussion or agreement between the parties to either increase the claimant's contracted hours to 9 hours and 45 minutes (work plus a paid lunch hour), or to maintain her contracted hours by reducing her working time to 7 hours and 45 minutes with a one hour paid lunch. We concluded, for these reasons, that the mistake (the clerical error) was apparent on the face of the appendix to the COT3 agreement.

61. We went on to further consider (if we have erred above, and the defect is not apparent on the face of the agreement) whether it is possible to lead extrinsic evidence of an agreement different from that expressed in appendix 3. We concluded, for the same reasons as set out above, that the extrinsic evidence in this case supported the fact a different agreement was reached between the parties, and that agreement was that 8 hours and 45 minutes would be worked in the pattern agreed, with a one hour unpaid lunch. We say that primarily because the terms and conditions of the claimant's employment include a one hour unpaid lunch. The claimant worked 8 hours and 45 minutes per week with an unpaid lunch hour. There were never any discussions or negotiations between the parties to change this.

62. We decided the reference to a "paid" lunch hour in appendix 3 was an error, and that it should have referred to an "unpaid" lunch. The claimant has a 0.25 contract and is contracted to work 8 hours and 45 minutes each week. The claimant reached agreement with the respondent regarding her pattern of working those hours: she works 7 hours in one day (currently a Monday) with an unpaid lunch hour, and the remaining 1.45 hours can be worked at a time to suit the claimant.

63. The total amount of wages properly payable to the claimant is for 8 hours and 45 minutes per week. The claimant has been paid the amount which is properly payable. We decided, on this basis, to dismiss this part of the claim.

The reasonable adjustments claim

64. We next considered the claim made by the claimant in terms of section 20 of the Equality Act. The section provides that where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty on the employer to take such steps as it is reasonable to have to take to avoid the disadvantage.

65. The claimant argued the provision, criterion or practice (the PCP) of the respondent was a failure to adhere to the terms of the COT3 agreement. Mr MacDougall, in his submissions, invited the tribunal to find that adhering to the terms of a COT3 could not constitute a provision, criterion or practice, because the PCP could not also be the disadvantage *(Taiwo v Olaigbe and anor EAT 0254/12). We* accepted this submission because the claimant's argument gives rise to a circular argument: the claimant is effectively seeking to argue that she was put at a disadvantage by the respondent's failure to adhere to the terms of the COT3 agreement, because of the application of the PCP of failing to adhere to the terms of the COT3 agreement.

66. We, in addition to the above, further considered there was no evidence to support an argument that the respondent had a PCP of failing to adhere to the terms of COT3 agreements.

67. We concluded the claimant had not, for these reasons, shown there was a PCP of failing to adhere to the terms of COT3 agreements.

68. We should state that even if we had been satisfied there was a PCP, we could not have accepted the PCP put the claimant (a disabled person) at a substantial disadvantage in comparison with persons who are not disabled. We say that because failing to adhere to the terms of a COT3 agreement would cause the same disadvantage to a disabled person and a person who is not disabled.

69. We, in addition to the above, also concluded that it was not the PCP which put the claimant at the substantial disadvantage, it was the fact an error had been made in the appendix 3 letter, which referred to a paid lunch rather than an unpaid lunch.

70. We decided, for all of the above reasons, to dismiss this part of the claim.

The victimisation claim

71. We had regard to the terms of section 27 Equality Act. The claimant, in bringing a victimisation complaint, must show that she has been subjected to a detriment and that she was subjected to that detriment because of having done a protected act.

72. The claimant submitted the protected act which she had done was (i) submitting a grievance and (ii) raising tribunal proceedings complaining of discrimination. The respondent accepted the claimant had raised a grievance and also raised Tribunal proceedings complaining of discrimination.

73. The detriment relied on by the claimant was not being paid for the lunch hour per the terms of appendix 3 to the COT3 agreement. The respondent accepted the claimant had not been paid a lunch hour.

74. The claimant must show that the respondent failed to pay a lunch hour because (our emphasis) she had raised a grievance or made a tribunal claim involving allegations of discrimination. The protected act need not be the sole reason for the detriment, but must be a significant influence.

75. We asked ourselves the question, what was the real reason for the respondent's failure to pay a paid lunch hour? The answer to that question was because the respondent made an error in appendix 3 by describing the lunch hour as paid. The lunch hour was unpaid, and ought to have been described as such in appendix 3, in accordance with the claimant's terms and conditions of employment and the national agreements covering those terms and conditions of employment. We accepted the respondent's evidence that the error went unnoticed and was cut and pasted into subsequent documents without being detected. In fact, the respondent knew nothing of the error until it was raised by the claimant.

76. The claimant suggested the respondent had known the lunch was to be paid and subsequently reneged on that agreement. We could not accept that suggestion because none of the evidence before the tribunal supported it.

77. We were entirely satisfied that the reason the respondent did not pay a lunch hour was because the lunch hour was unpaid, and had been erroneously been described in appendix 3 as being paid. There was no evidence to support the claimant's position that she was not paid a lunch hour because she had done a protected act. We, for these reasons, decided to dismiss this part of the claim.

78. We, in conclusion, decided to dismiss the claim.

Employment Judge: L Wiseman
Date of Judgment: 24 June 2021
Entered in register: 24 June 2021
and copied to parties