



EMPLOYMENT TRIBUNALS

Claimant: Mr Liam Fair

Case No. 2207298/2021

Respondent: Hampstead Hill School

Heard at: London Central - CVP

On: 30 March 2022

Before: Employment Judge Hunt

Representation

Claimant: in person

Respondent: Ms Stock - Solicitor

RESERVED JUDGMENT

- 1. The Claimant's claim that there was an unlawful deduction from his wages is not well-founded. This means that the Respondent did not make an unlawful deduction from the Claimant's wages and the claim is dismissed.**
- 2. The Respondent's application for costs is refused.**

REASONS

Background

1. The Claimant was employed by the Respondent, a Private School, as a teaching assistant from 15/10/18. The Claimant resigned on 14 June 2021 and his last working day was 9 July 2021, the date of termination of the Claimant's employment is in dispute. The Claimant commenced ACAS early conciliation on 16/9/21 (Day A) and a certificate was issued on 7/10/21 (Day B). Proceedings were issued on 29/11/21.

Claims and Issues

Unlawful Deduction from Wages - s.13 and s.23 ERA 1996

2. The Claimant is bringing a claim for unlawful deductions from wages under s.13 and s.23 of the Employment Rights Act 1996, claiming for withheld wages in the sum of £3,374.25.

3. The issues for the Tribunal to consider were discussed and agreed at the outset of the hearing, as follows:
 - 4.1 What was the date or dates when the Claimant claims the payments of wages were due?
 - 4.2 What date did the Claimant's employment come to an end?
 - 4.3 Was the claim presented in time?
 - 4.4 Does the Claimant's contract provide that he was entitled to be paid his annual salary or wages as claimed for the period of the school closure/holidays between 10 July 2021 to 31 August 2021? Were any such wages 'properly payable'?
 - 4.5 And/or did the Respondent have or apply a discretionary policy or practice to retain and pay Teachers until the end of the school closure/holidays? so, did the same discretionary policy or practice apply to teaching assistants such as the Claimant and was it extended to the Claimant on this occasion?
 - 4.6 Did the Respondent make an unauthorised deduction from wages by withholding payment for the period 10 July 2021 to 31 August 2021?

4. The Claimant submitted when discussing the issues that he did not have a date for the end of the contract, he says that he left at the end of term.
5. The Claimant clarified that he was not claiming for holiday or accrued holiday pay on termination.

If

Procedure – documents and evidence heard

6. The Claimant had some technical difficulties joining the CVP hearing and after a period of attempting to do so, as an alternative joined by telephone. I considered the over-riding objective and whether a fair hearing was possible and/or whether the hearing should be postponed taking account of the parties being on an equal footing, proportionality, seeking flexibility in the proceedings and avoiding delay so far as compatible with proper consideration of the issues. All parties being present and prepared for the hearing and the Claimant confirming that he was willing and able to continue and participate by telephone and that he could hear and be heard by all participating clearly, in preference to postponing the hearing with the agreement of the parties, I considered the hearing should go ahead and could be dealt with justly and fairly.

7. There was a small Bundle of documents of 73 pages. The Claimant noted he had filed his documents and Witness Statement (included at pages 44&45 of the Bundle) as directed by the Tribunal 7 days before the hearing but had only received the Hearing Bundle and Respondent's witness statement (at pages 71

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to 73 of the Bundle) the day before the hearing. Ms Stock for the Respondent said that they had had issues receiving correspondence from the Tribunal and that they had not received any case management directions but on receipt of the Claimant's documents and witness statement had prepared a Bundle to ensure all documents and witness statements were included and sent this to the Tribunal and sent a copy to the Claimant on Monday 28 March, updating the Bundle with one document the day before the hearing. The Claimant confirmed he had been able to read the witness statement for the Respondent and documents in the Bundle.

8. I heard evidence from the Claimant for himself and one witness for the Respondent, Mr Ross Montague, Headteacher for the Respondent. There was a written statement from the Claimant and a witness statement for Mr Montague both included in the Bundle. I read the documents in the Bundle that I was referred to.
9. The claim was listed for two hours of hearing time. The technical issues at the outset caused a delay to the start of the hearing, and although it was agreed to extend the length of the hearing to compensate, after conclusion of the evidence and closing submissions and a short adjournment, there was insufficient time for me to consider my decision and give an oral judgment, I therefore informed the parties that I would reserve my decision.

Findings of Fact

10. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have therefore not made findings in every area where that is not necessary for the proper determination of the complaint before me.
11. The Claimant was employed by the Respondent as a teaching assistant from 15/10/18 under a contract of employment dated 12/10/2018 and signed by the Claimant on 15/10/2018.
12. The Respondent is a private school, it sets its own terms and conditions and is not bound by the statutory provisions (set out in the Burgundy Book) that apply to state schools.
13. The Claimant's contract at pages 50-56 of the bundle includes the following express terms to which I was referred:

Clause 5.1 Salary

"Your basic salary is £23,500 gross per year which shall accrue from day to day and be payable monthly in arrears on or about the last working day of each month directly into your bank or building society account. Salaries continue to be paid during periods of School closure."

Clause 7 Holidays

“Subject to any other provisions of this agreement, you are entitled to take as paid leave all usual school holiday periods as published annually by the employer and such leave will, in any event, not be less than your statutory annual leave entitlement.

No leave may be taken during the school term save in exceptional circumstances at the complete discretion of the employer.

You will be paid in lieu of any accrued but untaken statutory holiday entitlement only on termination of your employment. The statutory holiday entitlement for a full time employee is 5.6 weeks.”

Clause 10.1 Termination and Notice Period

“After successful completion of the probationary period the prior notice required from you or the School to terminate your employment shall be no less than a term’s notice, to expire on the last day of Term before the School breaks up for the holiday (i.e. You must hand in/be given your notice by the last day of the Spring Term if you intend to leave at the end of the Summer Term). Whenever given the notice must always expire at the end of a term and not a half term. All notice, whether given or received must be in writing. If you have given verbal notice to terminate, we will require you to confirm such notice in writing.”

14. The Claimant resigned from his employment verbally and in writing to Mr Ross Montague, the Head Teacher, by an email dated 14 June 2021 (page 46 of the Bundle), which states:

“Just to confirm our conversation in writing, I am handing in my notice and will be leaving the school at the end of term. I am sorry I was not able to give more time and work out the full terms of my contract.”

15. The Respondent contends that the Claimant's employment terminated at the end of term on 9 July 2021, as stated in his ET1 (page 20 of the Bundle) and he was not entitled to be paid wages after that date. The Claimant states in his witness statement that he did not put a date in his resignation letter, only that he would be leaving at the end of term.
16. When put to him in cross examination that in handing in his notice he said he would be leaving at the end of term the Claimant agreed that 9 July 2021 was the last day of term and that he said end of term because it is more generic than a date because the dates are decided by the School.
17. I find that the school term ended on 9 July 2021, being the last day of term before the school holiday, which was the Claimant’s last working day. I find that the Claimant's employment terminated at the end of term on 9 July 2021.

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18. The Claimant submitted that he was not disputing the date he left but he was disputing that he had not been paid for July and August. The Claimant expected to receive his normal salary in July, he was paid his salary on 31 July 2021 and received approximately £660 which was approximately 1/3 of his normal salary and received nothing at the end of August.
19. The school academic year runs from September to July and during the summers of 2019 and 2020 the Claimant was paid in arrears at the end of each month, so by the end of August he had received his full annual salary. In his evidence he confirmed that in 2021 he worked until the last day of the academic year and there were no other dates he was asked to work. He expected to be paid his full annual salary for that year also.
20. The Claimant relies on clause 5 of his contract, which states that his annual salary accrues from day to day and is paid in arrears at the end of the month and continues to be paid during school closures. The Claimant read clause 5 literally, as meaning that he would continue to be paid during the school closure, and did not read that as meaning provided you come back in September, contending that he was paid an annual salary divided over 12 months. The Respondent contends that the entitlement to take paid leave during school closures, in the first part of clause 7 and the provision for payment of wages during school closures in clause 5, only applies to those who are employed during the period of school closures. I will address this in my conclusions.
21. The Claimant further contends that he should be treated the same as two teachers whom he says left on the same day as him and were paid over the summer holidays. I was referred by the Claimant to a copy of a teacher's contract at pages 57-63 that was in place at the time and to clauses 5 and 7, which he contends are in exactly the same terms as his contract as a teaching assistant and that he cannot see any difference that distinguishes it from his contract. I find that the relevant clauses are expressed in the same terms.
22. The Respondent contends that it sometimes elects to retain teachers until the end of the school holidays rather than their employment terminating on the last day of term before the school holidays. The Respondent contends that is not a contractual provision, as all contracts state that notice will terminate at the end of the academic term (clause 10) and further contends that such discretion is not exercised in respect of teaching assistants.
23. In his witness statement and in evidence Mr Montague accepted that there were two Teachers who left at around the same time as the Claimant and that both were paid during the summer holiday. Ms Hill, a teacher, sent in work during the summer two weeks into the school holiday and he states that planning such as this is expected of teachers, whose work always spills into the school holidays, which is why teachers are generally paid in the school holiday. He said there is

no expectation on teaching assistants to carry out any work during the school holidays.

24. There was an email in the Bundle (page 48-49) from Ms Hill to Mr Montague dated 22 July 2021 setting out work that she had carried out during the school holidays. Mr Montague said in his evidence that he recalled another email on 13 July that was not included in the Bundle and that some work carried out by teachers would be uploaded and it does not have to be sent by email. In cross examination, he said that both Gabi and Tessa (the second teacher in question) were present on the school site because they had a duty to maintain their classrooms whether leaving or were moving their class to a different room, but there was no expectation for teaching assistants to do so.
25. Mr Montague's evidence was that it was discretionary whether the school elected to pay teachers until the end of the school holidays, for example some specialist teachers may have different roles and would not be needed to work during the holidays. Mr Montague said that this discretionary practice had never been applied to teaching assistants during the time that he had been employed at the school, though he had been employed for a year and his exposure was limited but it was, to the best of his knowledge, his understanding that this had always been the case. The Claimant did not know of any teaching assistants who on leaving the school were paid through the school holidays and said this was because they were told never to discuss salary.
26. The Claimant confirmed in evidence that his work for the School finished on 9 July 2021 and he agreed that there was not any expectation from the School for him to carry out any work during the summer holidays and confirmed in cross examination that he did not carry out any work during the summer holidays. There was an inset day on 31 August that the Claimant said would have meant he would be due into work that day if his contract ran to September. He went on to say that he did not come into work that day because it would have been to prepare for the next day and he wasn't going to be there. In his witness statement he said that Ms Hill told him that she had spoken to HR to ask that the inset day on 31st August that she might be expected to work, be taken off her wages so that she did not have to go in that day.
27. In his evidence Mr Montague said that there is a distinction between teachers and teaching assistants that this is in the title of the job and the difference in the role and responsibilities. The Claimant in his evidence accepted that there is a distinction in the roles of teachers and teaching assistants.
28. I find that the two teachers (Ms Hill and Tessa) were retained in employment and paid during the school holidays in exercise of its discretion to do so by the Respondent. As teachers, they were generally expected to and did carry out some duties during that period. I find that the Claimant was not expected to carry

out any work and did not do so and was not retained in employment during the school holidays and have found that his employment terminated on 9 July 2021.

29. I was taken to a new updated Teacher's contract (at pages 64-70), and clause 10.3 at page 68 of the Bundle which it is contended differentiates between teachers and teaching assistants. Mr Montague confirmed that these changes were made after the time in question. As it was accepted that this change post-dates the period in question, I give it no evidential weight on the issues to be determined.
30. The Claimant accepted that he was in breach of contract by not giving a term's notice and that is why he apologised in the resignation letter and he said in his evidence and felt it important to note that he had tried to keep the school and Mr Montague informed prior to sending his resignation. After resigning he was made aware by Mr Montague that this was going to cause some disruption and apologised for this but felt at the time that the school were quite supportive in him getting the new job and gave him paid time off to attend interviews.

Submissions on Costs Application

31. In closing submissions, the Respondent made an application for costs on the basis that the Claimant's claim had no reasonable prospects of success. The Claimant opposed such application on the basis that he held a genuine belief in his claim, he was provided with a copy of a teacher's contract and cannot see any difference between teachers and teaching assistants in the terms of the contract and cannot see why he was wrong to assume he would be paid for July and August and that he went to Acas for advice before bringing his claim.

Law

32. Under **Section 13(1) of the Employment Rights Act 1996 (ERA 1996)** a worker has the right not to suffer unauthorised deductions from wages unless the deduction is required or authorised to be made by 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.

33. **s.13 (3) ERA 1996** states:

"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 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."

34. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to **Section 23 of the Employment Rights Act 1996**.

Time Limits

35. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made (**s.23(2)(a) ERA 1996**), or where a

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complaint is brought in respect of a series of deductions or payments, beginning with the date of the last deduction or payment in the series (**s.23(3) ERA 1996**), with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present the claim in time and the Tribunal considers it was presented within a reasonable period after that.

36. In **Arora v Rockwell Automation Ltd EAT 0097/06** the EAT set out three types of deductions: an actual deduction, a payment that is alleged to be less than what is due and a complete non-payment. For the first type of deduction the relevant time limit is contained in **s.23 (2)(a) ERA 1996**; for the second, an underpayment falls within **s.13(3) ERA 1996** and although not needed for its decision in that case, the EAT clarified that for a total non-payment, time begins to run from the date when the contractual obligation to make the payment arises, as decided in **Group 4 Nightspeed Ltd v Gilbert 1997 IRLR 398**.

‘Wages properly payable’

37. In deciding whether wages are properly payable the Tribunal has jurisdiction to resolve any issue necessary to do so including the meaning of the contract: **Delaney v Staples (t/as De Montfort Recruitment) 1991 ICR 331,CA** and in the combined appeals of **Agarwal v Cardiff University and Tyne & Wear Passenger Transport Executive v Anderson [2018] EWCA Civ 2084, [2019] IRLR 657** the Court of Appeal affirmed that the employment tribunal can, if necessary, construe and interpret the claimant's contract of employment including identifying any applicable implied terms in determining whether there had been an unlawful deduction from wages.
38. In **New Century Cleaning Co Ltd v Church 2000 IRLR 27**, the Court of Appeal found that in order to be within the definition of ‘wages properly payable’ there must be some legal (but not necessarily contractual) entitlement to the sum in question; if relying on a discretionary payment that is non contractual, it will be necessary to point to some other legal entitlement to the payment.
39. When interpreting the express terms of the contract in order to give effect to what the parties intended, the words should be interpreted in their ordinary sense in context and meaning, in accordance with conventional usage. With regard to employment contracts, in **Harlow v Artemis International Corporation Ltd 2008 IRLR 629, QBD**, Mr Justice McCombe said that these are ‘designed to be read in an informal and common sense manner in the context of a relationship affecting ordinary people in their everyday lives.’

Remedy

40. Where a Tribunal makes a declaration that there has been an unauthorised deduction from wages, it may order the employer to pay to the worker, the amount deducted, and such amount as the Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the unlawful deduction: section 24(2) ERA.

Conclusions

4.1 What was the date or dates when the Claimant claims payments were due?

41. The Claimant claims payment of his annual salary for July and August 2021. Clause 5.1 of the contract states that salary is payable monthly in arrears on or about the last working day of the month. In July, the Claimant said he was paid on 31 July 2021, receiving less than he claims he was entitled to receive by way of wages. In August, the last working day was 31 August 2021, when the Claimant claims his wages were fully withheld. I consider the relevant dates to be 31 July 2021 and 31 August 2021.

4.2 Was the claim presented in time?

42. In order to determine whether the claim was issued in time, it was necessary to hear evidence on whether there was a legal entitlement to payments from or of which it was alleged deductions were made. I refer to the issue identified at paragraph 4.6 and my conclusions at paragraph 51 below.

4.3 What date did the Claimant's employment come to an end?

43. The Claimant when giving notice said he would be 'leaving at the end of term'. His last working day was 9 July 2021, which was the last day of term before the school broke up for the holidays (clause 10 of the contract also clearly sets out the last day of Term for the purposes of notice). In completing his claim form in these proceedings the Claimant stated at 5.1 of the ET1 that his employment ended on 9 July 2021.

44. I consider that the Claimant gave short notice that expired at the end of term, which in this instance was 9 July 2021 and found that his employment terminated on 9 July 2021.

4.4 Does the Claimant's contract provide that he was entitled to be paid his annual salary or wages as claimed for the period of the school closure/holidays between 10 July 2021 to 31 August 2021? Were such wages 'properly payable'?

45. In order to succeed in his complaint of unlawful deduction of wages, the claimant must show that he was entitled to the wages he says were deducted in July and August 2021. In considering whether any wages are properly payable for the period of the school holidays from 10 July 2021 to 31 August 2021, I have considered Clause 5 of the contract on which the Claimant relies and which he contends as meaning that he remains entitled to receive his full annual salary despite his resignation, because he worked for the whole of the academic year up to the last day of term on 9 July 2021 and that clause 5 states that salaries continue to be paid during school closures.

46. I find that clause 5 in its ordinary meaning and its conventional usage in employment contracts is intended to set out the rate of remuneration, in this case an annual salary; and also to clarify how the annual salary offered under the contract shall accrue, which is on a 'day to day' basis; and when it will be paid, in

this case payable monthly in arrears. The inclusion of the rate of salary accrual is used for the purposes of calculating a rate of a day's pay, which may be necessary or relevant for a variety of reasons.

47. I have found that the Claimant's employment terminated on 9 July 2021 at the end of term and before the period of the school closure for the summer holidays. I conclude that the Claimant was entitled to be paid salary accrued up to the date of termination, which he was paid. In considering the interpretation of clause 5, I conclude that there is no evidence of or necessity to imply any special meaning to the wording in clause 5 beyond its ordinary meaning and that clause 5 does not operate to provide a legal entitlement to any ongoing accrual of wages after the termination of employment nor to provide a legal entitlement to be paid the balance of his annual salary as accelerated receipt on termination. I note that Clause 7 provides an entitlement to take as paid leave all usual school holidays and in its ordinary meaning and taking a common sense approach, I consider that taking paid leave during school holidays necessarily means leave taken from work during employment and not after it has terminated. I further consider that reference in clause 5 to salary continuing during school closures in its ordinary meaning and in context considering the contract as a whole, is reference to salary continuing to be paid during school closures during the employment and not after it has terminated.

48. In interpreting the Claimant's contract and taking account of the relevant case authorities and conclusions above, I conclude that there was no legal entitlement to the wages claimed by the Claimant under the contract and that such wages were not properly payable.

4.5 Did the Respondent have a discretionary policy sometimes to retain teaching staff until the end of the school closure/holidays, if so, did it extend to teaching assistants such as the Claimant and was it extended to the Claimant on this occasion?

49. The Claimant compares himself to two colleagues who were teachers, who left at around the same time and were paid during the school holidays after the end of the school term on 9 July 2021. He relies on their contractual terms being the same as his and argues that there is no difference in the express terms at clauses 5 and 7 to say why he should not be paid until the end of the school holidays also. I found that the Respondent exercised a discretion to retain teachers to the end of the school holidays and I have found that both teachers were retained and carried out some work or were present on site during that period. By contrast, I have found that there was no such expectation for the Claimant to work during the school holidays and that he did not do so and the Claimant's employment ended on 9 July 2021. I have reached the conclusion that the Claimant has not been able to show that any discretion exercised in relation to the teachers was or ought to have been extended to the Claimant nor do I find any evidence that the Respondent exercised its discretion unlawfully in this respect. I have made my findings above as to the interpretation of the terms of the contract and conclude that in the absence of the exercise of a discretion to retain him in employment to the end of the school holidays, the Claimant does

not have a legal entitlement to wages or payments for the period between 10 July 2021 and 31 August 2021, after the termination of his employment.

50. The evidence on whether such a discretion was or may have been extended to teaching assistants generally was limited as Mr Montague conceded that his personal knowledge was limited to a year but I did not need to decide this, having determined the point in relation to the Claimant.

4.6 Did the Respondent make an unauthorised deduction from wages by withholding payment for the period 10 July 2021 to 31 August 2021?

51. I do not consider that the Respondent made an unauthorised deduction from wages. Dealing with the issue identified at paragraph 4.2 of the list of issues relating to jurisdiction, I determined that no wages were properly payable. As I have not determined that any deductions have been made, it is not necessary to determine whether the unauthorised deduction from wages complaint was made within the time limit set out in section 23 ERA 1996. There were no deductions and so no series of deductions the last of which was brought in time. However, had the wages claimed been found properly payable, I consider the claim was presented in time. The date for payment in the last in a series of deductions in the case of a total non-payment of wages, is the date on which the contractual entitlement to wages arises and payment is due under the contract i.e. on 31 August 2021. Therefore the primary limitation was 30 November 2021 and the claim was presented in time on 29 November 2021, limitation also being extended by acas early conciliation by 22 days to 22 December 2021.

COSTS

52. In considering an application for costs under s.76(1) (b) that the claim had no reasonable prospect of success, I must first ask myself whether the ground is made out and secondly, if so I must ask myself whether it is appropriate to exercise my discretion in favour of awarding costs against the Claimant.
53. At the first stage, the question I must ask myself is whether the claim had reasonable prospects of success judged on the information known or reasonably available at the time it was brought and what view the claimant could reasonably have taken of the prospects of the claim in light of that.
54. The Claimant is a litigant in person and prior to the issue of proceedings had taken advice from acas which he understood to mean that despite resigning in breach of contract, he was entitled to pursue a claim for unlawful deductions from wages. The Claimant is a litigant in person and is not legally qualified and took a literal approach to the interpretation of his contract that he was entitled to continue to be paid during the school closure and was sent a teacher's contract by the school that was expressed in the same terms. In reliance on this, he believed that he should be entitled to be treated the same as two teachers who left the school at the same time as him and were paid their wages during the summer holidays, it not being known to him or apparent on the face of the contract that the Respondent had exercised a discretion to retain the teachers in employment during the holidays, which it did not exercise in respect of the

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Claimant. I note that in its application for strike out or a deposit order submitted on 31 January 2021, the Respondent did not include a costs warning or application for costs in the event its application were successful and given the proximity of the full merits hearing, it was determined that it was disproportionate for a preliminary hearing to be listed. I was told by Ms Stock that the Respondent has incurred costs in the region of £3,500. This is a similar sum to that claimed in these proceedings.

55. In considering the two stage test above and in deciding whether to exercise my discretion to award costs, I also take account of the fact that costs in the employment tribunal remain the exception rather than the rule. Taking all of the circumstances and above factors into account, I am satisfied on the evidence before me that based on the information known or reasonably available at the time and the matters in dispute that the claimant reasonably believed that there was genuine merit in his claims and that they had reasonable prospects of success. I do not consider it appropriate to exercise my discretion to order costs in this matter and the Respondent's application is refused.

Employment Judge Hunt

Date 05/04/22

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
06/04/2022.

FOR EMPLOYMENT TRIBUNALS