



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Harrison

Respondent 1: Governing Body of Endon Hall Primary School

Respondent 2: Staffordshire County Council

Heard at: Birmingham (Hybrid hearing via CVP)

On: 30th March 2022

Before: Employment Judge Beck

Representation

Claimant: In Person, Mr Harrison, Husband, assisting
Respondent 1: Mr Mahmood, Legal Executive

RESERVED JUDGMENT

1. With the consent of the parties, the Governing Body of Endon Hall Primary School is added as a respondent to these proceedings.
2. The claimant's complaint for redundancy pay is upheld and the claimant is awarded £366.77 for redundancy pay. Respondent 1 is to pay the claimant this sum.
3. The claimant's complaint for unauthorised deductions from wages in respect of arrears of pay is not upheld.
4. The claimant's complaint for unauthorised deductions from wages in respect of holiday pay is not upheld.

REASONS

Introduction

1. The claimant presented an ET1 form on the 12/10/21 in respect of her claim for redundancy pay, arrears of pay and holiday pay. She was employed by Staffordshire County Council and had 2 contracts of employment, one for a Higher-Level Teaching Assistant role (HLTA), and one for a Lunchtime Inclusion Support Assistant role (LISA).
2. The parties agreed that the Governing Body of Endon Hall Primary School should be added as a party to the proceedings. Mr Mahmood, on behalf of the school, drew the tribunal's attention to the provisions of the **Education (Modification of Enactments Relating to Employment) (England) Order (2003)**. This provides for the Governing Body to carry out the functions of the employer. In respect of conduct, discipline, suspension and dismissal of staff (including redundancy) the Governing Body carry out those activities in accordance with the **School Staffing (England) Regulations (2009)**.
3. The hearing was due to take place via CVP, however the claimant and respondent both attended the Tribunal Hearing Centre in Birmingham. Arrangements were made to use a tribunal room, and I conducted the hearing via CVP with both parties at the hearing centre.
4. The respondent has provided the tribunal with a 162-page bundle. Copies of the bundle were available to the parties at the hearing. I heard evidence from the claimant, and Miss Lewis, Headteacher of Endon Hall Primary School on behalf of the respondent.

Agreed Facts

5. The claimant commenced employment with Staffordshire County Council on the 2/9/13.
6. The claimant was employed as a HLTA, on a part time, permanent contract, based on 18 hours a week at a grade 7, from the 30/12/19.
7. The claimant was employed as a LISA, based on a part time, permanent contract of 5 hours a week, on a grade 4. On the 30/12/19 this contract was amended to reduce the hours worked to 4 hours a week.
8. From the 1/11/19 the claimant worked an additional 16.25 hours per week as an Inclusion Support Assistant (ISA) and was paid in accordance with a grade 4 salary for those hours.
9. The claimant was dismissed on the grounds of redundancy from the HLTA role on the 12/8/21.

10. Due to a previous union agreement 32.5 hours per week was deemed to be the full-time equivalent working week.
11. The claimant's gross monthly salary for the HLTA role was agreed as £1107.75 by the parties, and is shown in the salary slips in the bundle.
12. The parties agree the claimant had 7 years' service, and was entitled to 7 x 1.5 weeks' pay for each year of service, therefore entitled to 10.5 weeks' pay in the redundancy calculation.
13. The claimant's written statement of particulars at page 39 of the bundle, confirms that based on 5-14 years' service, the claimant was paid 45.86 weeks a year. This was based on working 38 weeks with the children and 1 week's training. The additional payment reflecting pro rata annual leave and public holiday entitlements, based on the county council's agreed formula.

Issues in Dispute

14. In relation to the redundancy payment the claimant states the calculation was incorrect. The authority of **Gilbert and others v Barnsley MBC 2002** being relied on by the claimant to establish the proposition that a week's pay for term time only employees, who are paid in equal installments over the year should be based on a week's pay for the weeks which are actually worked, and not on 1/52 of their annual pay.
15. The respondent maintains the redundancy payment has been calculated correctly. Weekly pay of £254.94 x 10.5 weeks totaling £2676.87.
16. The claimant states the additional 16.25 hours she agreed to work on the 1/11/19 were under her HLTA contract. She accepts she agreed to be paid for the hours at a grade 4 salary, but maintains they were part of her HLTA contract. The claimant argues the 16.25 hours should be aggregated with her HLTA hours, and the calculation of a week's pay for redundancy purposes should be based on the combined hours, as they represented her normal hours. The claimant asserts she has been underpaid for the redundancy payment she is due.
17. The respondent's position is that the 16.25 hours were not agreed as part of the HLTA contract. They were additional hours offered on a temporary basis, and formed a third contract between the claimant and the respondent. The additional hours should not be taken into account for a redundancy calculation.
18. As part of the claimant's calculations, she has referred to an amount of 'pension compensation' which the respondent had paid as part of its 'lump sum compensation' from the local government pension scheme. The claimant puts forward, as the calculation of redundancy pay is wrong on the grounds put forward under paragraphs 11 and 13 above, the lump sum compensation is wrong and ought to be adjusted by the tribunal. The claimant was not able to confirm on what basis she said the tribunal had the jurisdiction to consider this matter.
19. The respondent's position was that the tribunal has no jurisdiction to deal with the lump sum compensation payable. This is on the grounds it is governed by

a contractual relationship between the parties, which operates outside of the jurisdiction of the tribunal.

20. The claimant's position is that she worked the whole academic year from September 2020 until July 2021. She was not paid in full for the 45.86 weeks worked, and therefore a shortfall payment is due. If this argument is not accepted, the remaining weeks of the year represented holiday pay, and should have been paid as accrued holiday.
21. The claimant also pursues a claim based on holiday entitlement for the 16.25 hours she worked additionally, for the period 1/11/20 until 12/8/21. The claimant accepts a payment was made in September 2020 for this but maintains this was not the full amount due to her.
22. The respondent denies that the claimant is due any additional payment for either arrears of pay or holiday pay for the additional hours worked, and maintains the payment in September 2020 was correct.
23. The claimant's position is her gross weekly pay in relation to the HLTA role was £289.87.
24. The respondent's position is that gross weekly pay is £254.94 for the HLTA role. This is based on a full-time salary of £27,041, based on a 32.5-hour week. On an 18-hour contract, 18 divided by 32.5 x 27,041 is £14,976.55. To work out weekly pay the calculation is 14,976.55 divided by 52.14 weeks x term time paid weeks of 46.28 is £13,293.34, the annual salary the claimant earned. Weekly pay has been calculated at 13,293,34 divided by 365 days x 7 days is £254.94.

Evidence Heard

25. The claimant confirmed the HLTA role was a subject leader role, which involved delivering art and design lessons to different classes throughout the school. This was normally undertaken in the mornings. During covid the claimant was asked to work afternoons supporting keyworker children whilst paid the HLTA salary, as she was unable to work in different classrooms due to covid restrictions. On the 30/10/20 (bundle page 30) she received a text from Miss Lewis, asking if she would work 1:1 with a child in year 5 to include some mornings paid at grade 4 ISA. The claimant agreed to this arrangement, and began working in the mornings with the child in year 5, on a 1:1 basis. She also covered this role in the afternoons as she could not undertake her HLTA role due to covid, the school were keeping pupils in bubbles to prevent the spread of covid.
26. When cross examined, the claimant maintained she had agreed to do the extra hours under the HLTA contract, although accepted she was paid grade 4 for mornings and grade 7 for afternoons. She maintained that the HLTA and 1:1 role were not distinct roles, she believed her duties under the HLTA role had changed, and the 1:1 role was part of it at that time. She accepted the child who she worked with 1:1 was still at the school, and that she did not accept the role when it was offered to her after redundancy. She accepted that she did not challenge the notice of redundancy served on her, regarding the HLTA role on the 24/6/21, or challenge whether the additional 16.25 hours were redundant also.

27. Miss Lewis confirmed staff work 39.2 weeks per year, and are paid for 45.86 weeks, which takes into account holiday pay which is incorporated. Due to Covid difficulties, the claimant could not undertake the HLTA role as she would normally be in different classes in the afternoon. The WhatsApp messages formed the basis of an agreement between the parties, and clarified the ISA was a grade 4 role. She confirmed the claimant was working 1:1 all day with the same child, being paid at grade 4 in the morning, and grade 7 in the afternoon. It was her intention that the claimant would return to the HLTA role, however budget cuts and changes to ways of working resulted in the role being made redundant.
28. Miss Lewis maintained when cross examined that there was a distinction in the duties of an HLTA and ISA, and this was reflected in the grade for both roles. She asked why the claimant had not queried her salary, if she believed the 16.25 hours to be part of the grade 7 contract. It was supposed to be a short-term arrangement until December 2020. She confirmed she was unable to offer the claimant a fixed term contract for the 16.25 hours, as the ISA was a full-time role on a grade 4 contract. When cross examined, she stated the additional 16.25 hours were performed under a grade 4 inclusion support contract.

Reasons, conclusions and the law

Redundancy Pay

29. It is apparent from the pay slips provided in the bundle, that the claimant undertook the grade 4 ISA role for 16.25 hours per week, and was paid from the 1/1/19 until she was made redundant. The evidence provided in respect of the basis under which the 16.25 hours was undertaken is at page 30 of the bundle. The text from Miss Lewis on the 30/10/20, requested the claimant do alternative work instead of the HLTA work, by undertaking afternoon work in year 5 on a 1:1 basis. It was clear from this request that there was an additional request for morning working at grade 4 ISA.
30. The claimant in evidence was convinced that this was part of her HLTA contract, however I have not been presented with any other evidence to support this. Miss Lewis conceded no follow up e mail was sent after the text.
31. I find that Miss Lewis had made a reasonable request of the claimant, under her existing terms and conditions for the HLTA role, to work in the afternoon, due to changes required due to the impact of covid. The offer of work in the mornings at grade 4 ISA rate was a temporary concurrent contract being offered, which was alongside the HLTA and LISA contracts. I have taken into account, and the claimant accepted in cross examination, that she did not query the payment rate for the additional hours at the time in November 2019. If the claimant believed the additional 16.25 hours were payable under the HLTA contract, I would have expected the rate of pay to be queried at the time.
32. I have formed this conclusion, because it is clear from Miss Lewis's evidence that there was a requirement for a grade 4 ISA role full time in the longer term. This was a temporary solution because the claimant could not carry out her HLTA role because of covid restrictions. That this was only a temporary position, is supported by the evidence Miss Lewis gave that she offered the claimant this role when she was made redundant, on a full-time grade 4 ISA

salary. The claimant accepted in her evidence that she was offered this role and rejected it. Further confirmation that this was a temporary position for the claimant is provided at pages 114 and 115 of the bundle. In November 2021, the school was employing a full-time member of agency staff to undertake the full-time ISA role, in relation to the same child.

33. I find it significant that the claimant accepted her redundancy notice on the 24/6/21, in relation to the HLTA role, no appeal against this decision was made. In the claimant's letter dated 15/6/21, this appears to be the first time a query has been raised that the 16.25 hours formed part of the HLTA contract. I find this evidence supports my conclusion that the 16.25 hours formed a separate concurrent contract based on the WhatsApp message.
34. Mr Mahmood drew my attention to the case of **Lewis v Surrey County Council, (1987) IRLR 509**, in which the House of Lords found that it was not permissible to aggregate hours of work under distinct and concurrent contracts of employment, for the purpose of establishing continuous employment. It was pointed out that if parliament had intended this, it would have provided guidance on how this was to be achieved. The claimant did not make any particular representations on this case, and I have made my findings taking the case into account.
35. Therefore, any redundancy payment is based on the claimant's 18-hour contract. It is agreed by the parties that the claimant is entitled to 7 x 1.5 weeks' pay, 10.5 weeks' pay in total in relation to the redundancy payment.
36. The parties accepted the claimant's gross monthly salary for the HLTA role was £1107.75, which equates to a pro rata annual salary of £13,293.34. The respondent calculates weekly pay based on £13,293.34 divided by 365 days x 7 days as £254.94.
37. The claimant's calculation of weekly pay is based on £13,293.34 divided by 45.86 weeks as £289.87.
38. In accordance with **section 145 (2) Employment Rights Act (1996)**, the relevant date for the purposes of redundancy pay, is the date on which notice expires, when the contract has been terminated by notice. In this case, the relevant date is the 12/8/21, as evidenced by the second respondent's letter dated the 24/6/21, terminating the HLTA contract.
39. The calculation date, in accordance with **section 226 (6) Employment Rights Act (1996)** is the date on which notice would have been given by the employer to comply with minimum notice periods. In this case the notice period is accepted as 7 weeks, respondent 2 giving notice by letter dated 24/6/21, therefore the calculation date is the 24/6/21.
40. The claimants have relied on **Gilbert and others v Barnsley MBC 2002**. The case is an Employment Appeal Tribunal case which relates to employees of a school and how weekly pay is calculated for the purposes of a redundancy payment. Mr Gilbert, for example, was a technician at a school, employed on a contract under which he was paid for working 44 weeks, to include holidays, the actual working year being 38 weeks and 2 days. He was paid in 12 equal installments over the year, and argued his redundancy payment should have been calculated by using his annual salary divided by 44 weeks to arrive at his

weekly pay figure. The EAT accepted this argument, and found the reality of the annual contracts which the claimants had was that they were paid to work 44 weeks per year, and they were not required to work / or did work for the remaining 5/6 weeks per year. Normal working hours meant the hours worked in a normal week, not during a week when the claimants did not work at all. The EAT directed the calculation for redundancy payments in these circumstances should be annual salary divided by 44 weeks.

41. Mr Mahmood for respondent 1, has not made any particular submissions on the Gilbert case, or referred to any contrary authorities. The case is very similar in terms of the facts of this case, and I am required to follow it. Therefore, the redundancy calculation will be based on the actual weeks worked by the claimant.

£13,293.34 divided by 45.86 weeks = £289.87 weekly pay

£289.87 x 10.5 weeks = £3,043.64

£3,043.64 - £2,676.87 (redundancy payment already made) = £366.77

42. In relation to the 'pension compensation' the claimant has referred to in her claim, the claimant has not confirmed on what basis she says the tribunal has jurisdiction to consider this matter. Mr Mahmood on behalf of the first respondent maintains the tribunal has no jurisdiction in the matter. Considering the letter dated 14/5/21 sent to the claimant from the Staffordshire Pension Fund, a lump sum payment of £5353.74 gross was made in accordance with the **Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations (2006)**. It is apparent from the regulations that the employing authority may decide to pay discretionary compensation under the regulations, but it is a matter for them to determine. The tribunal has no jurisdiction in respect of this.

Arrears of pay / Holiday pay

43. The parties agreed the claimant received 7 weeks' notice of termination of employment on the 24/6/21, and her employment terminated on the 12/8/21, this was in accordance with her HLTA contract of employment, and she received notice pay based on this period.
44. The claimant's position is that her final salary slip in August 2021 of £428.82 for the HLTA role is incorrect, in that she should have been paid in full for the 45.86 weeks worked, and is due an additional £678.96. (£1,107.78 - 428.82). The claimant's position is that the respondent should have given her notice up until the end of August 2021.
45. The respondent's position is that the claimant has been paid her final salary correctly, up to the date of termination of contract, 12/8/21. This is on the basis the claimant was paid 12 monthly payments of £1,107.78, her salary on the 12/8/21 reflecting her employment for the period 1/8/21 to 12/8/21.
46. The claimants' HLTA contract (page 39 bundle) was paid on the basis of 45.86 weeks worked including pro rata holiday entitlement. The respondent paid the claimant up until the termination of her contract on the 12/8/21, which was

during the school holidays. It was the respondent's decision as to when to terminate the claimant's contract from. I accept the respondent's evidence, and am satisfied the claimant was paid correctly for the salary due to her and there are no arrears outstanding. Because the salary included a pro rata amount to cover holidays and bank holidays, I am satisfied there are no arrears of holiday pay due under the HLTA contract, therefore the claim for arrears of pay fails, on the basis I find the respondent has not made a deduction from the claimant's wages.

47. In relation to holiday pay relating to the additional 16.25 hours, the claimant accepted receiving a payment of £173.19 in September 2021, reflecting accrued holiday pay for additional hours worked from 1/11/19. Both parties accept this is based on 14.9 hours paid at the hourly rate of the ISA role, grade 4 of £11.62.
48. The claimant's position is that this is not correct, and should be based on a 5.6-week yearly holiday entitlement, pro-rated because the claimant worked 32/39 weeks, amounting to £865.45. The respondent rejects this argument as holiday pay is already incorporated into the claimant's pay, based on 38 actual weeks working, 1 week training and 45.86 weeks paid to reflect holiday entitlement. Mr Mahmood puts forward that a 5.6-week holiday entitlement is based on a full-time staff member working a full year, which is not the case for the claimant.
49. It is apparent from page 82 of the bundle, that the bursar who worked out this entitlement considered the hours the claimant worked under this additional contract as set out at page 77 of the bundle. The details contained cover the period 19/10/20 (before the additional hours contract started) to 21/6/21. The bursar has then worked out the pro rata holiday entitlement to 31/8/21, past the date the claimant's contract ended. I am satisfied this accords with how entitlement is calculated under the claimant's contract. 5.6 weeks holiday is the default position, but in this case the contractual terms prevail. I am satisfied the claimant has been paid the correct amount of holiday pay in relation to the 16.25 hours, and therefore the claim for holiday pay fails.

**Employment Judge Beck
27th April 2022**