



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr A Martin**

Respondents: **(1) Southwark Council**
(2) The Governing Body of Evangelina Hospital School

HELD AT: London South
ON: 12 March 2019
Before: Employment Judge Freer

Appearances:
For the Claimant: In person
For the Respondents: Mr P Linstead, Counsel

JUDGMENT FROM A PRELIMINARY HEARING

It is the judgment of the Tribunal that:

- (1) The Claimant's claim for unauthorised deductions from wages has no reasonable prospect of success and is struck out;
- (2) The protected disclosure at paragraph 4(c) of the List of Issues (an alleged disclosure to Michael Davern, Joint Secretary of NUT Southwark Section on 27 September 2017) has no reasonable prospect of success and is struck out;
- (3) The Respondents' application for a strike out or deposit order on the ground that the alleged protected disclosures were not in the public interest is refused;
- (4) The Respondents' application for a strike out or deposit order on the ground that the detriments relied upon by the Claimant have no or little reasonable prospect of success is refused;
- (5) The issue of the Tribunal's jurisdiction, having regard to the applicable time limits, is an issue for the full hearing;
- (6) The Claimant's application to amend his claim to add two additional Respondents is refused.

REASONS

1. This is a Preliminary Hearing arising from the Case Management Order of Employment Judge Martin on 13 September 2018. The issues for consideration are set out at paragraphs 4.1 to 4.5 of that Order.
2. The Respondent confirmed that it no longer objected to issue 4.2 regarding the correct jurisdiction for the claim of unpaid wages: whether it is an unauthorised deduction from wages or breach of contract claim and whether the Tribunal can consider it. This issue has been settled by the case of **Agarwal v Cardiff University**, which confirmed that a Tribunal may determine the construction of a contract of employment in an unauthorised deduction from wages claim.
3. In addition, the Tribunal addressed the terms of the list of issues and the issues raised in the Claimant's fourth claim under case number 2304431/2018. The Claimant's revised list of issues includes the matters contained in the fourth claim that he wishes to argue, in respect of which the Respondent has not yet had an opportunity to respond. Additional Directions have been made in a separate Order.
4. The Tribunal also considered the Claimant's application to amend his Particulars of Claim to add the Headteacher and the Chair of the Governing Body of Evangelina Hospital School as Respondents to all four of his claims.
5. The parties produced at a bundle of documents comprising 526 pages. The Claimant produced extra documentation. The Respondent produced a written skeleton argument. The Tribunal received a written witness statement from the Claimant, which it used with his consent as the Claimant's written submissions as it addressed the matters under review. Both parties also gave oral submissions.
6. The Tribunal referred itself to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, in particular rules 2, 37 and 39, together with authorities and statutory provisions submitted and relied upon by the parties.

Strikeout/Deposit Order in respect of the unauthorised deduction from wages claim

7. The Claimant makes three claims in respect of unauthorised deduction from wages. The first is with regard to the academic year 2015 to 2016 and a claim of 122 hours totalling £4,624.29. The second for the academic year 2016 to 2017 and a claim of 108.5 hours totalling £4,195.37. The third for the period of the 2017 Autumn term and a claim of 4.45 hours totalling £173.77. This is set out in the Claimant's Particulars of Claim at page 19 of the bundle. The 2017 Autumn term simply relates to September 2017 because the Claimant accepts that by October the hours issue had been resolved.
8. The Claimant's working hours are regulated by statute to the extent that a Teacher cannot work more than 1265 'directed' hours per academic year.

Directed hours are the periods in which a teacher is required by the headteacher to teach pupils in addition to carrying out other duties.

9. The Particulars of Claim argue: "The directed hours totals 7 hours per day. This amounts to 1365 hours over 195 days which contravenes the statutory 1265 hours by 100 hours each academic year. However, five days are INSET days which are usually shorter, consisting of six directed hours. This reduces the amount by five hours, totalling 95 directed hours worked in contravention of the statutory 1265 hours. Compulsory lunchtime meetings have reduced teachers' lunches by half an hour. Each lunchtime meeting adds half an hour to the 95 directed hours in contravention of the statutory 1265 hours. I am in many teams and therefore have a large number of lunchtime meetings. The Monday staff meeting every week finishes at 16.45 adding a further 15 minutes each week to the directed hours in contravention of the statutory 1265 hours".
10. Therefore the Claimant's claim in each year is based upon the number of hours worked in excess of the statutory 1265 hours of directed time, which as set out above includes; 95 hours extra per year, accruing daily, based on an 8.30am to 4.30pm day; 7.5 hours due to 30 staff meetings a year that add 15 minutes to the day; two hours due to four twilight meetings a year which add 30 minutes to the day; and 7.5 hours due to 15 lunchtime meetings of 30 minutes. The Claimant has set out these hours in schedules that commence at page 506 of the bundle.
11. The Claimant entered into a contract of employment with Southwark Council and the terms of that agreement are set out in a letter dated 26 June 2015, which commences at page 112 of the bundle.
12. That contract states: "You will be paid a salary calculated in accordance with the relevant order made by the Secretary of State for Education and Employment under the School Teachers' Pay and Conditions Act 1991 and any successor legislation".
13. With regard to hours of work the contract states: "Subject to any relevant orders made by the Secretary of State for Education and Employment and the School Teachers' Pay and Conditions Act 1991 and any successor legislation, a teacher employed full-time shall be available for work for 195 days in any school year, of which 190 days should be days on which he/she may be required to teach pupils in addition to carrying out other duties, and those 195 days shall be specified by his/her employer or, if the employer so directs, by the headteacher. Such a teacher shall be available to perform such duties at such times and in such places as may be specified by the headteacher, for 1265 hours in any school year, those hours to be allocated reasonably throughout those days in the school year on which he/she is required to be available for work. Such a teacher shall in addition to the requirements set out above, work such additional hours as may be needed to enable him/her to discharge effectively his/her professional duties, including, in particular, the marking of pupils work, the writing of reports on pupils in the preparation of lessons, teaching material and teaching programs. However, the amount of time required for this purpose beyond the 1265 hours and the times outside the 1265

specified hours should depend upon the work needed to discharge the teacher's duties".

14. The Tribunal was taken to the 'School Teachers Pay and Conditions Document 2017 and Guidance on School Teachers Pay and Conditions' dated September 2017, which is expressly incorporated into the Claimant's contract of employment.
15. Part 1, Paragraph 1.1 of the School Teachers Pay and Conditions Document 2017 provides: "Subject to paragraphs 29 to 36, 38 and 39, a qualified or unqualified teacher in full-time service is entitled to remuneration consisting of a salary determined under Parts 2 or 3 and any allowances payable under Parts 4 and 5". The main minimum and maximum pay ranges for from 1 September 2017 is set out at paragraph 13.1.
16. Part 1, paragraph 3 of the Document addresses 'Timing of salary determination and notification': which must be made annually with effect from 01 September of each year.
17. Part 4 the Document addresses 'Allowances and other payments for classroom teachers' and relates to teaching and learning responsibility payments, which is not relevant to this case.
18. Section 3 provides Guidance for Local Authorities, School Leaders, School Teachers and Governing Bodies of Maintained Schools and states at paragraph 3: "The Document [the School Teachers Pay and Conditions Document 2017] contains provisions relating to the pay and conditions of teachers and not support staff, whose pay and conditions are determined locally. No payments or conditions of employment other than those provided for in the Document may be applied to teachers, except those conditions which are always determined locally and which do not conflict with the Document, unless the Secretary of State has granted exemptions under other legislation. The Document does not provide for the payment of bonuses or so-called 'honoraria' in any circumstances".
19. The 'Working time' of teachers is set out in the Document at paragraph 51 and paragraph 51.5 which confirm: "A teacher employed full-time must be available to perform such duties at such times in such places as may be specified by the headteacher (or, where the teacher is not assigned to any one school, by the employer or the headteacher of any school in which the teacher may be required to work) for 1265 hours, those hours to be allocated reasonably throughout those days in the school year on which the teacher is required to be available for work".
20. Paragraph 51.6 provides: "Paragraph 51.5 applies to a teacher employed part-time, except that the number of hours the teacher must be available for work must be that proportion of 1265 hours which correspond to the proportion of total remuneration teacher is entitled to be paid pursuant to paragraphs 40 and 41".

21. Paragraphs 40 and 41 are provisions that expressly only relate to part-time teachers.
22. Paragraph 51.7 of the Document provides: "In addition to the hours a teacher is required to be available for work under paragraph 51.5 or 51.6, a teacher must work such reasonable additional hours as may be necessary to enable the effective discharge of the teacher's professional duties, including in particular planning and preparing courses and lessons; and assessing, monitoring, recording and reporting on the learning needs, progress and achievements of assigned pupils".
23. Paragraph 51.8 provides: "The employer must not determine how many of the additional hours referred to in paragraph 51.7 must be worked or when these hours must be worked".
24. The Claimant argued that he was required to work directed time for the academic year 2015 to 2016 the starting and finishing times of 8.30am to 4.30pm; the academic year 2016 to 2017 starting and finishing times of 8.30am to 4.30pm; and in the academic year 2017 to 2018 there were a number of changes from 04 September 2017 of 8.30am to 4.15pm; 11 September 2017 of 8.30am to 4.00pm and 04 October 2017 of 8.30am to 3.45pm.
25. Directed time can comprise teaching duties and non-teaching duties.
26. The Claimant referred to a document dated 2011 with respect to a past headteacher where the directed time is set out in a schedule. The Tribunal concludes that this is not a materially relevant document for the purposes of the Claimant's claim because the preparation of these types of working time calculations stopped when the new headteacher took over in September 2013 and the Claimant himself was not employed until September 2015.
27. The Tribunal was taken to a document at page 192 of the bundle where the current headteacher set out a directed time budget for the academic year 2017 to 2018. This refers to a working day (both timetabled and non-timetabled) between 8.30am and 3.45pm, factors in 5 INSET days, weekly Staff Professional Development Meetings and a 19-hour contingency. This gives a total of the statutory limit of 1265 hours. The Respondent raised an argument that the Claimant was confusing a working day with directed hours, however this document suggests that the headteacher was also calculating directed hours on the basis of an 8.30 to 3.45 typical working day and which included non-teaching time.
28. The Tribunal was referred to the minutes of a staff meeting on 09 May 2016 where the headteacher set out that the work hours for teaching staff is 8.30am to 4.30pm and also an email dated 11 September 2017 where directed activities were set out as being 8.30am to 4.00pm. All these documents are consistent with the Claimant's breakdown of directed time as set out in paragraph 77 of his witness statement.

29. The contractual documents make no reference to any rate of pay for directed time that teachers are required to work above the 1265 statutory limit. The Claimant argues that this is self-evident as the limit is precisely that and therefore there is no anticipation within the document that any teacher would work beyond that amount.
30. The provisions of section 13 of the Employment Rights Act 1996 relating to unauthorised deductions from wages are: "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".
31. Accordingly, to be 'properly payable' the Claimant must point to a legal entitlement (which need not necessarily be a contractual entitlement) to pay for the hours worked in the circumstances he describes.
32. The Claimant is not able to do that as there is no provision in any of the contractual documents produced to the Tribunal relating to pay for any directed hours worked above 1265 per year. An annual salary is paid in respect of which a teacher must work directed hours of no more than 1265 per annum and such additional hours as reasonably necessary to effectively discharge their work duties, but the amount and when those additional hours are to be worked cannot be directed by the employer.
33. The salary details of the Claimant are at pages 124 to 125 of the bundle and that sets out an annual rate at the foot of the document simply by dividing the annual salary by the 1265 directed hours limit. However, there is nothing to suggest that this is anything more than for payroll purposes and certainly has no link to any legal entitlement in the contract of employment and incorporated Pay and Conditions Document and Guidance.
34. The Claimant argued that a proportionate relationship applied between hours and pay and relied upon paragraphs 51.5 and 51.6 of the Document. However those paragraphs simply provide that a part-time teacher must be available for work for such proportion of the 1264 maximum hours that corresponds to the proportion of total remuneration the teacher is entitled to be paid. Those paragraphs do not apply to the Claimant because, obviously, he is not a part-time teacher and the Guidance specifically states that no payments or conditions of employment other than those provided for in the Document may be applied to teachers, except those conditions which are always determined locally and which do not conflict with the Document. The Claimant has not relied upon any locally agreement in respect of pay for directed time over the 1265 maximum. The Claimant accepted that he worked hours in addition to directed hours, as anticipated by paragraphs 51,7 and 51.8 of the Document and was not pursuing a claim for pay in respect of those hours worked. Therefore, the Claimant's annual salary already includes a sum in respect of hours worked above the 1265 directed hours maximum.

35. Accordingly, the Tribunal concludes that it appears there is no legal entitlement to pay for directed hours worked over the statutory limit of 1265 per year. As a consequence, no sum of money would become properly payable on any occasion, whether that is considered weekly, monthly or annually. The Tribunal concludes on the material put before it that the Claimant's claim for unauthorised deductions from wages has no reasonable prospect of success and is struck out.
36. The Claimant remains employed by the Respondent and therefore cannot pursue a breach of contract claim at the employment tribunals because such a claim can only be pursued where the breach of contract exists or arises upon termination of employment. However, even if the tribunal could consider a breach of contract claim in the Claimant's circumstances, it is difficult to see how the additional directed hours worked by the Claimant can give rise to a liquidated sum in damages without any implied term as to entitlement and rate of pay.

Strikeout/Deposit Order in respect of the protected disclosure claim

37. With regard to the protected disclosure claim and prospects of success, the protected disclosure at paragraph 4(c) of the list of issues (an alleged disclosure to Michael Davern, Joint Secretary of NUT Southwark Section on 27 September 2017) is a disclosure to a third party. Having regard to the Respondent's written submissions at paragraphs 52 to 57 it is the Respondent's evidence that no one from the Respondents saw the disclosure to the Claimant's trade union representative. The Tribunal concludes on balance that this protected disclosure has no reasonable prospect of success and is struck out.
38. With regard to whether or not the disclosures made were in the public interest, the Tribunal has been referred to the case of **Chesterton Global v Nurmohamed** which is set out in the Respondent skeleton argument at pages 12/13. The Claimant argues that he was pursuing this matter on behalf of colleague teachers. There are seven teachers at the Respondent school. It is an interest that potentially amounted to over 100 hours per year additional directed hours of work for each teacher. There is also a potential issue over whether or not the application of those additional hours was deliberate given the documents before the Tribunal setting out the directed hours and the Claimant's contention that they were changed when the matter was raised by the him. The Tribunal concludes that there is a live issue over whether or not in the reasonable belief of the Claimant the disclosure of information was in the public interest. On balance the Tribunal considers that this issue is arguable and cannot be described as having little or no reasonable prospect of success.
39. With regard to whether certain allegations cannot amount to detriments, the Tribunal was referred to paragraph 11 (a) to (q) of the List of Issues. The Claimant struggled to explain why (d) related to his protected disclosure and confirmed that (f) was not Ms Hamilton telling the Claimant that she had received a complaint from a colleague about him on 01 December 2017, but it was the time taken by Ms Hamilton to address the complaint and eventually tell the Claimant, he says, in July 2018 that it was not being pursued.

40. The Claimant's issue with (k) is that although Ms Hamilton had said in the Governing Body meeting that she was taking a member of staff through capability procedures without saying who it was, the Claimant argues that this declaration was actually not true and at that stage it had not been placed in the capability procedure.
41. With regard to (m), the Claimant confirmed that this matter related to Ms Hamilton's alleged behaviour at the Claimant's return to work meeting on 24 April 2018 where he says she stood up throughout that meeting and raised her voice to the Claimant.
42. With regard to (q) the Claimant argues that he had made a formal complaint two weeks before his email account was suspended. He argues that it was not standard practice for the Respondent to suspend an email account when an employee is off work through sickness and that he asked for confirmation of the document upon which that contention was made, which was not produced. The Respondent refers to document 284A of the bundle.
43. On balance and all matters considered, the Tribunal accepts the Claimant's submission that all of these detriments need to be considered in the round and that it cannot be said at this stage that they have no or little reasonable prospect of success. They are matters that are fact sensitive to be determined at the full hearing.

Time Limits

44. With regard to time limits, the Tribunal has made the decision above that the Claimant's unauthorised deduction from wages claim has no reasonable prospect of success and is struck out, but in any event for confirmation that claim is subject to the two-year statutory time limit and therefore any payments arising as properly payable prior to March 2016 is subject to the statutory jurisdictional bar.
45. With regard to the claim generally, the Claimant's claim to pay relates to matters occurring on a daily basis and therefore if the claim was not struck out, the issue of whether any deductions as found amount to a series of deductions would be a matter for the full hearing.
46. With regard to the protected disclosure claim and time limits, although the Respondent drew the Tribunal's attention to this matter in essence relating to two individuals over a period of 5½ months, the Tribunal concludes that whether or not it amounts to a series of events is a matter for the full hearing. In principle there is no reason why the involvement of the headteacher and deputy headteacher over that length of time after the Claimant made his alleged protected disclosure could not form part of a reason for any detrimental treatment. Whether or not there were any protected disclosure detriments; if so, whether or not they amount to a series of events; and if not whether an extension of time should be permitted to consider any claims that are out of

time are issues for the employment tribunal to determine at the full merits hearing after receiving evidence on them.

47. With regard to the Claimant's application for an amendment to add to all of his claims two additional Respondents of the Headteacher and the Chair of the Governing Body of Evangelina Hospital School, the Tribunal concludes that the Claimant will not suffer any prejudice by those two individuals not being added as Respondents. The Claimant argues that they need to be accountable for their actions, but the Claimant has bought a claim against the main organisations potentially responsible for the circumstances. There is no question of any statutory defence being argued in respect of any of the claims and therefore any compensation the Claimant may seek if his claim is successful will be against the bodies that have the facility to pay it. The Respondents that the Claimant wishes to add will be available to give evidence on behalf of the currently named Respondents and therefore will be 'accountable' on the evidence and the decision made by the employment tribunal in so far as relevant to the issues raised by the Claimant.
48. Accordingly, there is no prejudice to the Claimant caused by these individuals not been named as Respondents, but there is a prejudice to the Headteacher and the Chair of the Governing Body to be named as individuals to an action in circumstances where the Respondents currently named are satisfactory to determine liability and remedy if appropriate. The balance of prejudice tips in favour the Respondent and the Claimant's application to amend in that respect is refused.

Employment Judge Freer

Date: 10 May 2019