



EMPLOYMENT TRIBUNALS

Claimant: Ms J Rush

Respondent: A-Day Consultants Ltd t/a Academics Ltd

Heard at: East London Hearing Centre (by telephone)

On: 25 November 2020

Before: Employment Judge Jones

Representation
Claimant: In person
Respondent: Mr Warnes, Solicitor

JUDGMENT

The Respondent unlawfully deducted the Claimant's wages.

The Tribunal will set a remedy hearing date and will notify the parties accordingly.

REASONS

1. *This was a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was A: audio fully remote (by telephone). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents I referred to were included in bundles of documents sent to the Tribunal by both parties together with their witness statements and written submissions.*

Claim and issues

2. This was the Claimant's complaint that the Respondent unlawfully deducted wages due to her from her work as a temporary Primary School Art Teacher. It was the Claimant's case that the Respondent should have adjusted her pay on 1 January 2020 in line with the Agency Workers' Regulations and that it failed to do so. Once she pointed this out to the Respondent, her wages were adjusted. However, the Claimant complained that her wages were adjusted to

the wrong level. The Respondent denied that the wages should be adjusted to the level claimed by the Claimant. It agreed that her wages needed to be adjusted but the Respondent's case was that it should be adjusted to a lower level.

3. The Claimant began the early conciliation process on 24 July 2020. The ACAS certificate is dated 10 August 2020. The claim was issued on 26 August 2020. In its response, the Respondent stated that it was not necessary for the Trust to be joined as a Respondent. It stated that it would accept full liability for any sums found owing to the Claimant and was in no danger of becoming insolvent.

Evidence

4. The Tribunal had a bundle of documents from the Claimant together with a witness statement. The Tribunal also had a bundle of documents and written submissions from the Respondent with a witness statement from the Respondent's Managing Director, Jonathan Long. The parties agreed that this Tribunal would only decide the liability issue. If the Claimant was successful, the parties agreed that the remedy due to her would be decided at a separate hearing, if the parties were unable to reach an agreement on it.

5. The Tribunal heard live evidence from Mr Long and the Claimant.

6. The Tribunal made the following findings of fact from the evidence.

Findings of fact

7. In September 2019, the Claimant was engaged as an agency worker by the Respondent and placed with the Arbor Trust. She was returning to teaching after a career break after having her second child. The Claimant provided the Respondent with copies of her CV, qualified teacher's status certificate and her teaching degree. The Claimant was engaged as a qualified Primary School Art Teacher. The Claimant worked at three schools, all run by the Arbor Trust, between 25 September 2019 and July 2020.

8. Copies of two of the Claimant's assignments were in her bundle of documents. They confirmed that she was assigned to the role of Primary Art Teacher, to work the standard school working day. Her duties were stated as follows: –

“in your role as a teacher, you will facilitate teaching and learning support in a classroom environment by working from the national curriculum to deliver lessons appropriate to the age and ability levels of the pupils in your classes. Further duties could include break time supervision and ensuring order whilst pupils are moving around the school.”

9. The pay rate agreed between the parties was a daily rate of £140, which included holiday pay.

10. In April 2020, the Claimant found out about the Agency Workers Regulations when she queried the arrangements for teachers during the first

national lockdown. Once she found about the Regulations and the requirement to adjust her pay after 12 weeks, she contacted the Respondent by email, to query her pay. The Respondent confirmed that the 12week qualifying period had been met and that the Claimant should have been paid direct hire equivalent for all work done after 1 January 2020. In an email dated 10 July, the Respondent confirmed that having been told by its client, Arbor Academy Trust that if they had recruited the Claimant directly to the same job rather than via an agency they would pay her at the rate of M1 on the Outer London Scale for 2019/2020; they adjusted her pay to £145.41 per day and made a backdated payment of the difference of £178.53, which was added to her pay for that week.

11. The Claimant indicated that she was not satisfied that this properly addressed her complaint. She continued her correspondence with the Respondent with the assistance and support of the National Education Union (NEU) as she contended that the adjustment should have been to a daily rate of £212.40gross (scale point U1), which she contends is what she would have been paid as an experienced teacher, had been employed directly by the Trust.

12. The Trust engages teachers on contracts of employment covered by the School Teachers Pay and Conditions Document (SPTCD). The SPTCD 2019 document was in the Claimant's documents.

13. The Trust's policy states as follows: -

"23 Basic Pay Determination on Appointment

The Trust Board will not restrict the pay range or starting salary for a vacancy prior to advertising it other than the minimum of the pay range and the maximum of the upper pay range.

The school is committed to the principle of pay portability and will apply this principle in practice when making all new appointments. The school recognises that there are flexibilities allowed for within the School Teachers Pay and Conditions Document that individual teachers may wish to exercise."

14. It was agreed between the parties that pay portability was a practice by which a teacher would remain on the same level of pay when moving from one school to another. Since 2013 the STPCD abolished pay portability as a standard principle which applied to all schools in the UK, to allow teachers who been qualified for a while to accept work, even if offered at a lower pay scale. Mr Long's evidence was that since then, only about a third of the schools in the UK comply with pay portability.

15. The Trust's policy document did not state that they only recognised pay portability up to the M6 pay level. There was no qualification to the statement set out above.

16. The Claimant provided a copy of the 2019 Guidance to the Agency Workers Regulations provided by the Department for Business, Energy and Industrial Strategy (the Guidance). It stated at page 7 that the hirer should ensure that the agency has up-to-date information on their terms and conditions

so that they can ensure that the agency worker receives the correct equal treatment, as if they had been recruited directly, after 12 weeks in the same job. The agency is under a duty to ask the hirer for information about pay and basic working conditions so that, once it is clear that the agency worker will be in the same job with the same hirer for more than 12 weeks; they can ensure that the worker is treated as if they had been directly recruited to the job.

17. The Claimant provided evidence which confirmed that in 2014 she was appointed to the part-time post of Head of Art and DT at St Aubyn's School. She was paid at U1 (Upper Spine 1 of the IAPS national scale, Outer London Band) in that job. It was the Claimant's case that once a teacher achieves that status, it cannot be lost and that she should not be expected to start from the bottom of the scales again, if she were appointed as a teacher at another school.

18. The Claimant included examples of her work in her documents. She also enclosed an email from the headteacher at Davies Lane school dated 9 March 2020 in which the Claimant was asked if she was open to another teacher observing one of her classes to see how she managed pupils' behaviour and ensured good outcomes. This demonstrated that the Claimant's practice as a teacher was considered exemplary.

19. The Claimant's case was that given her experience and skills she would not have accepted a permanent Art Teacher position with the Trust at the M1 pay scale, which is the starting point for the Main pay scale.

20. There were two communications from the hirer that related to this matter. First, on 16 July, in an email to the Claimant's trade union representative, Katherine Lindenberg; Loren Feeley, Head of HR at the Arbor Trust, confirmed that the Claimant had worked with the Trust and that when the Trust use agency staff, they agree a daily rate with the agency. She stated that in the Claimant's case, the daily rate paid exactly was a rate that the agency provided and with which the Trust agreed. Ms Feeley stated that the rate of pay the agency agreed to pay the Claimant was between her and the agency. She also stated as follows:

"When we advertise positions for the Trust they are within the teacher pay range of M1 – M6, at the point of interviewing recruitment, we would determine the salary grade based on period of time teaching etc.

This is not a role that we have advertised for a permanent position within the Trust, so unfortunately I can't confirm a grade specific to this position or agency supply.

We understand that this issue is between Jenna and the agency, who are her employer."

21. The second communication was an email dated 14 September 2020 which is likely to have followed conversations between the Trust and the Respondent. It was also written by Miss Feeley. She was also responding to an email from Mr Long in which he correctly stated that the issue was what the Trust would have paid the Claimant had it recruited her directly to the same role. He stated that if she could provide "all of the necessary information as per our discussion we will

not need the school to have any further involvement, financially or legally, to get this resolved". In her response, Ms Feeley confirmed that the school had not advertised or recruited to the position of an Art teacher for a few years. She stated that during the Claimant's time with the school, she had not been expected to carry out planning, support with break times, communicate with parents, report writing, attendance at team meetings, parents' evening, etc. and was often in the class with an additional class teacher. The Trust stated that it was its view that the responsibilities which the Claimant held within the school was not to the level of an M6 teacher.

22. Miss Feeley informed the Respondent that although the Trust supported the local authority pay schemes and honoured pay portability, she could not confirm that the Claimant would have been paid on UPS or M6 scales as they had not carried out a review of her capabilities for a more permanent role within the Trust.

23. The Tribunal was not made aware of any issues with the Claimant's performance and notes that she was assigned to work for the Trust for almost a full academic year. Apart from parents' evening and support with break times, the rest of the matters referred to above in Miss Feeley's letter coincide with duties that (in addition to classroom teaching), would be expected of any qualified teacher whether on a temporary or permanent appointment. They are also the duties set out in the Claimant's assignment documents.

24. Qualified teachers at the Arbor Trust are paid according to nationally set pay scales. The Main Pay Scale has six increments, designated M1 to M6. The next pay scale is called the Upper Pay Scale, which ranges from U1 to U3. The Claimant's evidence was that she became a qualified teacher in 2003 and started at M1. She submitted that over the next six years she progressed through the M (Main) pay scale to the U (Upper) pay scale. The Claimant crossed to the Upper pay scale in 2009, having demonstrated that she had the knowledge, classroom management and teaching skills to be paid at that level. She had been teaching for over 15 years at the time of working for the Respondent. She was not a newly qualified teacher.

25. In the Arbor Trust's pay policy document, at paragraph 17, it states *that "before any teacher can access the upper pay range they will have to pass the performance 'threshold' in accordance with paragraphs 14.1 to 15.4 of "the Document"*. Reference to "the Document" is a reference to the STPCD.

26. In the STPCD, apart from headteachers and other senior leadership staff, Part 3, Section 12 puts all other teachers into four pay ranges as follows:

- (i) *The main pay range for qualified teachers who are not entitled to be paid on any other range,*
- (ii) *the upper pay range,*
- (iii) *the leading practitioner pay range, and*
- (iv) *The unqualified teacher pay range.*

27. Section 13.1 sets out the Main pay range from 1 September 2019. It states that *“a teacher on the Main pay range must be paid such salary within the minimum and maximum of the Main pay range, as a relevant body determines.”*

28. Section 14.2 refers to the Upper pay range that applied from 1 September 2019. It states that *a relevant body **must** pay a teacher on the upper pay range if:*

- (a) The teacher is employed in a school as a post-threshold teacher, for as long as a teacher is so employed at that school without a break in the continuity of their employment;*
- (b) The teacher applied to school to be paid on the upper pay range in accordance with paragraph 15 of this Document, that application was successful, the teacher is still employed at that school and there has been no break in their continuity of employment; or*
- (c) The teacher was employed as a member of the leadership group in that school, has continued to be employed at that school without a break in the continuity of their employment, was first appointed as such on or after 1 September 2000 and occupied such a post or posts for an aggregate period of one year or more.*

and the teacher will not be paid on the pay range for leading practitioners or as member of the leadership group.

29. Section 14.3 states that *a relevant body **may** pay a teacher on the upper pay range if the teacher is defined as a “post-threshold teacher” but was not employed as such in that school or was employed as such in that school prior to a break in their continuity of employment.*

30. Section 15 of the Document refers to applications to be paid on the Upper pay range. 15.1 states that *‘Qualified Teachers may apply to be paid on the upper pay range at least once a year in line with their schools pay policy. Relevant bodies shall assess any such application received and make a determination, in line with their pay policy, on whether the teacher meets the criteria set out in paragraph 15.2’.*

31. This part of the Document aligns with paragraph 27 of the Trust’s pay policy, which stated that the headteacher/head of school shall assess such applications and make a decision in line with the school pay policy as to whether the teacher meets the criteria set out in the Document. An application from a qualified teacher will be successful where the school is satisfied the teacher is highly competent in all elements of the relevant standards and that the teacher’s achievements and contribution to the educational setting are substantial and sustained. Any application must be received no later than 31 March, and pay will be backdated, if successful, to 1 September. The Document stated that any decision made under paragraph 15 applies only to employment in that same school.

32. There is no reference in the SPTCD Document to a subject specialist teacher being paid differently to any other type of qualified teacher or a requirement that a teacher was required to carry out break duties or attend

parents' evenings, in order to be paid above the basic level of the Main teacher's pay scale. Mr Long confirmed that the requirement to conduct lesson planning and other teacher duties were reflected in the title of Art Teacher, since it is likely that those are the basic requirements of the job.

33. It was agreed between the parties that the Claimant had not applied to the Respondent to be assessed and paid in accordance with the Upper pay scale.

34. It is unlikely the Claimant would have applied for this role if it had been advertised as a role for an unqualified teacher or a role that would be paid at the basic M1 pay grade.

35. In August 2020, after the Claimant left the Trust, the Trust advertised a vacancy for a Primary Art Teacher to be paid at the rate of £25,000 - £49,999 per annum. The Claimant produced a copy of the advert, which the Respondent placed on behalf of the Trust. Mr Long stated in his evidence that the advertised salary was the top of the Main pay scale. He did not dispute that this was the role that the Claimant had previously occupied on a temporary basis. The Claimant's belief was that the advertised salary was at the U1 level. From the copy of the relevant STPCD Document in the bundle, the wage band referred to in the advert is wide enough to span the Main pay scale to the top of the Upper pay scale. In the 2019 Document, M1 was stated as £28,355, whereas M6, the top of the Main pay scale is stated as £40,035. U1 was set at £41,419 and U6, the top of the Upper pay scale was stated to be £44,541. This was in keeping with what is stated in the paragraph 23 of the Trust's pay policy, which is that it will not restrict the pay range or starting salary for vacancy prior to advertising it other than to state the minimum of the Main pay range and the maximum of the Upper pay range. It was likely that the appointed person could be paid at any point on that spectrum.

36. Clearly, the Trust employs a number of teachers across its schools. The Respondent stated that the Claimant's directly hired colleagues would need to pass 'the threshold' before they are appointed to the Upper pay scale however, the Tribunal saw no evidence of this or that a teacher who had already achieved Upper pay scale at their previous school would be required to go through the threshold process again on being appointed to this school. The only advert that was in the bundle of documents was the one discussed above which demonstrated that the job, which was likely to be the Claimant's old job, could be paid up to U6.

Law

37. The parties agreed that the relevant law was contained in Regulation 5 of the Agency Workers Regulations 2010, which states as follows:

“(1) Subject to Regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer.

.....

(2) For the purposes of paragraph (1), the basic working and employment conditions are –

- (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;
- (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,

whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made any time after the qualifying period commenced.

(3) Paragraph (1) shall be deemed to have been complied with where-

- (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and
- (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to have taken place –

- (a) both the employee and the agency worker are -
 - (i) working for and under the supervision and direction of the hirer, and
 - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and
- (b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of subparagraph (a), works or is based at a different establishment and satisfies those requirements.”

38. Regulation 6 confirms that the term “relevant terms and conditions” means terms and conditions relating to pay, the duration of working time, night work, rest breaks, rest periods and annual leave.

39. Regulation 7 states that unless an agency worker has completed the qualifying period, Regulation 5 does not apply. To complete qualifying period, the agency worker must work in the same role the same hirer for 12 continuous calendar weeks, during one or more assignment.

40. The Claimant referred to section 3 of the Guidance which stated that deciding what “equal treatment” means will usually be a matter of common sense – the requirement is simply to treat the worker as if he or she had been recruited directly to the same job. It covers basic working and employment conditions. They are those which are ordinarily included in relevant contracts (or associated documents such as pay scales, collective agreements) of direct recruits. This means terms and conditions normally set out in standard contracts, a pay scale or pay structure, a relevant collective agreement, a company handbook or similar. In most cases equal treatment can be simply established by giving the same relevant entitlements “as if” she had been recruited as an employee or worker to the same job, i.e. what pay and holidays she should be entitled to, given a particular role and her particular skills and qualifications.

41. The Guidance confirms that it is not necessary to look for a comparator. It is quite possible to identify the appropriate “basic working and employment conditions” without one.

42. In the Guidance, under the heading ‘*How equal treatment is established*’, two examples are provided that illustrate the application of the regulations to pay. In one example, a hirer has pay scales/pay structures covering its permanent workforce. An agency worker is recruited on a production line who has several years’ experience. If the agency worker is paid at the bottom of the pay scale, that could be equal treatment if the hirer would have started that worker at the bottom of the pay scale, if it had recruited him or her directly. If the worker’s experience would mean starting further up the pay scale if recruited directly, then that is the entitlement.

43. In the second example, a sales company pays each person on its sales force at different rates. The rates depend on individual negotiation and there is no going rate. If all rates are individually negotiated and there is no established custom and practice as regards pay, then paying the agency worker the same rate before and after the qualifying period could be equal treatment.

Applying law to the facts

44. At the beginning of the contract, the Respondent set the rate at which the Claimant was engaged to work for the Trust. It was not the Trust who set the initial rate. The Trust made that clear in its email of 16 July. The Claimant makes no complaint about her pay before the end of the 12 week qualifying period, which was sometime around the beginning January 2020.

45. The Regulations are silent on where the duty to implement these Regulations is placed. The Guidance offers some help in that regard. It indicates that the hirer and the agency are both responsible for ensuring that the worker is given equal treatment in respect of pay and basic working conditions, once she has been employed for 12 weeks in the same job. In this case, both the hirer and the Respondent failed to do so. The Claimant reached the 12 week mark at or around 1 January 2020. She received no communication from the Respondent or the hirer about her rights under the Agency Worker Regulations at that time.

46. Once she found out about the Regulations in or around April 2020 and contacted them about it, the Respondent accepted liability and agreed to adjust her salary.

47. The main issue of contention between the parties and for this Tribunal is what level should her wages have been adjusted to. The Agency Workers' Regulations require the Claimant to be paid what she would have been entitled to, had she been recruited directly by the hirer. Is that as the Respondent submits, at M1, which is the lowest rate on the teacher's main pay scale? Or should her wages have been adjusted to U1, which is the first level of the upper pay scale and which Claimant proved that she was paid at her last employment?

48. The Respondent submitted that if a solicitor with 10 years professionally qualified experience applied for a newly qualified position with a firm, they could not expect to be paid at a 10year PQE level, even though their ability is not at issue. In this tribunal's judgment, that is not analogous to the situation that the Claimant was in. The Claimant was not a 15 year qualified teacher applying for a newly qualified position with the Trust. There is nothing in the Regulations that says that an agency worker, regardless of their skills and experience, should be treated as standing in the position of a newly qualified worker, once they have completed their 12 weeks employment. The question is what was the Claimant's entitlement, with all her skills and years of experience, had the Trust recruited her directly for the post of qualified Primary Art Teacher.

49. The Tribunal has not been able to rely on the statements by the Trust, set out in the findings above, about the Claimant's entitlement as they are contradictory. Firstly, in its pay policy document (paragraph 23), although it was no longer obliged to do so, the Trust made a clear statement that it was committed to the principle of pay portability and that it will apply that principle in practice when making all new appointments. It also stated that all teachers are paid in accordance with the statutory provisions of the STPCD.

50. The second of the Trust's statements was in Ms Feeley's emails to the Claimant's trade union rep in July and to Mr Long in September. In both emails she stated that if it were recruiting, the Trust would advertise for teachers within the Main pay scale and decide where the successful applicant fitted on that scale depending on their qualities, skills and experience.

51. The third statement was in Ms Feeley's email to Mr Long in which she stated that the responsibilities the Claimant held within the school was not to the level of an M6 teacher. At the same time, she stated that the school had not carried out a review of the Claimant's capabilities for a more permanent role within the Trust. It was not the Trust's position that the Claimant was carrying out the role of a newly qualified teacher or that she had failed to carry out the role of Primary Art Teacher, which was the role she had been engaged to do.

52. The Regulations do not ask whether the worker has been assessed as suitable for permanent appointment. It simply requires the hirer to pay the worker at the rate they would have been entitled to be paid had they been directly recruited by the hirer. It is likely that the Regulations operate on the assumption that if the hirer continues to engage the worker beyond 12 weeks, they are suitable and performing well in the role, otherwise the hirer would not continue to engage them.

53. Miss Feeley's statement that the school had not carried out a review of the Claimant's capabilities for a more permanent role indicates that she may have considered that if the Claimant was paid at M6 or UPS that meant that she would become a permanent member of staff within the Trust or that she could be considered as such. That is a misunderstanding of the law as the Regulations do not give the agency worker any additional security, they continue to be an agency worker. The Regulations are aimed at ensuring that the worker is paid appropriately for their services. The Trust is not required to assess the Claimant for a permanent role within the Trust in order for her to be paid what she would have been entitled to, had she been directly recruited.

54. At the time that both these letters were written, the Trust was aware that the Claimant was in dispute with the Respondent, that she was advocating to be paid at U1 level, had engaged her trade union to assist her in doing so and was likely to be contemplating legal action.

55. In contrast, the Trust's third statement was in the salary range quoted in the job advert. This indicated that the pay for the job could be fixed at anywhere between the Main pay scale and the Upper pay scale rate, depending on the skills and experience of the successful applicant. There was no mention in the advert of any requirement to pass a performance threshold in order to be paid at the Upper pay scale.

56. The fourth statement was in paragraph 17 of the Trust's pay policy document that before any teacher can access the Upper pay range they would have to pass the performance '*threshold*' in accordance with paragraphs 14.1 to 15.4 of the SPTCD. It is likely that this applied to existing teaching staff rather than anyone coming in who had already passed the threshold in other employment.

57. When addressing the Claimant's complaint, the Trust's stated position was that the principle of pay portability applied to a limited extent; i.e. up to the top of the Main pay scale and that otherwise, it wished to limit the application of that principle and retain the right to assess the teacher before confirming a wage in the Upper pay scale.

58. In this Tribunal's judgment, the Claimant came to the Trust, having already been assessed as a teacher entitled to be paid at the Upper pay scale. She was at U1 before she went to St Aubyn's School in 2014 and they honoured that and paid her at that level. Although the term 'post-threshold' was not defined in the SPTCD, as she has already passed the threshold at another school before coming to work for the Trust, application of the everyday meaning of those words must mean that she can properly be described as a 'post-threshold' teacher. I was not pointed to anything that stated that a teacher would need to repeatedly go through the threshold process at every new appointment.

59. The Claimant was entitled to have the benefit of a conversation with the Respondent and the Trust at the 12week mark as to what would have been the appropriate wage for her given her status as a post-threshold teacher, the Trust's commitment to pay portability, the application of Section 14.2 of the Document and the provisions of Regulation 5 of the Agency Worker Regulations. She was denied that benefit. Had she known that the hirer and the Respondent did not intend to pay her in the Upper pay scale, she would have been able to make

a decision as to whether she wanted to continue working for the Trust or to seek employment elsewhere. It was not until July that it became clear to her that that was the position. Given the complications of the pandemic and school closures/lockdown arrangements, the fact that she was not fully apprised of the Respondent's position until July, may not have made much practical difference to her situation but she was still entitled to be told.

60. Once the Claimant became aware of her right and pointed it out to the Respondent and the Trust, the Tribunal was not given the rationale for setting the Claimant's wage at the lowest level of the Main pay scale. The Trust's position is that she was entitled to be paid in accordance with Sections 14 and 15 of the SPTCD. In this Tribunal's judgment, the starting point is the Upper pay range since Section 12 states that the Main pay range is only applicable to those teachers who are not entitled to be paid on any other pay range.

61. In this Tribunal's judgment, as a post-threshold teacher, the Claimant was entitled to be paid under the Upper pay range. Section 14.2 is applicable as it states that the Trust *must* pay her on the Upper pay range if she is employed at the school as a post-threshold teacher. The Trust does not have to be the employer that assessed her as passing the threshold. There is nothing here that indicates that.

62. It is this Tribunal's judgment, that the Claimant was a post-threshold teacher. She was employed as a qualified Primary Art Teacher. It is highly likely that the Respondent would have been aware that the Claimant was a post-threshold teacher. The Trust and the Respondent would have been well aware of her skills and experience as they had her CV, her teaching degree and her qualified teacher's status certificate. She would have been interviewed by the Respondent before being assigned to the job. Also, they had as much information as they would have had if the Claimant had applied for the job in response to the advert placed in August 2020. The advert shows that, contrary to the position stated in Ms Feeley's letters, the stated salary range for the permanent post allowed the Trust to appoint the successful applicant up to U6, depending on their skills and experience and the scale that they were paid at their previous post.

63. Although the Trust stated that it would need to assess the Claimant's ability and performance before it can confirm her entitlement to be paid under the Upper pay scale, this was stated after it became aware of the dispute. Also, it was, in fact, in no worse position that it would have been on recruitment where it would not be possible to carry out any assessment. Although Ms Feeley stated that the Trust would only advertise jobs within the Main pay scale, that was not what happened with this job as it was advertised with a salary range up to £49,999 which is to the top of the Upper pay scale.

64. In this Tribunal judgement, the Claimant's situation could also fall under Section 14.3 of the SPTCD, in the unlikely event that at the time of her appointment, the Trust had not been aware that she was a post-threshold teacher. That Section states that as a post-threshold teacher who was not employed as such in that school, the Trust *may* pay her on the Upper pay range. The Document gives the Trust the discretion to pay the Claimant at the upper pay range rather than the duty to do so.

65. It is this Tribunal's judgment that had the Claimant, the Trust and the Respondent had a discussion about her pay, at the 12week mark as the Agency Workers Regulations envisage, as a post-threshold teacher, the Claimant would have advocated strongly to be paid at the U1 pay level. The Trust would have either agreed that she was entitled to that level and paid her at U1 or if it had not genuinely not been aware until that discussion that she was a post-threshold teacher, it could have applied its discretion and paid her at U1 or offered to pay her at another level.

66. It was not clear to the Tribunal how the Trust and the Respondent came to the decision that it was appropriate to pay the Claimant who was a qualified, post-threshold teacher with 15 years' experience, at M1, which was the first rung of the Main pay scale. Nothing in the evidence supports the position that her entitlement was to M1.

Judgment

67. The Claimant was appointed to the post of qualified Primary Art Teacher to the Arbor Trust. The Claimant was a post-threshold teacher, which the Respondent and the Trust should have known at that time, given her experience and the documents she provided. The Claimant began her appointment in September 2019.

68. After 12 weeks, the Claimant was entitled to have her pay and conditions mirror those that would have had applied had she been directly recruited by the Trust as an employee, rather than those applied to agency workers.

69. After the Claimant claimed her rights under the Agency Workers Regulations, the Respondent adjusted her wage so that she was paid according to the M1 pay scale which is the first and lowest level of the Main teacher's pay scale. Having considered all the above, it is this Tribunal's judgment that in doing so, the Respondent unlawfully deducted the Claimant's wages.

70. The Regulations give the Claimant the right to be paid at the level that she would have been paid at, had she been recruited by the Trust. The Regulations require her to be paid at the level she would have been entitled to.

71. Even though it is no longer required to do so, the Trust makes a clear statement in its pay policy document that is committed to the principle of pay portability and that it will apply this principle when making new appointments. That is a clear, unequivocal statement.

72. It was not disputed that the Claimant had been paid at the U1 level at her last employment. The Claimant was a post-threshold teacher. The Respondent and the Trust knew or ought to have known that she was a post-threshold teacher and Section 14.2 of the SPTCD entitled her to be paid at the U1 level. Even if the Respondent was not aware that she was a post-threshold teacher, the application of the pay portability principle means that she was entitled to be paid at the U1 level.

73. It is this Tribunal judgment that the Respondent has unlawfully deducted the Claimant's wages.

74. The Claimant is successful in her complaint.

Remedy

75. It is this Tribunal's judgment that the Claimant is entitled to remedy for her successful complaint of unlawful deduction of wages.

76. The Claimant should have been paid at U1 for the period 1 January 2020 until the date she left in July 2020. As she has already been paid at M1 level for that period, the Claimant is entitled to be paid the difference between M1 and U1. The parties indicated that there was a dispute over the figures and that they would want to return to court to address the remedy issue.

77. Should the parties come to an agreement on the remedy due to the Claimant, they are to notify the Tribunal accordingly.

78. The remedy due to the Claimant will be determined by the Tribunal at a remedy hearing, a date for which will be set by the Tribunal and sent to the parties in due course.

Employment Judge Jones
Date: 22 February 2021