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EMPLOYMENT TRIBUNALS

Claimant: **Mrs Stephanie Franklin**

Respondents: **(1) The Governing Body of Newtons Primary School London**
(2) The London Borough of Havering

Heard at: **East London Hearing Centre (By Cloud Video Platform)**

On: **Thursday 3 June 2021**

Before: **Employment Judge R Barrowclough (Sitting Alone)**

Representation:

Claimant: **Mr Franklin (Claimant's husband)**
Respondents: **Mr Wilding (Counsel)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

1. **The Claimant's claim for unlawful deductions fails and is dismissed.**

2. **The Respondents' application for a costs order, pursuant to rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, is refused.**

REASONS

1. This is a claim for unpaid wages where the Claimant claims a shortfall of five or alternatively six hours pay per week from the time that she was promoted to the role of a Higher Level Teaching Assistant ('HLTA') in January 2020 up until the present. In fact, the alleged loss of earnings is continuing, since the Claimant remains employed by the First Respondent in that role.

2. The Claimant has been employed by the First Respondent which, as its' name implies, is a primary school in East London, since October 2015. Initially, that was as a Mid-day Assistant or Supervisor ("MDS"), working a total of six hours per week monitoring or supervising the children at the school during their lunchtime break, generally outside in the playground. Subsequently and additionally, the Claimant was also employed from 1 September 2019 as a Teaching Assistant, working 26.5 hours per week. Accordingly, the Claimant undertook a total of 32.5 hours work per week in the combined roles from then until January 2020.

3. The Claimant claims that she should have continued to be paid the equivalent of her MDS pay, amounting to six hours per week, in addition to her salary as a HLTA, which is based on 35 paid hours work per week, from January 2020 onwards. Alternatively, the Claimant claims that she should have been paid for the additional one hour per day which she says she had to spend at the school whilst working, a total of five hours per week. The Respondents resist both claims and assert that, on the Claimant's promotion to the role of HLTA, her roles and associated entitlements as both a Teaching Assistant and a MDS expressly came to an end, and that the Claimant has been paid all the monies to which she is lawfully entitled.

4. At a Preliminary Hearing on 1 March 2021, Employment Judge Burgher dismissed the Claimant's claims for notice and holiday pay allegedly arising from the termination of her MDS role, finding that both complaints had been presented out of time, and that the Tribunal had no jurisdiction to hear and determine them. He also refused to strike out the Claimant's current unlawful deduction of wages complaint, or to order a deposit, on the basis that it had no or little chance of success.

5. I heard this case over the course of a two-day hearing, on 3 and 4 June 2021. The Claimant was represented by her husband Mr Franklin and gave evidence in support of her claim. Both Respondents were represented by Mr Wilding of Counsel who called as witnesses (i) Ms McClenaghan, the Executive Head Teacher at the First Respondent school, and (ii) Ms Una Connolly who has been the Head Teacher at the school since January 2020. A witness statement from Ms Jean Woods, the former but now retired Finance and Administration Officer at the school, had been served by the Respondents, and it was intended that she be called to give evidence, but ultimately and for practical and logistical reasons that was not possible.

6. The matters in dispute occurred within a relatively short timeframe – from 7 January until approximately 9 April 2020. In late 2019, the First Respondent school had decided to recruit or appoint two additional HLTA's, and an advertisement for the role was placed both online and in the school's staff room. A copy of the advertisement is at page 42 in the agreed bundle. That stipulates five days a week from 8:30am to 4:30pm 35-hour week, and also the salary payable for the role. Whilst the advertisement does not specifically say so, in my judgment it is necessarily implicit and I think would have been clear to potential applicants that included in the stated hours of 8:30am to 4:30pm is a one hour unpaid lunchbreak, since otherwise those hours would amount to a 40-hour week.

7. The Claimant applied for the role and was interviewed on 7 January 2020 by Ms Connolly and Ms McClenaghan. At the end of their formal questioning, she was asked if she herself had any questions. It is agreed that the Claimant then asked about the possible continuation of her six hours per week MDS role, covering the children's lunchtime break. Thereafter, recollections differ. Ms McClenaghan and Ms Connolly say

that the Claimant was told in clear terms that if her application for the HLTA role was successful, she would not be able to continue undertaking that role. The Claimant says that account is not correct, and that she was simply told that it would be an issue for future determination.

8. It is not entirely easy to resolve that conflict of evidence for a number of reasons. First, no confirmatory or follow-up letter was sent to the Claimant following her interview by the First Respondent. Secondly, and on any view, the Claimant continued to undertake her MDS duties for approximately two weeks thereafter, until 20 January 2020, with the knowledge and agreement of the school authorities. Thirdly, and whilst the Claimant's HLTA application had been successful, the Second Respondent's letter of 5 February (page 47) confirming her appointment makes no reference to the Claimant's MDS role, although it does specifically mention the termination of the allowance payable to her as a Teaching Assistant. Fourthly, the Claimant was in fact paid for her MDS role for the month of February 2020, in addition to her HLTA salary, although those monies were subsequently recovered by the First Respondent as having been paid by mistake. Finally, and whilst unfortunately I did not hear from Ms Woods as one of the Respondent's witnesses, it is noteworthy that in her witness statement she says that she was asked by Ms Connolly to confirm to the Claimant on 21 January that she would be unable to undertake her MDS role in future: had the position been made plain to the Claimant on 7 January, as the Respondents assert, it is difficult to see why that would be necessary. Taking all those matters into account, in my judgment it was by no means clear on 7 January or in the period thereafter whether the Claimant's MDS role and the associated pay would continue indefinitely and beyond 20 January 2020, the commencement date of her HLTA role, although those present at the meeting on 7 January may have thought otherwise.

9. The situation only became clearer in late March/early April 2020. It was then that the Claimant realised, I accept for the first time, that her MDS role had come to an end, at least so far as the Respondents were concerned, since her monthly wages for March were significantly less than she had expected. The Claimant contacted the school raising the apparent shortfall and seeking an explanation, and as a result Ms Connolly wrote to her on 1 April, a copy of her email being at page 51. That communication is not entirely straightforward or easy to understand. In it, Ms Connolly states that the Claimant had to give up her MDS role on taking the HLTA role, since her new position was a 35 hour week from 8:30 am to 4:30pm with one hour for lunch, and that she should have received a contract letter explaining that. However, so far as I was told, no such letter was ever sent to or received by the Claimant. The email continues that the Claimant had been rostered to undertake a 30 minute slot in the Chameleon or Nurture room, which provides for special needs children, between 12:30 and 3:30pm and that if she did so, she would be allowed to leave the school at 4pm instead of 4:30pm. When not so rota'd, the Claimant should take a one-hour break between 11:30 am and 12:30pm. Finally, Ms Connolly acknowledges that the rota did not always work as it was supposed to, particularly if staff were absent from the school.

10. Ms Connolly wrote to the Claimant once more, responding to the Claimant's husband's email and seeking to provide greater clarity concerning both salary payments and the Claimant's contractual status, in a letter dated 2 April 2020 which is at pages 62/63. That repeated the Respondents' position that by accepting the HLTA role the Claimant had given up her former MDS role, since it was impossible to undertake both roles simultaneously, enclosed the applicable HLTA rota concerning the Claimant's

breaks, explained the mistaken February overpayment, and acknowledged how distressing the apparent uncertainty and confusion would have been for the Claimant and her family, a copy of the grievance procedure being enclosed.

11. However, the termination of the Claimant's MDS role evidently remained unacceptable to both the Claimant and to her husband Mr Franklin, who effectively represented her thereafter, and Ms Connolly wrote once more in an important letter dated 7 April 2020 (pages 73/74). That letter made clear that, contrary to the Claimant's apparent belief, the Respondent considered that it was not possible to undertake the HLTA and MDS roles simultaneously; that the Claimant had not in fact been doing so since assuming her HLTA role on 20 January 2020; and that neither she nor anyone else would be paid twice for effectively working the same hours. As a potential way forward, Ms Connolly suggested that the Claimant might like to revive her six hour per week MDS role, which would enable her to supervise the school's children during their lunchtime, as she apparently wished to do and had previously enjoyed, and simultaneously reduce her HLTA hours from 35 to 29 per week, thereby preserving her total of 35 paid hours per week. But that proposal was not acceptable to the Claimant and her husband, the grievance that had already been initiated was pursued, and subsequently this claim was issued.

12. My conclusion from all this is that at least by 2 April 2020 the Respondents' position had been made clear to the Claimant, who was then given the opportunity to combine both the roles that she apparently wished to undertake, which she refused and would not accept. That brings me back to the question of the heart of this case: Was the Claimant entitled to be paid the equivalent of her six hours per week MDS salary, in addition to her HLTA salary for 35 paid hours per week after she took on that role on 20 January 2020?

13. In my judgment, the short answer is that the Claimant was not so entitled. I find that the Claimant was paid in full for the MDS role which she undertook up until 20 January 2020, when she became an HLTA, and ceased to act as an MDS. I can understand why the Claimant was unclear about her situation, given the lack of clarity around the discussions on 7 January that I have already referred to, as well as the flexible and changing lunchtime roles that she undertook until the end of February, when the Chameleon or Nurture room at the school became fully functioning, and finally because the Claimant was (mistakenly) paid her MDS salary in February 2020. But thereafter, the Claimant's true position should have become much clearer to her, and she was given the opportunity to undertake an essentially hybrid role, namely six hours per week as a MDS and 29 hours as a HLTA, which would have addressed her apparent concerns, since it was plainly inappropriate for the Claimant (or anyone else) to be paid double for working one set of hours, which is essentially what the Claimant was proposing.

14. Mr Franklin, who has pursued his wife's case with considerable vigour and some skill, says that it was never made clear to her before April 2020 that the HLTA role was only seven paid hours per day, rather than eight. With respect, I disagree. As I have already found, the inescapable conclusion from the advertisement for the role to which the Claimant responded and to which she was appointed, is that it comprised 35 paid hours work per week, with a one hour unpaid break every day.

15. Whilst I accept that there may well not have been any meeting of minds concerning the potential continuation of the Claimant's MDS role in January 2020, it was made very clear to the Claimant in early April what was, and more significantly what was not, on offer;

and the Claimant was given the chance to return to the status quo ante, if she wished. Indeed, had she chosen that option, her position would have been enhanced, since the Claimant was then being offered a total of 35 paid hours per week, as opposed to her earlier 32.5 hours, and the HLTA rate of pay is higher than that payable to a Teaching Assistant. But the Claimant turned down that opportunity, and in so doing and continuing to work thereafter effectively accepted what the Respondents were offering: a working week as a HLTA of 35 paid hours with a one-hour unpaid break every day. I find that was the contractual role which the Claimant accepted and undertook, and those were the hours that she agreed to work and be paid for. There were no unlawful deductions from the Claimant's wages, and her claim must be dismissed.

16. The Respondents applied for a costs order against the Claimant, pursuant to rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, on the basis of what they characterised as Mr Franklin's abusive, disruptive, and unreasonable conduct of the Claimant's claim, essentially from April 2020 onwards, and in particular in the weeks leading up to this hearing. It is said that he was then obstructive, unhelpful and guilty of bad faith. Whilst it seems to me from the correspondence to which I was taken that there may well be a good deal of merit in those criticisms, and in my judgment Mr Franklin's conduct of his wife's claim certainly has not helped her, I have decided not to make such an order. In doing so, I bear in mind that whilst it would not have been pleasant or easy for the Respondents and their advisers having to deal with Mr Franklin, the prejudice they suffered as a result has been strictly limited; that at the earlier Preliminary Hearing the Respondent's application for a Deposit Order was refused; and that the original lack of clarity and confusion concerning the Claimant's position, which I have referred to above and which I accept would have been upsetting for both the Claimant and her husband, was in my view largely attributable to the Respondents. Whilst those matters do not excuse some of Mr Franklin's actions on his wife's behalf, they may go some way to explaining them; and I am very conscious of the fact that the Claimant continues to be in the Respondents' employment, which I would not wish to imperil, and that the Respondents' criticisms, whilst directed against her husband, would primarily be suffered by the Claimant, who has conducted herself properly throughout, if a costs order were made. In these circumstances I make no costs order.

Employment Judge Barrowclough

7 July 2021