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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100697/2020

Held by Cloud Video Platform (CVP) on 30 April 2021

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Employment Judge: Ronald Mackay

Mr D Duncan

**Claimant
Represented by:
Ms Ogg -
Representative**

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Elgin Town Hall for the Community

**Respondent
Represented by:
Mr Adams -
Director and
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1 The Claimant succeeds in his claim and the Respondent shall pay to the
Claimant the sum of FIVE THOUSAND FOUR HUNDRED AND SIXTY
25 NINE POUNDS AND NINETY SEVEN PENCE (£5,469.97).

2 The sum awarded is gross of tax and national insurance contributions. The
Respondent shall be responsible for making any deductions lawfully
required to account to HMRC for any tax and national insurance
contributions due.

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REASONS

Introduction

3 This is a claim for arrears of pay. It flows from the Claimant's assertion that
35 he has been acting up in a more senior position and is entitled as a matter
of contract to an acting up allowance.

4 In the course of his evidence, the Claimant stated that he was not acting up
to the full extent of the senior position, but was doing so in the order of 75%.

5 The Respondent disputed that the Claimant had a contractual entitlement to
an acting up allowance but submitted, in the alternative, that the Claimant
5 was doing in the order of 50% of the duties of the senior position.

6 The parties agreed the quantum of the claim as being £7,293.29 for a 100%
acting up allowance. 75% equated to £5,469.97 and 50% £3,646.65.

7 The parties produced a joint bundle which was available to the Tribunal.

8 The Tribunal heard evidence from the Claimant and, on behalf of the
10 Respondent, Mr Michael Devenney, Chairman of the Respondent and Mr
Donald Squair, Director of the Respondent.

9 The Tribunal found the Claimant to be entirely credible and reliable. He
gave his evidence in a clear and candid manner. The Respondent's
witnesses were equally credible. They were, however, markedly less able
15 to give evidence on the day-to-day duties of the Claimant than he was
himself.

10 Few of the relevant facts were, otherwise, disputed. Any areas of conflict
are dealt with in the Findings in Fact section which follows.

Findings in Fact

20 11 The Respondent is a registered charity. It operates Elgin Town Hall ("**the
Hall**") under a lease arrangement with Moray Council. The Claimant is
employed as a Hall Keeper. He commenced continuous employment on 24
August 2015. His employer at that time was Moray Council. He remained
employed by the Council until he was transferred to the Respondent under
25 the *Transfer of Undertakings (Protection of Employment) Regulations 2016*
("**TUPE**") on 1 December 2019. With effect from 1 August 2018, he had
been seconded from Moray Council to the Respondent. During that period,
he remained employed by the Council with a reimbursement mechanism
agreed with the Respondent.

12 The Claimant worked alongside a Senior Hall Keeper, Mr William Beaton.
Like the Claimant, Mr Beaton was employed by Moray Council. He became
unwell and retired from his employment prior to the TUPE transfer to the
Respondent.

5 13 The respective duties of the Hall Keeper and the Senior Hall Keeper are set
out in job descriptions.

14 It was a matter of agreement that the Senior Hall Keeper has a number of
duties which the Hall Keeper does not have.

15 Moray Council has in place a collectively agreed policy ("**the Policy**")
10 dealing with employees who temporarily undertake higher graded duties.

16 That Policy, amongst other things, provides that an employee "*will receive
an allowance in accordance with the following criteria:*

- *In the event that the employee is undertaking in full the duties and
responsibilities of the higher graded post then they will receive in full
15 the monetary difference between their salary placing and that of the
first incremental point of the higher graded post. The allowance will
be paid with effect from the first day in which the employee was
required to undertake the duties and responsibilities of the higher
graded post.*

- *Where the employee is undertaking less than the full range of duties
and responsibilities, an assessment by the employing department in
consultation with Personnel Services must be made in order to
determine the extent to which the duties and responsibilities have
been undertaken. An appropriate percentage allowance will be
20 calculated on this basis. The allowance will be paid after a qualifying
period of 20 working days, however, it will be backdated to the first
25 day in which the employee undertook the additional duties and
responsibilities."*

17 The Tribunal had no hesitation in finding that the Policy contained a contractual entitlement to acting up allowances if they were warranted by the circumstances.

18 The Senior Hall Keeper became absent due to sickness in July 2019. With
5 effect from August 2019, he remained continually absent from work until his employment terminated.

19 The Council did not employ a substitute Senior Hall Keeper. The Claimant assumed many of the responsibilities of the Senior Hall Keeper including the following:

- 10 • Line management of staff (including at one point two volunteers with learning difficulties);
- Managing his own activities;
- Providing forecast sheets and rotas;
- Arranging additional volunteer staff where required;
- 15 • Ensuring that staff were trained to cleaning standards;
- Carrying out inspections and reporting repairs;
- Directing the work of contractors;
- Ordering and maintaining stock;
- Carrying out regular building maintenance checks including legionella and fire/smoke alarm systems;
- 20 • Ensuring all nominated representatives were trained in the emergency procedures of the Hall;
- Controlling and supervising members of the public using the facilities;
- 25 • Ensuring that the premises were vacated after the close of functions;
- Reporting directly to board members/directors;
- Providing operational advice to board members/volunteers;

- Having responsibility for petty cash;
- Purchasing sundries; and
- Being available during non-working hours to provide assistance.

20 Whilst the Respondent's witnesses sought to downplay the extent of the
5 Claimant's additional duties, it was ultimately accepted in submissions that
he performed approximately 50% of the functions of the Senior Hall Keeper.
The Claimant candidly accepted that he did not perform all of the functions
but estimated that he performed approximately 75% of the duties.

21 Having regard to the Claimant's considerably more detailed knowledge, and
10 superior understanding, of the roles and the work that he performed, the
Tribunal was satisfied that the Claimant's analysis should be preferred.

22 The Claimant made various attempts to discuss arrangements for receiving
an acting up allowance with representatives of Moray Council.
Representatives of the Council did not engage with him; nor did they carry
15 out any assessment of the extent to which the Claimant was undertaking
additional duties.

23 In advance of the transfer of the Claimant under TUPE on 1 December 2019,
the Claimant corresponded with representatives of Moray Council and
Directors of the Respondent including Mr Devenney and Mr Mark Conti. By
20 email of 8 November 2019, he provided a list of additional duties which he
indicated that he had been carrying out in the absence of the Senior Hall
Keeper. By email dated 19 November 2019, he urgently sought an update
on his claim.

24 By email dated 27 November 2019, the Claimant wrote to Mr Devenney an
25 email with the subject "*Acting Up*". In the email, he asked for any news on
his acting up payment. He stated that he had been told that Mr Devenney
was dealing with the issue and he expressed the hope that it could be sorted
out before his transfer to the Respondent.

25 He went on to state that the matter had been ongoing for a number of months and he felt that he had been doing most if not all of the work that a Senior Hall Keeper would be doing.

26 In response, Mr Devenney indicated that he had met with a colleague and
5 that they were “*working on something*”.

27 By email dated 28 November 2019, Mr Devenney advised the Claimant that he and his colleague had “*drafted a proposal that is intended to be discussed with you but felt it necessary to share with a few board directors*”.

28 The next communication between Mr Devenney and the Claimant was a
10 letter of 30 November 2019. That letter amongst other things confirmed the transfer of the Claimant’s employment under TUPE.

29 In addition, the letter contained the following paragraph:

15 *“In recognition of the contribution which you have made during a transition, recognising not only the demands on your time but also the flexibility shown in undertaking the role of Hall Keeper, we will be providing you with a cheque for £500 as an ex gratia payment from the Directors of the Board.”*

30 The Claimant saw this as an attempt to pay his claim for an acting up allowance. Whilst Mr Devenney sought to persuade the Tribunal that it was
20 quite separate, having regard to the exchange of correspondence referred to, the Claimant’s perception is preferred.

31 By operation of TUPE, which Mr Devenney acknowledged he understood, the Respondent became liable for any arrears of pay due to the Claimant. They also, by virtue of the transfer of the contractual rights under the Policy,
25 assumed liability for ongoing acting up payments.

32 By email dated 4 December 2019, the Claimant wrote to Mr Devenney. He indicated that he appreciated the offer but he did not feel that it reflected the full extent of the duties he had been performing. He also highlighted that

the payment did not accord with the Policy. He again sought to enter into discussions to resolve the issue, without success.

33 The Claimant continued to perform the additional duties. He is currently absent due to sickness.

5 34 The Respondent is in the process of recruiting a Hall Manager. With that additional support, it is envisaged that the Claimant's role will revert to the duties of his substantive position.

35 There was a clear acceptance from all concerned for the Respondent that the Claimant is a very diligent and hardworking employee.

10 **Submissions**

36 On behalf of the Claimant, Ms Ogg submitted that there existed a clear contractual entitlement to acting up allowances in accordance with the Policy. She stated that had the Claimant remained employed by the Council, he would have been entitled to benefit from that. By virtue of TUPE,
15 that contractual right transferred to the Respondent and the Respondent was similarly bound by it. She went on to highlight the additional duties carried out by the Claimant and asked that the Tribunal make an award at 75% of the agreed quantum in the claim.

37 On behalf of the Respondent, Mr Adams sought to contend that the acting up allowance contained in the Policy was not a part of the Claimant's
20 contract of employment. In support of that proposition, he referred to the case of *Department for Transport v Sparks & Others [2016] EWCA Civ 360*. He sought to draw from that authority the proposition that if a policy is not referred to in a contract of employment, it should not be held to have
25 contractual status.

38 He went on to submit that if the Policy was found to be contractual, the award should be limited to 50% of the agreed quantum on the basis that the Claimant undertook only 50% of the Senior Hall Keeper's duties.

Discussion & Decision

39 The Tribunal had no hesitation in rejecting the Respondent's primary
submission. The Policy was collectively agreed. It contained a clear
5 commitment to make additional payments in circumstances where
additional duties were being performed. A contract may be contained in a
number of different documents and that is particularly so in the context of a
unionised environment.

40 Having established that the allowance was a contractual benefit, it follows
that TUPE operated so as to transfer liability for non-payment by Council to
10 the Respondent. The Respondent then had an ongoing obligation to pay
ongoing allowances.

41 Having regard to the finding in fact that the Claimant was providing 75% of
the Senior Hall Keeper's duties, it follows that he should receive 75% of the
agreed quantum.

15 42 The Tribunal would like to thank the parties' representatives for their
assistance in this case. It is clear from the perspective of the Respondent
that there was frustration that they, as an organisation set up to improve the
operations of the Hall (which they have done successfully notwithstanding
the intervening pandemic), should inherit an issue which might have been
20 resolved prior to the transfer.

Employment Judge

R Mackay

Date of Judgment

28th of May 2021

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Date sent to parties

28th of May 2021