EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107957/2021

Final Hearing Held by CVP on Tuesday and Wednesday 25 and 26 January 2022 at 10.00am

Employment Judge Russell Bradley

John Ross — **Claimant**
N MacDougall
Advocate

The Highland Council — **Respondent**
D Hay
Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is not well founded. It is dismissed.

E.T.Z4(WR)

REASONS

Introduction

1. On 26 February 2021 the claimant presented an ET1. Its paper apart detailed a claim of an unauthorised deduction from wages. The period of claim was later specified as being between 21 January and 5 October 2020. The claim was resisted. On 23 August 2021 a telephone conference preliminary hearing took place in order to discuss case management issues. On 23 September 2021 standard orders for a CVP hearing were made.

2. For this hearing an indexed joint bundle was prepared and lodged. It contained 81 pages. Prior to hearing evidence it was agreed that a full copy of the claimant's contract of employment (to include **pages 34a and 34b**) and a counter-schedule of loss (**pages 82 to 85**) should be added.

Issues

3. The issues for determination were as set out here. They are based on the respondent's pled position (paragraph 14 of its Grounds of Resistance at page 32). Neither party demurred from them:-

    a. In the period from 21 January to 5 October 2020 inclusive what was the total amount of wages (if any) properly payable by the respondent to the claimant, wages including employer pension contributions?

    b. In particular,

        i. what roles were offered to the claimant in respect of that period?

        ii. Was the claimant's unwillingness to accept any of those offers unreasonable?

        iii. If not were "*wages*" properly payable to him

c. If so to what remedy is he entitled?

Evidence

4. I heard evidence from the claimant and from Anne MacPherson, a Workforce Planning & Staffing Manager employed by the respondent.

Findings in Fact

5. I found the following facts admitted or proved.

6. The claimant is John Ross. The respondent is the Highland Council. It is the local Authority for the Scottish Highlands region. It is responsible for the administration of state education in its area.

7. As per an unsigned offer and contract of employment, the claimant was appointed principal teacher of Craft, Design & Technology at Dingwall Academy with effect from 8 May 2012 (**page 34**). That role included responsibilities for a full timetable of teaching and management of the department. Under the **Job Detail** heading, it said,

> "*The Council has the right to transfer you either temporarily or permanently to any school in the Highland area. A permanent transfer will be subject to the proposal being discussed fully with you, your domestic circumstances being taken into account, and reimbursement of any relocation expenses. Temporary transfers are required principally to cover short-term requirements at other locations. As these may occur at short notice, the Council will take into account the grounds for any concerns you may raise about such a temporary move while reserving the right to insist on your compliance with a requirement for such a temporary transfer*."

8. The contract provided that the claimant's period of continuous service for the purposes of calculating entitlement to (amongst other things) occupational sickness provisions was from 10 January 2003. By the time of the contract the claimant had an entitlement to paid sick leave in any one period of 12 months of 6 months full pay and 6 months half pay.

9. The claimant continued in post at Dingwall until 22 February 2018. He was suspended that day pending a disciplinary process. On 3 September 2018 the

respondent issued to him a final written warning. At the same time the respondent made a recommendation of mediation. Its purpose was to attempt to resolve differences between the claimant and members of his department. It was overseen by Kateryna Zoryk an HR business partner employed by the respondent. The mediation continued until about October 2019. It was not successful.

10. In the period from 21 January 2019 until 8 July 2019 the claimant's general practitioner provided four statements (sick notes) (**pages 40 and 41**). In each, they advised the claimant that he was not fit for work. The stated reason on each was "*stress at work*." Early in that period, on 11 February 2019, Kayren Milne Senior Occupational Health Nurse Advisor wrote to Karen Cormack, the Headteacher at Dingwall Academy (**pages 46 and 47**). In that letter she noted that; she understood the claimant had been referred due to absence from work since February 2018; she understood the respondent was seeking advice in relation to his fitness for his post in the near future and any other actions that should be followed up to support him; the claimant had requested to see a copy of the report prior to it being sent to Ms Cormack; there was outstanding mediation to be completed prior to his return; the claimant remained under the care of his GP and had been given guidance on self-management techniques in order to try and improve his resilience both physically and psychologically; and she had advised him that it would be better to attend the mediation in the near future "*so that there is no further prevention of returning to school."*

11. On 4 July 2019, the claimant's GP provided to him another sick note (**page 42**). It advised him that he may be fit for work taking account of "*workplace adaptations*". The GP's comments were that the claimant was "*fit to return to work if mediation process agreement followed as per Highland Council recommendation.*" It said that this would be the case until 4 September 2019.

12. On 25 September 2019, Mrs MacPherson emailed James Vance, at that time the respondent's interim head of education (**pages 48 and 49**). In it she said; she had had an email from Ms Zoryk; she referred to her involvement in the

mediation with the claimant, Ms Cormack and the staff within the technical department at Dingwall Academy; it was not going well; Ms Zoryk's feeling was that the claimant was not engaging, was constantly putting obstacles in the way which in turn was delaying the process, and seemed to have "*deep issues with the staff and Karen*." Mrs MacPherson discussed her email with Mr Vance. They discussed the potential offer to the claimant of a vacant role as a Craft, Design & Technology teacher at Inverness Royal Academy. Their intention at that time was to facilitate a return to work for him and to fill a vacancy at Inverness Royal Academy.

13. Around that time in late September 2019, the claimant telephoned Mrs MacPherson. By that time and in accordance with his contract, the claimant's pay had reduced to half pay. The claimant's purpose in calling was to query that pay reduction. In the course of a second call Mrs MacPherson offered him the role at Inverness Royal Academy. She said to him that; it was an unpromoted post; it would provide a return to full pay; it had no management responsibilities and would not necessarily be for ever. The claimant did not take up the post. He did not respond to the offer. He saw it as informal. He regarded it as being a "*further punishment*."

14. On 24 October 2019, solicitors for the claimant wrote to Nicky Grant the respondent's then interim head of education (**pages 50 to 52**). The letter is headed, "***Formal Grievance***." Part of its last page is redacted. After setting out the history of matters from February 2018, the letter noted that the mediation process was ongoing. On the claimant's behalf it raised a grievance under six bulleted issues. They criticised the respondent's handling of matters in various ways related to his suspension and disciplining.

15. The grievance was discussed at a meeting on 18 December 2019 attended by the claimant, his wife as his representative, Mr Vance and Lorna MacKenzie (HR) who took notes. In answer to a question from Mr Vance, the claimant told him that he did not want to return to Dingwall Academy in the prevailing circumstances. But he did not see it as untenable or as a formal resignation from the role there.

16. On or about 10 January 2020 James Vance issued to the claimant an undated letter with a response to his grievance (**pages 54 to 57**). It referred to the meeting. The letter responded to each of the claimant's six points. Three were partially upheld. Two were not upheld. One was upheld. The letter answered other related issues. One was the vacancy in Inverness. Mr Vance said, " … *when Mrs MacPherson …….offered you the chance to work at IRA after you went down to half pay you failed to respond to it because you did not understand how that would work with mediation, a phased return and what job you would be returning to. I believe that whilst Highland Council could have clarified the offer, you could have asked those questions in seeking a solution*." Mr Vance also responded to what the claimant told him was his wish as a resolution which was, in short, to be compensated for the period of half pay since mid-July 2019. The letter records his recommendation that the loss be restored. It continued: "*If you accept this decision you will need to liaise with Anne Macpherson with immediate effect about identifying suitable work for you*." The letter continued further, "*You also asked that you not return to Dingwall Academy as you believe that the time that has elapsed and the rumours that have circulated make your position untenable.* ***I agree that this is a suitable element of the resolution. We will be in touch with within the next two weeks to look at suitable alternatives*****.**" The bold emphasis was Mr Vance's.

17. On 16 January, the claimant's solicitor emailed Mr Vance (**pages 58 to 59**) saying, amongst other things, "*in circumstances where it has been confirmed in the grievance outcome that suitable alternative roles will be presented to him to consider, we would wish to review such alternatives before making any decision regarding his intention to appeal the outcome*."

18. On 22 January Ms Grant replied to that email (**pages 60 to 61**). In it she said that; there was at that time no suitable Principal Teacher role; on the basis of the claimant's indication at the grievance meeting of his wish not to return to Dingwall Academy, the respondent was prepared to offer a return to a teaching role "*to facilitate his return to work*"; the offer was that "*previously*

offered", being the role at Inverness Royal Academy; the offer was made as "*an initial placement to enable your client to return to duty and as a supportive measure without initially being required to undertake management duties. We would commit to continuing to pay your client his substantive salary whilst he undertook this post until the end of the current school session, to be reviewed at that time. During this time, we would continue to seek any suitable Principal Teacher posts for your client*"; and asked for a response by 31 January.

19. On 30 January, the claimant's solicitor replied (**pages 62 to 63**). She advised that the claimant would not be appealing the grievance outcome. On the question of returning to work, she noted; the claimant had considered the respondent's offer; her understanding of another teacher role at Fortrose Academy shortly due to be advertised; and the assertion that it was a more suitable reasonable alternative it being within a closer commutable distance from the claimant's home and him already knowing teaching staff there. On the question of what had been said by the claimant at the grievance meeting on 18 December on returning to Dingwall, she said she "*would highlight that our client has not stated that he does "not wish to return" to his principal teacher post at Dingwall Academy, as stated in your recent letter, rather he accepts that this role would currently be difficult to return to in circumstances where (1) he was never provided with any supportive measures from the management within Dingwall Academy, and continues to be provided no support (or even contact), (2) no meaningful efforts have been made to have him return to this role and (3) the mediation process has arguably worsened rather than helped the possibility of him feeling able to return to his Principal Teacher role at Dingwall academy (which of course he is still contractually entitled to)*." On the question of sick pay, she said, "*we understand that our client has been reduced to nil pay with effect from 21st January 2020. This is inconsistent with the undertaking provided in the grievance that his full pay would be reimbursed from July 2019 and be maintained to date, in acknowledgement of failures on the part of the Council in managing his current absence. Therefore I would be grateful if you please arrange to have this rectified at your earliest opportunity*." Mrs MacPherson was not aware of

the vacancy at Fortrose at that time. The claimant accepted that there was nothing to stop him accepting the role in Inverness on an interim basis while other options were being explored.

20. On about 5 February in an undated letter Ms Grant replied (**page 64**). On the Fortrose proposal, she said (erroneously referring to it as a Principal role) that it was considered in terms of possible redeployment but decided to be not suitable due to a "*clear potential for conflict of interest to arise for both your client and his wife*" who was a Depute Head Teacher there. On what was said about a return to Dingwall she said "*notes taken during the grievance hearing that your client was asked if he wished to return to his substantive post and he replied that he did not*." The notes were not part of the hearing bundle. On the question of pay, she said "*As part of the grievance outcome, an offer was made to repay your client's half sick pay salary deductions from mid-July, I have arranged for this to be progressed. Please be aware, as of 21 January 2020, your client will have exhausted his entitlement to sick pay and he will move onto nil pay, thereafter until he returns to work. To facilitate an expedited return to work, we would like to offer your client a meeting with Derek Martin, Area Care & Learning Manager (Mid Area). Please contact me as soon as possible and no later than close of business on Wednesday 12 February 2020 to allow arrangements to be made*." Ms Mackenzie told Mrs MacPherson that the claimant had said that he did not want to return to Dingwall.

21. On 26 February the claimant's solicitor replied (**pages 65 to 66**). On the question of the vacancy at Fortrose, she; corrected the error as to the role (Teacher, not Principal); noted that it had been rejected "*out of hand*"; set out five grounds as to why there was no basis for the "*conflict of interest*" argument; and said that if the Fortrose proposal was not accepted, the claimant would return to his role in Dingwall; and asserted that; "*for the avoidance of any doubt, our client has been fit, willing and able to work since July 2019 (in circumstances where he has not had to submit any further sick lines, in circumstances where he is fit to return) and it is simply the Council's failure to provide him with any place of work that is prohibiting his ability to*

perform his contractual duties." On the question of pay and sick pay she said, "*our client is not on sickness absence, and therefore should not be considered to be receiving sick pay. He is ready, fit and willing to perform his contractual duties, and therefore should be provided with his full pay. Therefore, please ensure that the half pay he received since July 2019 is reinstated (in accordance with the grievance outcome), and that his full pay maintained, until confirmation is received in relation to the two options above regarding his ability to return to the alternative teacher role or his substantive contractual post at Dingwall Academy*."

22. On or about 14 April in an undated letter Ms Grant replied (**pages 67 to 68**). It recognised that there had been a delay in responding. The delay occurred because there had been an amount of discussion and negotiation involving the head teacher at Fortrose Academy and the area manager responsible for the area (David Martin) which area covered both Fortrose and Dingwall. The letter proposed a temporary deployment to Fortrose on five bulleted bases. They included; remaining on current salary; to start from 20 April, the beginning of the next term; a continued consideration of suitable permanent Principal roles and the identification of a mentor. The letter sought confirmation of acceptance by Friday 17 April.

23. On 17 April the claimant's solicitor replied (**pages 69 to 70**). It recorded the claimant's positive reaction to the Fortrose proposal. It put forward two counter-conditions. One of them was that in relation to any alternative Principal role he agreed its suitability. In relation to timing, it; sought a further seven days; confirmed his fitness, willing and availability to work from 20 April; and sought guidance on logistics of a laptop and a date for discussion with Fortrose Academy's head teacher. It sought an urgent response.

24. On 24 June the claimant's solicitor wrote again to Ms Grant (**pages 71 to 72**). It expressed disappointment at there being no reply to hers of 17 April. It alleged a failure in duty of care specifying lack of support, abandonment and absence of contact. It alleged an unlawful deduction of wages "*in circumstances where he had been fit, able and willing to work since his*

sickness absence expired early July 2019" and advised of the likelihood of legal redress with seven days. It noted advice given to the claimant by her as to a strong claim if he were to resign. It sought an acceptable response within seven days which failing the claimant's expectation of returning to his Dingwall role.

25. On 14 August solicitors for the respondent replied to the letter of 24 June (**pages 73 to 75**). Its heading set out that it was written "*without prejudice and subject to contract*" which was repeated in the final paragraph.

26. On 6 October 2020 the claimant returned to work. He received wages from that date.

Comment on the evidence

27. Both witnesses were credible. There were few areas of dispute between them. Mrs Macpherson was clear that there had been two conversations with the claimant in September 2019 about the vacancy in Inverness. She was clear that she had offered the role at that time. The claimant's position was that it had been mentioned. His attitude to it was coloured against it because he saw it as a "*further punishment*". The respondent did not put the offer in writing.

28. On the question of what was said in the grievance meeting about returning to Dingwall Academy, my finding was that in answer to a question from Mr Vance, the claimant said that he did not want to return to Dingwall Academy in the prevailing circumstances. This was based on the claimant's evidence in this hearing, supported by Mrs Macpherson's evidence of her discussion with Ms Mackenzie. It was disappointing that her notes from that meeting were not in the bundle.

29. While it may not be material, the claimant's assertion that he had been fit, willing and able to work since July 2019 (in circumstances where he had not had to submit any further sick lines) is erroneous. On 4 July 2019 he was assessed by his GP whose advice was that he may be fit for work with certain adaptations. The GP then specified "*fit to return to work if mediation process*

agreement followed as per Highland Council recommendation." That advice was that the claimant's fitness to return was conditional on an event which, as it transpired, did not occur. The sick note said that that would be the case for two months, until 4 September.

30. I regarded Mrs MacPherson as a reliable witness. Her evidence was measured. She properly accepted that in certain aspects and at certain times the respondent could have handled matters better.

Submissions

31. Both counsel spoke to pre-prepared written material for which I am grateful. I do not repeat either here.

32. The claimant addressed matters under four main headings. I comment on some of it below.

33. The respondent's speaking note followed three headings. Again, to the extent necessary I comment on it below.

34. There was no real dispute as to the relevant law.

The Law

35. Both parties made reference to section 13 of the Employment Rights Act 1996. Section 13(3) provides, "*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 the 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…*"

36. Both parties also referred to the decision of the House of Lords in ***Miles v Wakefield Metropolitan District Council*** [1987] ICR 368 and to the decision of the Court of Appeal in ***Gregg v North West Anglia NHS Foundation Trust*** 2019 ICR 1279. I considered both in deciding the issues.

Discussion and decision

37. In my view, the starting point (from section 13(3) of the 1996 Act) is to ask; what if any wages were properly payable to the claimant for the period of his claim? He answers that question on his application of the facts to the law by considering the case in the context of two principles from ***Gregg***, being (i) whether he can demonstrate he was ready, willing and able to work; and (ii) whether there was as involuntary impediment to him working. It is convenient to consider the claim in the context of both in turn.

38. The parties agreed with the general proposition that if an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay. The claimant's argument proceeded on that basis. He relied on four examples which he said objectively supported the conclusion that he was indeed ready, willing and able. First, reliance was placed in his active involvement in the mediation process. This was, it is said, demonstrative of someone ready, willing and able to work. I do not agree that it goes that far. It is evidence of a belief in the mediation process as a way of resolving a dispute. To the extent that its purpose was to enable the claimant to return to Dingwall, his active involvement indicates a willingness to do that. But that is not the same as being ready, willing and able to work *per se*. Second, the claimant says that his willingness to leave Dingwall (if doing so was in all parties' interests) is similarly demonstrative. He asserts that "*he was prepared to move from the senior post he had been in for a period of about eight years to allow his employment with the Respondent to continue*." I do not accept that the evidence supports that conclusion. The claimant did not accept the role in Inverness. Third, it is said that "*the very fact of engaging with the process and providing alternatives (*the process being dialogue about returning to work, the alternative being Fortrose*) is demonstrative of an individual who is ready, willing and able to work*." In my view this overstates the position. The claimant was willing to return to work if it was at Fortrose. His position on 26 February was that if his Fortrose proposal was not accepted, he would return to his role

in Dingwall. The claimant says that "*The elephant in the room is that Fortrose was an option and the Respondents did not offer it to him when they knew, or ought to have known, it was a suitable post. The tribunal can draw its own conclusions in that regard*." The conclusion that I draw based on Mrs Macpherson's evidence is that she was not aware of the vacancy prior to 30 January when it was first raised. While the respondent might be criticised in that "*the left hand didn't know what the right hand was doing*" I do not conclude that the respondent was concealing the vacancy from the claimant. Fourth, it is said (in the context of the chronology of the Fortrose post) that by 17 April the claimant had responded positively to a conditional offer and he was clear that he was fit, willing and available to perform the duties required of him. That only takes the claimant so far (i.e. from 17 April) and was subject to counter-conditions. I agree with the respondent's contention that the issue is whether the respondent made available work that the claimant was able to perform in terms of his contract of employment that the Claimant was ready and willing to perform. I had regard to the terms of the contract. The respondent has the right to transfer the claimant temporarily to any school in the Highland area. While the respondent accepted that it did not seek to exercise that right, it was relevant context for the suggestion that was made in September 2019 and the offer in January 2020. The claimant's submission (at paragraph 4.5) is that he did not refuse to work in Inverness when it was first offered to him. Taking account of my findings at paragraphs 18 and 19, it can equally be said that the claimant did not accept that work either. At that time, the claimant's position was that the Fortrose vacancy was a "*more suitable reasonable alternative*". I agree with the respondent that that approach confuses the concept of work being made available by an employer in terms of a contract of employment, with one of reasonableness in steps to identify suitable alternative employment, for example in a question of an entitlement to a statutory redundancy payment. It is not a question of what offer was reasonable or indeed what was the more reasonable between two, which was the claimant's approach at the time.

39. On the question of there being an involuntary impediment to the claimant working he referred to three examples which he summarised as being the respondent's unreasonable acts or omissions in the period "*and he should be compensated for that.*" The first is in effect to say that at the time that the vacancy at Inverness was offered, the respondent should instead have offered the vacancy at Fortrose. In my view this is a repetition of the "*more reasonable alternative*" argument which I do not accept. The second and third are criticisms of delay not of impediment. On the claimant's argument he did not refuse to work in Inverness. There was no impediment to him doing so. The "*impediments*" relied on are exclusively to do with the vacancy in Fortrose.

40. Looked at in the context of the issues then, in the period from 21 January to 5 October 2020 inclusive no wages were properly payable by the respondent to the claimant. On 22 January 2020 the respondent made available the role at Inverness Royal Academy on the basis as found at paragraph 18 above. The claimant's unwillingness to accept it was unreasonable. The judgment reflects my view on the issues.

41. The claim does not succeed. It is dismissed.

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Employment Judge Bradley

Date of Judgment: 24 February 2022

Date sent to parties: 25 February 2022