EMPLOYMENT TRIBUNALS

Claimant: Mr. D. Hughes

Respondent: Wrexham County Borough Council

HELD AT: Mold **ON:** 3-4 February 2020

BEFORE: Employment Judge T. Vincent Ryan
Mr J.D. Williams
Ms S.D. Atkinson

REPRESENTATION:

Claimant: Mr Hughes represented himself
Respondent: Mr. K. McNerney, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. R failed to pay holiday pay due to the claimant in that it paid him rolled up holiday miscalculated as to the appropriate percentage of wages included in his pay (applying 12.07% instead of 14.36%). The extent of the non-payment is to be considered at a remedy hearing at which the tribunal must also consider whether some of the claimant's such claims were presented to the tribunal out of time.

2. The claimant's other claims fail and are dismissed, namely:

    2.1 That the respondent failed to give the claimant, as an employee, a written statement of employment particulars;

    2.2 That the respondent made unauthorised deductions from his pay in respect of working time spent by him travelling from his home and to his home and breached his contract by failing to pay travel expenses for such journeys; the claimant's claims that pre-date 20 December 2016 were presented out of time (on 13th September 2018) in circumstances when it was reasonably practicable for the claimant to have presented them in time; the tribunal does not have jurisdiction to hear these claims but further and in the alternative the respondent did

not make such deductions from, or fail to pay as alleged, monies due to the claimant.

2.3 That the respondent breached his contract of employment when his anticipated work pattern was changed (a reduction in work) in April 2016. This claim was presented out of time in circumstances when it was reasonably practicable for the claimant to have presented it in time; further and in the alternative the tribunal found no breach by the respondent: further, if there was a breach of contract by R, C waived any such breach and affirmed the contract for casual work on reduced hours.

2.4 That the respondent breached his contract of employment when his anticipated work pattern was changed (a reduction in work) in September 2017. This claim was presented out of time in circumstances when it was reasonably practicable for the claimant to have presented it in time; further and in the alternative the tribunal found no breach by the respondent; further, if there was a breach of contract by R, C waived any such breach and affirmed the contract for casual work on reduced hours.

2.5 That the respondent treated him, a part-time worker, less favourably than it treated a comparable full-time worker as regards the terms of his contract or by subjecting him to any other detriment by any act or deliberate failure to act. The claimant's claims that pre-date 20 December 2016 were presented out of time (on 13th September 2018) in circumstances where it would not be just and equitable to extend time; the tribunal does not have jurisdiction to hear these claims but further and in the alternative the respondent did not treat the claimant, nor subject him to detriment, as alleged.

REASONS

The claimant requested written reasons having heard the oral judgment.

1. **The Issues**: We established at the outset (and repeated during the hearing) that the issues in the case were as follows:

   1.1. Was the claimant (C) an Employee or worker?

   1.2. If he was an employee was he issued with a written statement of employment particulars?

   1.3. Was the time spent by C travelling from his home to the first school he visited each day, and the time spent travelling home from the last school visited each day working time for which he was due to be paid?

1.4. If the answer to 1.3 was "yes", did the respondent (R) make an unauthorised deduction(s) from C's wages in respect of travelling time and fail to pay travel expenses?

1.5. Did R breach C's contract in April 2016 when it reduced his working days from 4 days per week to 3 days per week?

1.6. Did R breach C's contract in Sept 2017 when it reduced C's working days from 3 days per week to 2 days per week (Mon/Thur)?

1.7. Did R fail to pay holiday pay due to C in respect of public holidays?

1.8. For the purposes of C's detriment claims below, who is C's full-time comparator?

1.9. Did R treat C less favourably than it treated a comparable full-time worker by subjecting him to the following detriments:

1.9.1. Not paying him correctly or on time as a consequence of his having to complete time-sheets?

1.9.2. By not allowing him the benefit of 5 training days per year?

1.9.3. By not paying him for Public Holidays?

1.9.4. By not allowing him 10% of his student contact time as time spent in Planning Preparation and Assessment?

1.10. Were any of C's claims presented to the tribunal out of time such that the tribunal does not have jurisdiction to hear them?

1.10.1. Were the claims presented within 3 months of the matter/less favourable treatment/detriment complained of or of the last of a series?

1.10.2. If any detriment claim was presented out of time would it be just and equitable to consider it?

1.10.3. If the any other claim was presented out of time, was it reasonably practicable for him to have presented it/them in time and did he present it/them within a reasonable time?

2. **The Facts**:

2.1. The Respondent (R):

2.1.1. R is a large Employer; it is a Unitary Authority responsible for all Local Government functions within its area and as such is responsible for education in Wrexham County Borough. For many years R provided free music tuition in schools depending on the individual schools within the county requesting a teacher for specific instrument tuition and "buying in"

that service; the music teachers were known and managed as "the Music Service". In 2018 R stopped offering free music tuition in schools.

2.1.2. At the relevant time, that is prior to the cessation of free school music tuition, the Music Service comprised 19 people, being 16.5 full-time equivalents, as follows:

2.1.2.1. Full-time salaried staff ("established"):

2.1.2.1.1. they did not complete timesheets.

2.1.2.1.2. They received a salary in accordance with the statutory scheme "School Teachers' Pay and Conditions Document" (STPCD) taking account of an agreed 195 working days.

2.1.2.1.3. Provision was made for 5 training days per year and

2.1.2.1.4. 10% of their time was allowed for Planning Preparation & Assessment ("PPA");

2.1.2.1.5. their pay was calculated to include rolled up holiday pay with a percentage uplift calculated over a 12-month period of 12.07%.

2.1.2.1.6. They were not paid either for their time in travelling nor their expenses incurred in travelling between their homes and any school. They would be paid for any travelling, with incurred expenses, between schools in any day.

2.1.2.2. Part-time salaried staff ("established"):

2.1.2.2.1. they did not complete time sheets; when there was no available music tuition within their contracted part-time hours they would be given additional duties to perform but this was "irregular" (oral evidence of Mr Roberts, R's Head of Education);

2.1.2.2.2. In all other respects they were treated in the same way as the full-time salaried staff, albeit the principle of pro rata applied (and so I will not repeat paragraphs 2.1.2.1.2 – 2.1.2.1.6 above).

2.1.2.3. A pool of Supply Teachers ("casual", not "established"): Mr Roberts confirmed, unchallenged, that at any time there would be 3 - 4 teachers in this pool. Neither party was able to identify a full-time casual teacher and at the conclusion of the case C said *"I look forward to receiving Written Reasons* [of the judgment]*. How can you say that there is a comparator when one does not exist?"*, and words to the effect (and not a direct quotation) that we could not find one because there was no comparator. Mr McNerney submitted that there is no evidence of a full-time teacher who was required to submit timesheets or who was in the pool of casual/supply teachers.

There was no evidence at the tribunal hearing of there being a full-time supply teacher, R's evidence being that the pool of Supply Teachers comprised only part-time teachers, by their nature only required on an as and when basis, allowing the Music Service to be flexible and responsive to need, even though general patterns of work would emerge. We find that there was no full-time, unqualified teacher in the pool of 3-4 supply teachers that included C.

2.1.2.4. Supply teachers:

2.1.2.4.1. Completed time sheets recording their hours for purposes of wage calculation, approval and payment. This is a requirement throughout R's staff in respect of "supply/relief officers" (Mr Roberts' unchallenged evidence).

2.1.2.4.2. They were paid in accordance with STPCD;

2.1.2.4.3. They were not routinely allowed or paid for training days but only days when they were required by a purchasing school to teach music;

2.1.2.4.4. They were not routinely given provision of time for PPA but, at least in the claimant's case, his timesheets were amended to allow 10% pay in lieu of time during a working day;

2.1.2.4.5. Their pay was calculated to include rolled up holiday pay with a percentage uplift calculated over a 12-month period of 12.07% (albeit this did not reflect their working pattern which would have been more accurately reflected by applying a percentage roll-up of 14.36%, as asserted with authority by the claimant and conceded by the respondent). The applicable rate of pay was intended to compensate Supply Teachers for the fact that they are paid for the hours worked and do not receive pay throughout school holidays.

2.1.2.5. Staff, whether established or casual may have been either qualified (holding PGCE certificates or higher qualifications) or unqualified. Staff were paid in accordance with the applicable STPCD scale, either the qualified or unqualified staff scale. The scale has points of payment, the maximum being the top of Point 6.

2.1.2.6. All staff within the Music Service were peripatetic in that none was "embedded" (my word used when asking the parties for clarification) in specific schools; naturally for continuity some would provide tuition at certain schools more than other teachers within the service and some regularity or patterns emerged but always dictated by the needs of the purchasing school and available resources of the Music Service.

2.2. The Claimant: the claimant (C) is a music (woodwind) teacher, whose principal teaching instrument is the saxophone and:

2.2.1. He was engaged by R from May 2014 until 31 August 2018 as a Supply teacher (Casual) in R's Music Service;

2.2.2. He is Unqualified, in that he does not hold a PGCE teaching qualification; he is a music graduate;

2.2.3. He was engaged on a part-time, as required, basis albeit he established something of a pattern of work and there was a core of schools that he attended to teach at subject to their need and purchase of teaching hours;

2.2.4. He completed time sheets;

2.2.5. He was paid at the top of Point 6 on the STPCD scale for unqualified staff;

2.2.6. Initially he was not given either paid training days or payment in lieu of attendance at training but by way of compromise resolution of the claimant's eventual grievance R made pro-rated payment for a two year back dated period from August 2018 (see below); we did not hear whether this concession was granted to the others in the supply pool.

2.2.7. He was not given pay for time specifically designated for PPA, but R adjusted his time sheets to pay him in lieu, a 10% voluntary allowance; we did not hear whether this concession was granted to the others in the supply pool.

2.2.8. He was paid rolled up holiday pay calculated using an uplift of 12.07%, being an annualised calculation rather than one more appropriate for teachers, namely one calculated over a 12-week period;

2.2.9. By R's concession and negotiated agreement with C (30 December 2016 – see below), where C was assisted by his trade union (NASUWT), it was agreed that R would pay C for travelling time and travel expenses, not from and to home but between schools, effective (back-dated) from 1st October 2016 in respect of travelling time and 1st November 2016 in respect of travel expenses.

2.2.10. Throughout his engagement C was available to, and did sometimes, work up to 5 days per week providing his services to schools both within a fairly regular pattern and others where a need arose, where cover was required. In 2014 he established a fairly regular pattern of 4 six-hour days per week visiting a core number of schools, albeit in some weeks he worked on 5 days. R unilaterally changed that pattern in April 2016 reducing fairly regular attendance at core schools to 3 days per week and then again in Sept 2017 further reducing it, unilaterally, to 2 days per week (always with the potential for up to 5 days' work per week as and when required, which C sometimes accepted). There was a core of schools that C fairly regularly attended in that pattern but there was some alteration over time even with that list, with a school dropping out

(Penley) and another coming in (Eyton). C's attendance is described as "fairly regular" above in that whilst he clearly expected and would have wanted to teach at specific schools week in and week out, part of C's apparent frustration with R was that he would frequently be cancelled and sometimes at short or no notice. Schools would for example cancel him on staff training days, when there were school outings which he would not be invited to join (as full-time school staff would), when the students were otherwise engaged and for example (given by C) when a head-teacher decided that it was not necessary or appropriate to have music tuition in the first week of a new term when there were other priorities. At all times it was a matter for particular school headteachers to buy services from R's Music Service according to the demand in that school; as that varied R required the flexibility provided by maintaining a pool of Supply Teachers, such as C. The market dictated. R's reduction of bookings for C reflected its understanding of the nature of a Supply Pool.

2.2.11. When C's pattern was changed in April 2016 from 4 "regular" days to 3, and again in 2017 (3 days reduced to 2) he did not raise a grievance or pursue any claim in the Employment Tribunal.

2.3. Status:

2.3.1. Initial Terms and Conditions of Employment: On 17 June 2014 R wrote to C, with the subject being shown as "Supply Music Teacher", that he would be paid in accordance with the scale of pay for Unqualified Teachers at Point 6 and that he was not registered with the General Teaching Council for Wales.

2.3.2. His applicable overall terms are contained within STPCD (pp 504-585). By its nature the role of a Supply Teacher is to provide cover, short or long term, and to provide services on a flexible basis as and when required (whether covering staff absences or, as more often in this case, cover for a need notified by a client/customer school).

2.3.3. In the latter half of 2016 C voiced his dissatisfaction with his terms and conditions especially in respect of holiday pay, and travel time. With the help of NASUWT he sought to resolve it with R. R reviewed his terms and agreed to amend some of them, but not all, and it took the opportunity to spell out the casual nature of the engagement. An agreement was reached and is at pp 64-65. R set it out in a document dated 14 December 2016 and advised C that if he wished to continue in post and be paid for future work (by implication on that basis), that agreement was to be signed and returned. C had the support of his Trade Union in seeking this review of terms and time to consider his position. On 20 December (6 days after R set out the reviewed, compromised, terms in writing), C counter-signed the letter to him of 14 December 2016; he confirmed that he was not an employee, that he was a Supply Worker without a contract of employment, that R was not obliged to provide him with work and he was not obliged to accept the offer of any work; he accepted rolled up holiday pay and travel time between schools (without provision for payment for time or of expenses to and from his home). There was no evidence to support C's assertion

that he signed the document under duress or as a result of coercion; we find he did so voluntarily, albeit he saw this as a compromise and not his ideal outcome. He then worked to those revised terms, and the other standard terms of his engagement. The tribunal finds that the claimant was somewhat disgruntled with his lot as a Supply Teacher and was ambitious to improve his terms if and when possible but that his agreement of 20 December 2016 set the context and extent of the relationship that continued until cessation of his engagement in 2018.

2.3.4. R would deduct tax and National Insurance payments from C's pay. He was subject to professional teaching standards.

2.3.5. Other than the provisions of STPCD, the need for timesheets and the expectation that C would honour bookings made by R's "customer/client" schools there was no evidence before us to suggest that C's teaching activities and methods were controlled or dictated by R.

2.4.7 <u>C's assertions as to comparators:</u>

2.4.1. During the hearing (there having been no case management preliminary hearing or other Order requiring C to identify a comparator in advance of the hearing) C named the following individuals in respect of whom we found as follows (having anonymised them for the purposes of publication of this judgment):

2.4.1.1. **HT**: HT was a salaried (established), full-time, qualified, music teacher. She was not at any relevant time a Supply Teacher.

2.4.1.2. **ML**: ML was a salaried (established), full-time, qualified, music teacher. He was not at any relevant time a Supply Teacher.

2.4.1.3. **MH**: MH was a salaried (established), full-time, unqualified music teacher. She was not at any relevant time a Supply Teacher.

2.4.1.4. **LA** (whose name C proposed after close of submissions, which finished late in the afternoon of the first day, on the morning of the second day before judgment was announced, although respective submissions were considered without evidence by the tribunal before the tribunal confirmed its judgment): LA was a salaried (established), full-time, unqualified music teacher. She was not at any relevant time a Supply Teacher.

2.4.1.5. **SA** (whose name was considered in the same circumstances as LA above): SA was a salaried (established), full-time, unqualified music teacher. He was not at any relevant time a Supply Teacher.

2.4.2. As mentioned above at paragraph 2.1.2.3 both parties accepted that at the material time there was no full-time Supply Teacher comparator. Our finding is, as above, there was no full-time, unqualified, supply teacher in the pool of casual teachers.

2.5. June 2018 "redundancy": On 21 February 2018 R decided to reduce its budget and cut free music tuition; this entailed closure of the relief work register and the end of the need for C's services as a Supply Teacher. Because of C's fairly regular (see above) pattern of work R decided to treat the situation akin to a redundancy and went through a consultation process ending with notice of termination on 7 June 2018 (p104-105) and a payment to C of £1,078.56; C had challenged the calculation and it was enhanced as he indicated. C's engagement as a supply teacher ended on 31 August 2018.

2.6. C's Grievance:

2.6.1.1. On 12 June 2018 C raised his first formal grievance (pp 106 – 113) in which he raised all of the above issues and more.

2.6.1.2. Mr Roberts chaired the grievance hearing on 13 July 2018; C was accompanied by his NASUWT representative (full-time official).

2.6.1.3. On 9 August 2018 Mr Roberts wrote his outcome letter (pp122 – 124). Mr Roberts upheld C's grievances only in respect of Training Days and he acknowledged the fact of some late payments, although all money contractually due to C had been paid even if at times subject to some delay. Mr Roberts did not uphold C's grievances in respect of holiday pay, breach of contract, conditions of employment, and discrimination. C was given 5 days to appeal.

2.6.1.4. On 5 September 2018 C submitted his written appeal against the grievance outcome (p.127). Because the appeal was late R did not accept it.

2.7. C entered early conciliation with ACAS on 4 July 2018 and an Early Conciliation Certificate was issued on 15 August 2018; C presented an ET1 claim form to the tribunal on 13 September 2018.

3. **The Law**:

3.1. Status:

3.1.1. By virtue of section 230 (3) Employment Rights Act 1996 (ERA) an "employee" is defined as an individual who has entered into or who works under a contract of employment, where "a contract of employment" means a contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing. "A worker" may be somebody working under a contract of employment or any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual.

3.1.2. In general terms one would therefore expect in relation to an employee that:

3.1.2.1. they offer their work in return for pay and

3.1.2.2. they are subject to control by the other party, the sufficiency of that control being a question of fact to be determined by the tribunal,

3.1.2.3. there must be mutuality of obligation whereby they are obliged to perform work which the other party to the contract is obliged to provide and pay for and

3.1.2.4. any other terms of the agreement between the parties must not be inconsistent with a contract of employment.

3.1.3. Where business needs fluctuate and work is available on an "as and when" basis a casual worker may be engaged. A casual worker may be classed as an employee provided there is an umbrella arrangement between assignments and enduring through assignments and the above qualifying criteria for employment status are met. Provided the qualifying criteria are met in each assignment, such assignments may be joined together for the purposes of continuity of employment.

3.1.4. A "zero hours" contract is one where a provider of work is not obliged to so provide and the worker is not obliged to accept any offer of work. In such circumstances an individual may be an employee or a worker. If in reality there is no mutuality of obligation (beyond mere labelling but in fact), the individual will not be an employee.

3.1.5. These principles and tests involve matters of fact to be determined by the tribunal.

3.2. Written Employment Particulars: s.1 ERA provides that an employer shall give to an employee a written statement of employment particulars not later than 2 months after the beginning of the employment and again upon any significant change. Such a statement(s) must contain information listed within s.1 ERA.

3.3. Working Time – travel:

3.3.1. Regulation 2 Working Time Regulations 1998 (WTR) defines "working time" in relation to a worker as being any period during which they work at their employer's disposal carrying out the employer's activities or duties, any period of relevant training and any additional period that is to be treated as working time under a workforce agreement or collective agreement forming part of a contract of employment.

3.3.2. In a situation where a worker, such as an engineer, is dispatched each day from his home to a different customer's address to carry out their employer's activities and they have no other habitual place of work, the time spent by those workers travelling each day between their homes and the premises of the first and last customer designated by their employer constitutes working time. It is of course open to contracting parties to provide how time so spent is to be remunerated, if at all.

3.4. Unauthorised deductions from wages: s.13 ERA provides an employee with the right not to suffer unauthorised deductions from pay.

3.5. Breach of contract: a contract involves one party's offer which is accepted by another party for valuable consideration. The terms of a contract cannot be varied unilaterally unless, which would be unusual, the contract makes provision for this. Determination of questions relating to breaches of contract do not rely upon arguments of reasonableness. A breach cannot be cured but can be waived. A party who feels that their contract has been breached can nevertheless affirm the contract and not accept that breach as being fundamental, bringing their contractual relationship to an end. Such affirmation is more than a question of the effluxion of time; for there to be a true affirmation notwithstanding any breach, the parties must act in such a way that is consistent with a continuing contractual relationship such that it is a genuine acceptance of an altered state of affairs. The passage of time is a factor but it is not in itself determinative of this question.

3.6. Holiday Pay:

3.6.1. WTR provide a method for calculating holiday entitlement and thereby a means of calculating pay due for any accrued holiday period. An employer is liable to pay holiday pay to an employee or worker in accordance with the provisions of WTR. Annual holiday entitlement in the UK is 5.6 weeks, where a week is the number of days worked by the employee/worker during any calendar week.

3.6.2. Employers should pay holiday pay when holidays are taken rather than rolling holiday pay up in an hourly rate ("rolled-up holiday pay") as rolling up is a disincentive to a worker actually having holidays, a health and safety issue. That said, rolled up payments that are in accordance with a contract, that are paid "transparently and comprehensibly" can be offset against any liability for holiday pay.

3.6.3. Any tribunal claim ought to be brought within three months of an underpayment unless it forms part of a 'series of deductions', in which case the time limit starts to run from the last deduction in the series. A tribunal will generally not have jurisdiction to hear such a claim if there is a gap of more than three months between one series of deductions and the next. If there is a gap of more than three months between underpayments then generally it will not be possible to rely on the 'series of deductions' provision to bring a claim in respect of the earlier underpayments, subject to an equitable extension if it was not reasonably practicable for a claimant to have presented a claim in time (and then it is presented within a reasonable time).

3.7. Part-time worker detriment:

3.7.1. Reg 5 Part-time Workers (Prevention of Less Favourable Treatment) Regulation 2000 (PTWR) provides that a part-time worker has the right not to be treated by their employer less favourably than the employer treats a comparable full-time worker either as regards the terms of the

contract or by being subjected to any other detriment by any act, or deliberate failure to act, of the employer. This applies only if the treatment is on the ground that the worker is a part-time worker and the treatment is not justified on objective grounds. In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

3.7.2. Reg 2 (4) PTWR confirms that a comparable full-time worker in relation to a part-time worker is one that is employed by the same employer under the same type of contract and is engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience. Furthermore, the full-time worker must be based or work at the same establishment as the part-time worker, or where there is no full-time worker working or based at that establishment who satisfies those requirements, works or is based at a different establishment and still satisfies the above requirements.

3.7.3. There is no provision for a comparison to be made with a hypothetical comparator. This situation is different to unlawful direct discrimination claims under the Equality Act 2010. For a claim to succeed under Reg 5 PTWR there must be an actual full-time comparator.

3.7.4. A tribunal does not have to pro-rate benefits for a part-time worker to ensure that a full-time worker is not treated less favourably or to avoid an advantage for a part-time worker; we have to determine whether C as a part-time worker was treated less favourably than a comparable full-timer. Whereas a full-time contract may include a simple calculation for holiday pay WTR takes priority, even if this means a “windfall” for a part-time worker, such as where rolled up holiday pay ought to rely on a 12-week calculation period rather than being averaged out over a 12-month period (a disadvantage for those working irregularly). This principle is relevant to both C’s claim of detriment and his claim that he was not paid holiday pay due to him. In this case C contends that the appropriate percentage to be applied for rolled up holiday pay was not a year’s average of 12.07% but more accurately to reflect his working pattern 14.36%; R conceded this point.

3.8. Time issues – presentation of claims:

3.8.1. In respect of the following claims there is a 3 month primary time limit for the commencement of proceedings, or commencement of early conciliation which may serve to extend that initial three month period, measured from the date of the act or omission complained about, or where there is a series then the last in a series of such acts or omissions, failing which the tribunal will not have jurisdiction unless it decides it was not reasonably practicable for a claimant to present a claim in time (and in the latter circumstances the claim must still be brought within a reasonable time):

3.8.1.1. a claim that an employer has failed to provide a written statement of employment particulars

3.8.1.2. the claim that an employer has made an unauthorised deduction from wages

3.8.1.3. a claim that there has been a breach of contract

3.8.1.4. a claim that an employer has failed to pay holiday pay to which a worker was entitled.

3.8.2. in respect of a part-time worker detriment claim there is a three-month time limit measured from the act or omission in question or the last in such a series, but a tribunal has a discretion to consider a late claim if it decides that it would be just and equitable to do so.

4. **Application of law to facts***:*

4.1. *Was C an Employee or worker*? C acknowledged that he was not an employee when he signed the agreement of 20 December 2016. C's casual status was more than a label in reality notwithstanding that there were some schools that he visited on a fairly regular basis. Part of C's complaint is that he was not always required by those schools and, understandably he was frustrated when a headteacher cancelled him because of training days, outings, start of term activities or whatever but he accepted (and it is the case) that he was only required to teach at a school if and when that school had a need and bought in his services. As C explained in evidence and complained, there were occasions when R did not provide him with work when he was available and other occasions when he worked up to 5 days per week when he was needed although he did not have to accept those offers of work. There was clearly no mutuality of obligation in fact. C's work pattern changed throughout the period of his engagement as a Supply Teacher with days when he might be required being serially reduced from 5 days per week initially (C's unchallenged evidence), to 4 days per week by 2016, then to 3 days per week in April 2016 and to 2 days per week in September 2017. C did not pursue formal grievances or present claims to the Tribunal at these times until his grievance of 12 June 2018 (post notice of termination of engagement) and this claim (presented on 13 September 2018). C's teaching was not controlled by R, save in respect of professional standards. He was obliged to submit timesheets as an administrative requirement to ensure payment akin to billing. C had sought an enhanced status, to be treated as an established salaried employee in many respects, but the negotiated compromise he agreed emphasised his status as a casual worker on a supply basis. His statement that he was not an employee was signed having had negotiations, with the benefit of time to consider and Union support. An agreement was reached and the tribunal does not have to imply anything further to make such an arrangement workable; in those circumstances it ought not imply any further terms.

4.2. *If he was an employee was he issued with a written statement of employment particulars?* The claimant was not an employee and so this right was not engaged. He was given terms and conditions that made his status and terms of engagement clear. His claim of entitlement and R's failure to provide fails and is dismissed.

4.3. *Was the time spent by C travelling from his home to the first school he visited each day, and the time spent travelling home from the last school visited each day working time for which he was due to be paid*? No. C voluntarily reached an agreement with R concerning travelling time. He agreed to payment for time and of expenses for journeys between schools and not in respect of home journeys. He was not entitled to the payment claimed. In any event he says that he had a fairly regular set of school to visit (albeit time commitments were serially varied by those schools and R) and as such he was not as mobile as a worker having no base. R honoured its agreement as to payment for travelling time and expenses. C's claims in this regard fail and are dismissed.

4.4. *If the answer to 4.3 was "yes", has R made an unauthorised deduction from C's wages in respect of travelling time?* Not applicable. See 4.3 above.

4.5. *Did R breach C's contract in April 2016 when it reduced his working days from 4 days per week to 3 days per week?* No. There was no mutuality of obligation between the parties. C was a supply teacher providing services as and when schools required and booked him. The point of the relationship was to allow flexibility and R used that to tailor the time it required C's availability and services. It did so consistently with their contractual relationship. This reduction predated C's agreement to revised terms of 20 December 2016 but the flexibility was always part of the deal and it was not reviewed or revised by R and C in the following December. That agreement, save as revised, merely confirmed that R was entitled to vary the call upon C's time, and it did so. Furthermore, C's claim in respect of this act by R is late in circumstances where it would have been reasonably practicable to present a claim within 3 months of the variation of hours. It does not form part of a series of acts where the further reduction was in September 2017, not least bearing in mind that in any event C did not always work a set 3-day week after April but worked as and when required. C worked on without protest on the reduced regime after April 2016 and affirmed the contract, waiving any potential breach; his signature to the agreement of 20 December 2016 confirms this. This claim fails.

4.6. *Did R breach C's contract in Sept 2017 when it reduced C's working days from 3 days per week to 2 days per week (Mon/Thur)?* For the reasons stated above (4.5), save that this reduction post-dated C's agreement of 20 December 2016, this claim fails and is in any event out of time. C's agreement to the revised terms and his declaration as to status of 20 December 2016 reinforces why this claim fails.

4.7. *Did R fail to pay holiday pay due to C in respect of public holidays?* C was paid rolled up holiday pay, transparently and comprehensively and he agreed to this (20 December 2016). That said the method of calculation was inconsistent with C's rights under WTR and did not accurately reflect his worked hours leading up to holiday periods, including public holidays. As agreed by the parties he ought to have had a rolled up percentage element of 14.36%. R is entitled to offset payments made (with a rolled-up element of

12.07%) against any liability. The parties were unable to either settle this claim or agree whether and what claims are in time and which are out of time. It is understood that the maximum amount at stake is £163.80 if C is given the benefit of the doubt as to time issues. By agreement any further consideration of the applicable time provisions and subsequently remedy have been postponed. The parties are asked to consider proportionality when these matters are listed for hearing. The tribunal understood from C's comments that he was unable to deal with the matter at the moment and unwilling to compromise any point pending his signalled potential appeal against this judgment. Subject to any settlement these matters will be considered at a hearing of 1 hour's duration to be listed on a date not before 30 April 2020.

4.8. *For the purposes of C's detriment claims below, who is C's full-time comparator?* C's comparator is an unqualified, casual/supply, peripatetic music teacher in R's Music Service who is on full-time hours. There is no such person, as C conceded. None of his proposed comparators are appropriate. At the root of C's claim appears to be his sense of injustice or unfairness that he is not an established teacher but is a casual teacher; that is the nature of the job for which he applied and to which he was "appointed" or in which he was engaged. The tribunal fully understands the vagaries of supply teachers' practice and engagement. C wished to be what he was not. He then sought to argue that he should have been "established". The tribunal's role is not to grant a wish for a more settled occupation with more beneficial rights and entitlements. The tribunal is to determine whether a part-time worker is treated less favourably than a full-time comparator. Both parties accept that there is none, and therefore this claim must fail. C cannot rely upon and we cannot speculate about a hypothetical comparator.

4.9. *Did R treat C less favourably than it treats a comparable full-time worker by subjecting him to the detriments listed:* In the absence of a comparator the claim fails but in any event:

4.9.1. *Not paying him correctly or on time as a consequence of his having to complete time-sheets?* C has not established that established staff in the Music Service (who are not his comparators anyway) were always or routinely paid accurately and on time without administrative issues arising; he assumes that is the case without consideration of typical payroll issues;

4.9.2. *By not allowing him the benefit of 5 training days per year?* C was not entitled to 5 training days as schools just did not book him for their training days as he was not required. That said, in dealing with his grievance of 12 July 2018 R made a compensatory payment backdated for 2 years as a gesture to him. He lost an immeasurable opportunity to train but was recompensed for notional time spent training.

4.9.3. *By not paying him for Public Holidays?* As already stated C was paid rolled up holiday pay as were his established colleagues (who are not comparators). The calculation was wrong and amounts to an

underpayment although issues remain as to which claims, if any, C can pursue to remedy and which, if any, are out of time.

4.9.4. *By not allowing him 10% of his student contact time as time spent in Planning Preparation and Assessment?* As with training days C was not entitled to PPA like his established colleagues (who are not his comparators) but by concession R adjusted his timesheets and paid him 10% uplift to compensate him. He lost an opportunity which is immeasurable.

4.10. *Were any of C's claims presented to the tribunal out of time such that the tribunal does not have jurisdiction to hear them?*

4.10.1. *Were the claims presented within 3 months of the matter/less favourable treatment/detriment or of the last of a series?* C's claims of breach of contract were presented late when it was reasonably practicable to have presented them in time; the tribunal does not have jurisdiction, but in any event found there to be no breach or alternatively any breach was waived and the contract affirmed. The claims in respect of travel time (unauthorised deductions and breach of contract in respect of expenses) have failed in any event but there was a series of acts/omissions by R (payment of less than C would have ideally hoped for despite his explicit agreement otherwise). In the circumstances C's claims that pre-date 20 December 2016 were presented out of time, even if they had any merit. The series of "non-payments" changed on 20 December 2016 because thereafter full payment was made in accordance with the agreement reached with C and his Union. If C had any claims for the earlier period he ought to have presented them sooner, and credit would have to have been given for backdated payments R conceded (from 1 October 2016 in respect of time spent and 1 November 2016 in respect of expenses). It was reasonably practicable for C to present those claims within 3 months of the new agreed arrangements that were confirmed on 20 December 2016; he did not do so; the tribunal has no jurisdiction to hear them.

4.10.2. *If any claim was presented out of time would it be just and equitable to consider it?* The only jurisdiction in respect of which this question is relevant is the detriment claim which has failed. C maintained that there was a series of acts/omissions (R's treatment of him) from 2014 until cessation in 2018; subject to voluntary reviews and concessions R treated C as a casual worker throughout that period and as such the treatment was a continuing act or series of acts. The detriment claim, or at very least elements of it, were presented in time without the need for equitable extension. In so far as any claims may have been late C did not advance evidence or make submissions as to why the tribunal ought to exercise its discretion to allow an equitable extension of time.

Employment Judge T.V. Ryan
Date: 10.02.20

JUDGMENT SENT TO THE PARTIES ON 11 February 2020

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FOR THE TRIBUNAL OFFICE