



2361118/2013

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Ms H Bharadia
Mr G Shaw

BETWEEN: Ms Kamalammal P K Puthenveetil

Claimant

v

Mr Santosh Alexander (R1)
&
Ms Riya J George (R2)

Respondents

ON: 3 – 10 October 2016
11 October & 4 November 2016 (In chambers)

Appearances:

For the Claimant: Ms A Reindorf, Counsel

For the Respondents: Ms R Azib, Counsel

Malayalan Interpreter: Mr B Banikanveetil

RESERVED JUDGMENT

1. The constructive dismissal claim fails and is dismissed.
2. The claimant is not entitled to the national minimum wage by virtue of Regulation 2(2) of the National Minimum Wage Regulations 1999.
3. The claimant is entitled to holiday pay of £297.23 in respect of her final leave year. All other claims for unlawful deduction of wages fail and are dismissed.
4. The respondent failed to provide the claimant with a statement of employment particulars. The Tribunal awards 2 weeks' pay in the sum of £240.
5. The respondents failed to provide the claimant with payslips in breach of section 8 Employment Rights Act 1996.
6. The respondents are ordered to pay the claimant the total sum of £537.23

REASONS

1. By a claim form presented on 22 July 2013, the claimant complains of constructive unfair dismissal; Unlawful deduction of wages (non-payment of National Minimum Wage); breach of Regulations 11 (Weekly Rest Break) and 14 (Annual Leave) of the Working Time Regulations 1998 (WTR); Failure to provide a written statement of Employment Particulars (section 38 Employment Act 2002) and Failure to provide Itemised pay slips - section 8 Employment Rights Act 1996, (ERA). The respondent denies dismissal and contends that the claimant resigned. Save for the last claim, which is admitted, the respondents resist the claims. Claims of direct and indirect race discrimination pursuant to the Equality Act 2010 were withdrawn prior to the hearing.

Witnesses

2. The claimant gave evidence on her own account through an interpreter. Also giving evidence on her behalf was Mr Gana Nathan, a friend. The claimant also presented written statements from her daughter, Mrs Bindu Kochupattan, and her brother, Mr Murugan Nooranad. though neither attended the hearing.
3. Both respondents gave evidence. Also giving evidence, on their behalf, were Anju George, sister to Mrs Riya George (R2), Jens Punnilath Koshy, brother in law to the respondents and husband of Anju George; George; Kochattu Varghese, father of R2; Saju Varghese, family friend of the respondents; and Abeymon Abraham, friend of R1.

Documents

4. The tribunal was provided with a joint core bundle, running to 503 pages; a supplementary bundle running to 109 pages and a claimant bundle comprising disclosures from the Home Office under the Data Protection Act 1998, running to 312 pages. Needless to say, the tribunal was taken to a fraction of the 924 pages provided. References in square brackets in the judgment are to the core bundle unless prefixed with a "S" or "C" in which case they refer to the supplementary and claimant bundle respectively.

The Issues

5. The issues in this case are set out in the Case Management Order of Employment Judge Pritchard of 11 July 2014, and are considered in detail in our findings and conclusions. Ms Reindorf, counsel for the claimant informed the Tribunal that an agreement was reached early on in the proceedings that the preliminary issue at paragraph 14 and 15 of the Case Management Order (whether the Tribunal has jurisdiction to determine whether regulation 2(2) NMWR 99 are compatible with Article 157 of the European Treaty and Equal Treatment Directive and if so, whether it is so compatible) would not be considered on this occasion but deferred until after the Tribunal's decision. The Tribunal can find no record of such an agreement on file but as both parties having the same understanding of the agreed position, we have not addressed that issue.

Credibility

6. The accounts of the parties on almost every issue are so diametrically opposed that they cannot be explained by confusion or imperfect recall. Despite the voluminous bundle, there are limited documents supporting disputed accounts. Although the parties produced supporting witnesses and/or witness statements, that evidence was of marginal assistance, either because it was third hand or because it was mainly subjective opinion, most likely influenced by the personal relationship with one or other of the parties. As a result, we have placed little, if any, weight on the supporting witness evidence and have based our findings on the documentary evidence (or lack of) and the respective credibility of the parties.
7. We have not approached the question of credibility globally but have looked at each allegation individually. We have done so recognising that just because a party is not credible on one matter does not mean that they cannot be credible in relation to another. That is pertinent here because we have concerns about the credibility of both the claimant and the respondents in a number of different respects, which we will highlight as we go along.

Findings

Much of the evidence contained in the witness statements of the parties is irrelevant background narrative. We have therefore not made findings on all of the disputed matters but instead have focused on those matters that are relevant to the issues.

Findings of Fact

1. The claimant was employed by the respondents as a domestic worker between 14 November 2005 and 23 April 2013, when she resigned. The claimant and the respondents are Indian by national origin, all hailing from southern India.
2. The circumstances of the claimant's recruitment are disputed. R1 contends that she had been a domestic worker for his father (VM Alexander) since November 2003 and had accompanied him to England in order to continue providing him with care and support when he stayed with the respondents while receiving medical treatment in July 2005. The claimant on her part says that she had never worked for VM Alexander, before coming to England and met him for the first time through a recruitment agent in India. She also claims that she was instructed by VM Alexander that if asked, she was to tell the High Commission that one of the reasons for her trip was to look after his grandchild (Ryan) because she had looked after him before and built up a strong connection with him. She says she was also told that if she did not say these things she would not be given a visa.
3. In the bundle is a contract of employment between VM Alexander, and the claimant, which we understand was presented to the High Commission in Chennai, India, for the purposes of the claimant's visa application. The claimant is illiterate so would not have been able to read the document though she is able to sign her signature, which appears on the contract. The document records that the claimant had been a domestic worker for VM Alexander since 5.11.03 and that while in England, her duties would involve providing him with care and support. [422] The claimant says that she was unaware of the contents of this document until these proceedings as they were never translated to her at the time.

4. We heard no evidence at all from the respondents as to the work carried out by the claimant for VM Alexander in India and VM Alexander did not give evidence. Further, in his email response to the claimant's grievance, R1 makes the comment: "*Let me first say that no wonder she (the claimant) has not worked at any place for more than a year due to her nature before she joined us in 2005*". If the claimant had worked for his father since 5.11.03 (nearly 2 years) he would not have made that comment.
5. We accept the claimant's evidence that she had not worked for VM Alexander before 2005 and that the reference to her having worked for him the previous 2 years was invented in order to support her visa application. We have seen elsewhere in this case instances of the respondents presenting a misleading picture to the immigration authorities in order to facilitate the visa application process and it is inconceivable that they were unaware of VM Alexander's deception.
6. We also find that the claimant was aware of VM Alexander's deception and that it suited her to go along with it. Whilst it is likely that she would have been instructed on what to say at her visa application interview, we doubt her account of that instruction. Any instructions given would need to have been consistent with the contract submitted to the High Commission and it is noteworthy that there is no reference at all in the contract to the claimant looking after Ryan, even though this was supposedly key to her receiving a visa. We consider it more likely that the claimant was instructed by VM Alexander to support the fiction of a pre-existing employment relationship dating from 2003, if asked, as he would not have wanted to risk her saying something to the contrary.
7. Hence, in respect of this conflict, we find that that claimant commenced work for Mr Alexander in or around July 2005.
8. On Mr VM Alexander's return to India in October 2005, it was agreed that the claimant would stay on to work for R1 and R2. This arrangement suited both parties. The claimant wished to remain so that she could earn money to send home to her family in India and the respondent wanted someone to look after Ryan from the same cultural background.

9. The Home Office was notified of the changed arrangements and a revised contract was entered into, this time between R1 and the claimant. The contract, dated 14 November 2005 provided that the claimant was employed as a domestic worker to act as a nanny to Ryan and that her role involved cooking his meals, stimulating him in play and work and doing his washing and ironing. It further provided that the claimant would be provided with free food and accommodation, including a single room for her exclusive use. Her pay is cited as £110 per week, to be paid at monthly intervals. The contract is signed by both the claimant and R1. [424].

10. The contract was updated a number of times for visa renewal purposes. We have been provided with contracts dated 30/7/07 [425], 13/10/08 [C50] and 1/1/10 [428]. The 2008 contract was disclosed by the claimant. R1 says that he does not recall the 2008 contract but it bears his signature and he does not claim it to be a forgery. Also, it was amongst documents provided to the claimant by the UK Borders Agency (UKBA) following a DPA (data protection access) request and appears to have been an enclosure to a visa extension application made by R1 for the claimant on 12.1.09. We are therefore satisfied that the document is valid. The significance of this contract is that it purports to increase the claimant's weekly pay from £110 to £120 per week. The claimant denies ever receiving such an increase. The claimant claims that a further contract was signed at the airport in India in 2011. R1 denies this. We have seen no evidence of that contract but in any event, it is not suggested that the terms were materially different from those that went before it.

11. Apart from the salary increase referred to above, the terms of the various contracts were the same as the original one, even though the respondents had 2 more children during the claimant's tenure – Johann in January 2010 and Megan in December 2012.

12. Notwithstanding what is written in those contracts, there is a dispute between the parties as to the duties the claimant was required to undertake and her working hours. The claimant claims that she was responsible for the majority of the household tasks and worked 17 hours a day, 7 days a week. The respondents, on their part, contend that the claimant's role was limited to the matters set out in the contract, (save that it later included Johann) and that she was not responsible for housework generally. Her working hours were said by the respondents to be, on average, 4 hours a day, Monday

to Friday. The respondents do not say that the claimant did not do any housework; what they say is that anything she did over and above chores related to the children was done on a voluntary shared basis with other members of the family. We shall come back to this point later.

Control

13. The claimant claims that the respondents exercised undue control over her. She claims that they had custody of her passport throughout her employment ; that she was instructed not to speak to their guests and; that they discouraged their son, Ryan, from conversing with her in English so that she would not be able to speak to people outside the house. She also claimed that she was not allowed out and was told many times that after doing the school run, she was to return straight home and not to roam around. She also claims that her possessions were routinely searched. The respondents refute all of these allegations and say that the claimant was free to come and go as she pleased when not carrying out her duties.

14. The claimant travelled to India on her own on 3 separate occasions during her employment – February 2008, July 2010 and 2011. On those occasions, she would have had custody and control of her passport for the journey, at least. The claimant claims that on each trip, her passport was taken off her on arrival by a person acting on the respondents' behalf (a member of their family) and only returned on her departure. She says that this was done to ensure her return to the UK under threat of having to reimburse the respondents for the cost of her visa and flight, which she could not have afforded to repay. That suggestion is however belied by the claimant's own evidence.

15. The claimant travelled to India with the respondents in 2007 and her position is that R1 retained her passport throughout the trip. The claimant told us that while spending time with her mother during that trip, she informed the respondents, that she was unhappy and would not be returning to work for them in the UK. She claims that as a result, the respondents came to her at her mothers' house, begged her to change her mind and offered her a pay rise. If they were exerting control of her through custody of her passport, as suggested, she would not have had the free will to threaten resignation and there would have been no need for the respondents to beg her to change her mind. Also, the claimant did not assert to us that she returned on that occasion because she

felt forced by the fact that the respondent had her passport; what she said was that she returned because of pressure from her mother and because of the financial opportunities it would bring to her family.

16. Whenever the claimant needed her passport, for example, on the 3 occasions she travelled to India alone, it was available to her. The only occasion when the claimant needed her passport and it was not available was when it was in the custody of the Home Office.
17. For these reasons, we are not satisfied, on balance of probabilities, that the claimant's passport was held by the respondents against her will.
18. We note from the evidence that the respondent gave the claimant an Oyster card for her personal use (it was not required for her duties). She was also given a mobile phone and had her own key to the house at all times. Further, on more than one occasion, the claimant was left alone in the house while the respondents were abroad in India. As already mentioned, she travelled to India by herself on 3 occasions and on one of them, remained for 8 months while tending to her sick mother. This does not suggest to us that the claimant's movements were controlled by the respondents; quite the opposite.

Non payment of national minimum wage

19. The respondents rely on Regulation 2(2)(ii) National Minimum Wage Regulations 1999 (NMWR) in support of their contention that the claimant was not entitled to the national minimum wages as she was treated as a member of the family. There are significant factual disputes between the parties as to how the claimant was treated by the respondents. Indeed, the claimant's allegations about her treatment by the respondents are as far removed from the way in which a family member would be treated as you can get.
20. In May 2013, after her employment had terminated, the claimant provided information about her treatment, working conditions and living conditions with the respondents to Kalayaan, a London based charity that provides advice and support to migrants. That information was provided for the purposes of a Home Office referral of the claimant as a

potential adult victim of trafficking. The referral documentation provides guidance on trafficking and examples are given of the type of treatment that might suggest trafficking. Although the claimant has not alleged before us that she was trafficked, a large part of her evidence so closely mirrors some of the examples set out in Kalayaan's guidance as to invite caution. e.g. the withholding of a passport is cited as a key exploitation indicator. The claimant told Kalayaan that she had never seen her passport apart from one occasion when she travelled to India alone. As found above, the claimant in fact travelled to India alone on 3 separate occasions. We therefore have to ask ourselves why the claimant gave a misleading account to Kalayaan.

21. We understand that based on the information provided to Kalayaan, the claimant was deemed to be a potential victim of trafficking and it was submitted by counsel on her behalf that the tribunal cannot therefore look behind that information. We disagree. We understand from the respondents that their account was not sought before the designation, which means that the claimant's account was taken at face value. As there were no legal findings made binding the tribunal, we are entitled to scrutinise the claimant's statements for the purpose of assessing her credibility as we note that some of the responses she gave on that occasion are inconsistent with her evidence before us.

22. The respondents have the burden of proving that the NMWR exemption applies and they rely on the following matters in support.

Accommodation

23. Throughout her employment, the claimant lived with the respondents in their family residence, which was a 3 bedroom house. The claimant was provided with her own bedroom, the respondents slept in the second bedroom and the third bedroom was the childrens' room. The claimant was never required to share or give up her bedroom even when the house was full with visitors, which it often was as the respondents' often had relatives staying over from India. Also, R2's sister, Riya, lived with them for 4 years while studying in London during which time she shared the childrens' bedroom.

Meals

24. The respondents say that the claimant shared the family's meals and was invited to eat with them but generally chose to eat her dinner early in her room as she tended to retire by 9pm. The claimant denies this and told us that she was required to eat her meals separately from the rest of the family. Her case was that whilst the family ate at a dining table, she was made to eat her meals on a plastic chair in the corner of the kitchen.
25. In her statement to Kalayaan, the claimant alleged that she was made to eat left overs though that is not an allegation she has repeated in these proceedings. She accepted that she ate the same meals as the rest of the family but said that R2 decided on the menu. It has not escaped our attention that not eating with the rest of the family and being given left overs is one of Kalayaan's indicators of domestic servitude. We are concerned that facts may have been manipulated to fit into certain headings and this causes us to treat with some caution what the claimant is telling us now, especially where it differs from early statements.
26. On this conflict, we prefer the respondents' evidence and find that the claimant was not required to eat separately. Having been a domestic servant on 2 previous occasions where there may well have been a clear demarcation between servant and master, to use old terminology, the claimant may not have expected to eat with the family and may have felt uncomfortable doing so. Either way, we are satisfied that it was a matter of personal choice.

Involvement in social activities

27. The respondents contend that they involved the claimant in family and other social events. In support of this, they have produced a variety of photographs of the claimant with them or the children at different social or family events. In our view, the photos are of little evidential value as they do not assist us in determining why the claimant was present. Her position is that she did not socialise with the family at all and that when she attended social events with them it was in order to look after the children. However, she also told us that she was often invited to attend church with the family but chose not to go. The children accompanied the respondents to church every Sunday and spent the best part of the day there. If the claimant was required to attend to look after them, she would not have had the option of turning down the invitation.

28. In August 2010, the respondents travelled to India for the wedding of R2's sister, Anju. The claimant flew out to India, alone, a few days after the respondents. The respondents say that the claimant was a guest at the wedding but she claims she was there not as a guest but to look after the children. The claimant's daughter, Bindu, was also at the wedding and the respondents say that they invited her so that the claimant had someone she knew to keep her company. That to us seems inconsistent with the claimant being in attendance to work and she has provided no alternative explanation for her daughter's presence. Taking all of these matters into account, we find, on balance, that the claimant was invited to join the respondents in social events and chose whether or not to do so.

Housework

29. There is a dispute between the parties as to the extent to which the claimant was required to undertake household chores and cooking. The claimant says that in addition to her childcare responsibilities, she cooked all of the meals and did all of the washing, ironing and cleaning. The claimant contended that she worked 18 hours a day, 7 days a week. In her statement to Kalayaan, she states that she worked from 6am to 11pm, sometimes later if there were guests over. [390F] However, when challenged on her hours in cross examination, she said that she never looked into the hours she was working. As part of her evidence, she has produced a Schedule of Activities breaking down her basic duties and the period of time spent on them. The footnote to the schedule indicates that this was the state of affairs prior to the other 2 children being born (pre 2010) and states that the duties listed continued thereafter. In addition to childcare duties, the schedule contains a list of household chores that she says she was required to perform.

30. It is not the respondents' case that the claimant did not do housework and we believe that she did. They say that it was not part of her job and that any housework was done voluntarily on a shared basis with other members of the house. R2 said that she did most of the cooking for the week at the weekend and the claimant would offer to assist.

31. We have difficulty with the claimant's schedule. When the claimant started, Ryan was enrolled in nursery for some days of the week, then started going every day from age 2½. He started school full time in 2008. None of that is reflected in the Schedule. There

are a number of household chores on the Schedule which are unlikely to have been carried out on a daily basis yet the schedule assumes that they are. e.g. window cleaning, which the claimant says she did for an hour a day. It may well be the case that the claimant did the majority of the housework and that would not be surprising given that she was at home most of the day and the respondents went out to work. However, we do not believe she did so to the extent set out in the schedule. We believe it was more ad hoc – she did what needed doing as and when it was needed - and on a voluntary basis rather than the regimented regime her Schedule suggests.

Manner of address

32. The respondents addressed the claimant as Chechi, which they say means older sister. They say they did so out of respect and because they considered her part of the family. The claimant accepted that the respondents addressed her as Chechi but said that the term was one used to address servants in Malayalam, which is what they considered her to be. In support of that assertion, the claimant claims that the respondents' children were instructed by R2 to treat her as a servant. We prefer the respondents' evidence on this, not least because it is supported by the claimant's own witness statement where, at paragraph 43, she says: "*They in turn called me "Chechi" which means "elder sister"*". The claimant also confirmed in the same paragraph that she called R1 "Monay" meaning son and R2 as "Moluti" which was a nickname she said everyone used for R2. We consider it unlikely that someone who was regarded as a servant would address her employers using such terms of endearment. The fact that she did not address them by their names (or them by hers) is unremarkable and we are satisfied that this was a matter of cultural norm rather than social hierarchy. In reaching our findings, we have been greatly assisted by the knowledge and experience of panel member Ms H Bharadia, who is of Indian origin.

Weekly rest

33. The claimant alleges that she was never given any time off. That implies that she worked 7 days a week without a rest day. The respondents disagree and contend that she was not required to work on Saturday or Sunday because they looked after their children then, nor was she assigned any other tasks. Looking again at the claimant's Schedule of Activities, we note that there is only one childcare related duty listed over the weekend - preparing and feeding Ryan breakfast for 30 minutes on Sunday – and

even that appears rather random (why just Sunday and not Saturday). The respondents spent a large part of Sunday at church and the claimant accepted in cross examination that they would take the children with them. She also confirmed that the children would accompany them if they went out on Saturday. As far as other duties are concerned, we repeat our findings at paragraph 32 above. We therefore prefer the respondent's evidence and find that the claimant was not required to work at weekends.

Has the Claimant received her contractual pay

34. This dispute was a difficult one for us to resolve as we had issues with the credibility of both parties in certain respects. There is a dispute between them as to the sums the claimant was actually paid and the method of payment. According to the written contracts we have seen, the claimant's salary was initially £110 per week then increased to £120 in 2008. We accept the respondent's evidence that the claimant had the contracts read to her and was aware of the figures contained therein, as we found in relation to her initial contract with VM Alexander.
35. The claimant says that the salary figures in the contracts were not the amounts that she actually received and says regardless of what is written, she was told that she would be paid 30000 rupees a month and that this would be paid into her daughter's account. She says that contrary to that agreement, the respondent was sending only 6000 rupees a month to the account. The claimant contends that she received no other income from the respondent.
36. R1 contends that the claimant was paid the contractual sums set out in the written contracts and that, in accordance with her wishes, it was paid in 3 ways: i) sterling cash in the UK; ii) cash in rupees during holidays in India and; iii) bank transfers to Indian accounts. Indeed, R1 says that he has overpaid the claimant.
37. It is common ground that over the period of employment, the respondent sent 863,000 rupees by bank transfer to accounts in India, mainly the claimant's daughter, Bindu's, account. Both parties say that the amount requested to be transferred from September 2011 was 20000 rupees a month. There is a slight difference between the parties' as to what this equates to in sterling as they have used different conversion rates. However as the claimant has provided an online source for her rates, we have relied on those.

We find therefore that the total figure in pounds sent by bank transfer over the course of the employment was £10,778.73, which clearly does not equate to the totality of the contractual sums agreed for the period.

38. R1 has produced a schedule of payments which he claims to have created contemporaneously with events. However we have concerns about the provenance of this document. Firstly, the schedule for 2008 is based on the claimant's salary between 11.10.08 and 31.12.08 being £110 per week. However, we have already referred to the 2008 contract that increased the claimant's pay to £120 per week. The respondent told us that he was an auditor and treasurer and kept meticulous records. If he was reconciling the payments made to the claimant at the end of each year, as he contends, the fact that she had received an increase in salary a couple of months earlier would have been fresh in his mind at the time and so would have been reflected in the paperwork.
39. R1 told us that the cash payments to the claimant were ad hoc and irregular in amount. In those circumstances, we are surprised that the reconciled figure at the end of each year is, for the large part, within a few pounds of what was said to have been agreed e.g. 2006 (£2); £2007 & £2009 (£6); 2010 (£3). [49-57] In the years where the difference recorded is larger, this is always a credit in the respondent's favour rather than the claimant's.
40. This looks suspiciously contrived and our feeling is that the schedule was created long after the event, most likely for these proceedings, to provide a retrospective record of sums the respondents may or may not have paid. We therefore place little reliance on the document except to the extent that the sums recorded are evidenced elsewhere or otherwise agreed.
41. In relation to the supposed cash payments set out in the schedule, R1 produced copies of his bank statements showing withdrawals in corresponding amounts. He contends that the withdrawn sums were given to the claimant. Given our view on the timing of the schedule's creation, and in the absence of any receipts or payslips for the cash, it would

have been near impossible for R1 to attribute any particular withdrawal as having been made on behalf of the claimant distinct from any other withdrawal.

42. R1 opened a bank account in the Claimant's name in 2006 and at various points in time paid money into the account by standing order. However the claimant did not use the account, apparently because she did not feel comfortable doing so; and none of the money in it was hers. R1 had full control of the account, which he was able to access online and did so. Between May 2006 and January 2007 R1 made regular standing order payments of £110, in line with the salary figure set out in the pre-2008 contracts. A lump sum payment of £3600 was transferred out by R1 on the 15 January 2007, leaving a balance of £30.99. [S9] The account was then dormant until August 2007 when R1 paid £1500 into the account and then resumed the £110 monthly credits. These continued until February 2008, when R1 made a lump sum withdrawal of £4000 leaving a balance on the account of £62.50. [S19] The account was again dormant for a period of time but became active again in late 2011 when sums in varying amounts were credited and withdrawn. [S53-60]
43. The periods of activity on the account seemed to coincide with applications for visa renewals and R1 confirmed in evidence that the bank statements were submitted with such applications in 2007 and 2008. The question however is whether this was done in order to deceive the Home Office into believing the claimant was paid £110 a week when she was not or; was it to assist the visa renewal process. Either way, the picture the respondent sought to portray was a misleading one.
44. That is not to say, however, that the respondents did not give the claimant any cash. The respondents difficulty is that it has no documentary evidence to show what, if anything, was paid hence its attempt to create these retrospectively.
45. The claimant's evidence on what she received in salary was contradictory. At paragraph 15 of the particulars of claim, she says that on payment of her first salary, only 6000 rupees was paid into her daughters account; not 30000 as R1 claims. When the claimant was asked in cross examination "*Are you saying your daughter has never been sent 30000 rupees?*", her response was: "*Never*". However R1's bank statement shows

that 30000 rupees was sent by bank transfer to the claimant's daughter's account on 8.2.06.

46. Having asserted in her witness statement that she was not given any cash by the Respondent on her trips to India, she conceded in cross examination to being given some cash but significantly less than the amounts claimed. So when it was put to her that she was given 70000 rupees on 22 February before her trip, she claimed it was around 1000 rupees, and when it was put to her that on 28 October 2007 the respondent gave her 100,000 rupees, she said she was only given 1000 rupees. Yet she does not refer to any of these payments in her witness statement.
47. In relation to many of the disputed facts, we have preferred the respondents' evidence. That is because the claimant's account of her treatment has at times been exaggerated beyond credibility or has been contradictory. Throughout her evidence she sought to portray the respondents in the worst possible light and made no concessions to this at all. Even benign or positive acts by the respondents were given a negative spin in order to diminish their effect. For example, when it was put to her that the respondents bought her presents every Christmas, she agreed but added that she did not consider them to be presents.
48. We have reviewed the emails between the claimant and respondents dated 3.4.13 and 24.4.13. We are conscious that by this stage the claimant was acting under the guidance and assistance of others. Her email, though addressed to the respondents was, we would suggest, written with a wider audience in mind. In the emails, the claimant demands 6 months arrears of pay, which she calculates as 120,000 rupees, and threatens legal action if her demands are not met. [439A] In his response, R1 sets out the electronic payments transferred to India. [439C] It was submitted on behalf of the claimant that the absence of any reference to cash payments by the claimant or respondent supports the claimant's case that she only received bank transfer payments. We disagree. The claimant's demand for outstanding wages relates specifically to electronic transfers agreed in 2011 and the Respondent has replied accordingly. There would be no need for either of them to refer to cash payments if they were being paid, as agreed, just as there was no need for either of them to refer to the electronic transfers that occurred prior to 2011.

49. Looking at all of this evidence in the round, and having, with great difficulty, weighed up the relative credibility of the parties, we find the claimant's assertion that she received no cash at all during her 8 years with the Respondent highly implausible. Whilst we are not able to say with any great certainty that she received all her contractual pay, we find, on balance of probabilities, that she did.

Indefinite leave to remain application

50. In 2012 the respondent applied to the Home Office for the claimant's permanent residence in the UK. This was initially rejected because the claimant had been absent from the UK for 8 months in 2008 thereby breaking the continuous 5 year residence requirement. [433] This was the time that the claimant was in India looking after her mother, who subsequently died. The respondent lodged an appeal against the refusal but the appeal was also rejected. Such action by the respondents appears to us inconsistent with the picture presented by the claimant of an employer keeping her in domestic servitude, using the leverage of her immigration status as a means of control. On the contrary, this was beneficial to her and something that she desired. Yet her evidence was that this was all done without her knowledge. We don't accept that. The claimant's mother's death certificate was presented as documentary evidence in support of that appeal and was sent to R1 by the claimant's brother. The claimant says that the respondent had told her it was needed in order to apply for her visa renewal but we are satisfied that it was for the appeal and that she and her brother were aware of this. This is another example of the claimant doing her level best to ensure that the respondent should not be seen in anything other than a bad light.

Allegations of Abuse

51. The claimant alleges that she was verbally abused by the respondents and relies on this as the last straw act leading to her resigning by walking out on 23 April 2013. The allegations are denied by the respondents.

52. At paragraph 42 of her statement the claimant says that she felt treated like a street dog and she says that this was because she was constantly told off and shouted at. In her supplementary statement, prepared in response to the respondent's statements, this has evolved to her not just feeling like a street dog, but being referred to as a servant dog or

working dog by R2. At paragraph 182 of her statement, she claims that in a phone call from India, R1 threatened to slap her face because she had asked him for salary she said was owed. Needless to say, the respondents deny the allegations. R1 contends that no such call took place.

53. In her statement to Kalayaan, the claimant alleges that her employers (a reference to both R1 and R2) on a few occasions raised their hands to her as if they were going to hit her. In her letter at 439 of the bundle, she says that she is worried about R1's temper and possible physical abuse. When this was explored in cross examination, she accepted that R1 had never raised his hand to her and she was unable to give any examples of occasions when he had lost his temper with her. It is clear from the final paragraph that the claimant was thinking about leaving her employment and we consider that its purpose was to paint a particular picture, in preparation for that eventuality.

54. The allegations of verbal abuse do not sit comfortably with our other findings and once again, the inconsistencies in the claimant's evidence and exaggerated nature of the allegations causes us to prefer the respondents' account.

Resignation

55. On the 23 April 2013, the claimant walked out of her employment with the respondents. The day before, she claims she had an argument with R1. Her account of the events of 22 April 2013 are recited at paragraph 194 of her statement. She claims, among other things, that R1 quizzed her about her whereabouts when he and R2 had been in India, accused her of bringing a man to the house and asked her where she had been going for a job. The claimant further alleges that R1 told her that she was not to stay in his house a second longer. She said that she then asked to be sent home and requested her passport, money and a ticket but was told by R1 that he did not know where her passport was. She said that R2 was present and interjected with words of abuse.

56. The claimant's account was completely rejected by the respondents. R1 said that 22 April 2013 was the date he found out that the appeal against the refusal of the claimant's application for indefinite leave to remain had been rejected and that when he told her she became angry and accused him of lying and withholding her passport.

57. The claimant denied in evidence that there had been any conversation about an appeal and contended that she only became aware of the appeal subsequently through her solicitors. We have difficulty with this evidence as the claimant also told us that she was unaware that an application for indefinite leave to remain had been made in the first place yet we have found that she was. We find that she was also aware of the appeal and we accept R1's evidence on this. In those circumstances, we consider it unlikely that R1 would have said to her that he did not know where her passport was, as she claims.
58. On this same day, the respondents discovered a conversation, recorded on their landline, between the claimant and her daughter, Bindu. Although the claimant claims in her statement that the respondents had recorded her, as they were in India at the time of the conversation, the more likely explanation is that the claimant recorded herself inadvertently. We have been provided with a transcript of the recording and although the contents are not challenged, the interpretation is. [436-438]
59. The respondents say that from the transcript, they became aware that the claimant had started working for someone else and had lied to her new employers by claiming that her granddaughter, Achu, was her daughter who she was supporting financially. The respondents claim that she asked Bindu to back up her lie so that she could get a bigger salary from her new employers. The transcript does not transcribe the whole of the conversation as at various points the recording is unclear. As a result, it was difficult for us to properly consider the disjointed bits of the conversation in context. Whilst we were able to discern the conversation about Achu (her relationship to the claimant like a number of the claimant's family relationships is ambiguous) it was far from clear whether the claimant had commenced work elsewhere. What we can say however is that she appeared to be preparing to leave the respondent. There is further support for this in her letter to the respondent of 3 April 2013 which, as well as containing a threat of legal action for monies owed, states: "*I will not stay in your home either as I am worried about your temper and possible physical abuse*". [439A]. Regardless of the truth of that statement, it is difficult to see how there could be any way back from that allegation.

60. We know from the claimant's evidence that she had an alternative place to go as she had become acquainted with Gana Nathan, apparently a friend of a friend of her brother, in March 2013 and met with him and his wife, while the respondents were in India in April 13. It was Gana Nathan who drafted the letter of 3 April on the claimant's behalf and it was to his and his wife's house that she went following her resignation. In the bundle is a "To Whom It May Concern" letter from Gana Nathan dated 25 September 2013 confirming that the claimant was staying with his family and had been since 25 April 2013 (we wonder whether that date is correct given the claimant's evidence that she went straight to his house after leaving the respondents). The letter also states that the claimant was being provided with food, accommodation and £75 per month to cover her basic needs and travel expenses. [391] The respondents contend that Gana Nathan and his wife are in fact the new employers discussed by the claimant and Bindu during their recorded telephone conversation. We note from paragraph 21 of Gana Nathan's statement that he and his wife had discussed and agreed that they could offer the claimant work and that they had made her a formal job offer, though he does not say when the offer was made.

61. The respondents say that they did not challenge the claimant about the recording at the time or at all and she accepted in evidence that this was the case. If R1 had quizzed her about her other job on the 22 April, as she claims, it is surprising that he did not at the same time confront her about the recording.

62. Having weighed up the conflicting accounts, on balance, we prefer the evidence of the respondent on the events of 22 April 2013.

63. The following day, 23 April 2013, the claimant left the respondent's house never to return. She claims that this followed an incident where she was shouted at and verbally abused by R2 who told her to get out of the house. R2 on her part claims that there was no argument or discussion and that the claimant left the house through the garden unannounced. The claimant's version of events is very similar to her account of the 22 April. We rejected that account and we also reject this one. We prefer R2's evidence.

Annual Leave

64. The Claimant contends that she did not receive paid leave during her employment
Annual leave is not referred to in her contractual documentation so the default position is the statutory provisions at section 13 WTR, which entitles her to 5.6 weeks paid leave per year.
65. In order for the leave provisions to have been breached, the claimant must either have been refused leave or have taken the leave and not been paid for it. There was no evidence before us that the respondent ever refused the claimant leave. Indeed we know that she went to India with the respondents and on her own a number of times, staying for 8 months on one occasion.
66. The claimant's position on whether she was paid during leave is tied in with her evidence on pay generally, which we have not accepted. We have preferred the respondents' evidence, which was, that the claimant was given cash in rupees whenever she was on holiday in India.
67. The claim in respect of leave is limited to the final year of employment. For the purposes of Regulation 14, Working Time Regulations 1998, the claimant's leave year ran from 14 November each year (the anniversary of her commencement of employment) so the proportion of the leave year up to termination was between 14 November 2012 – 23 April 2013.

Submissions

68. The parties presented detailed written submissions, which they spoke to. I do not propose to set them out here but they have been and carefully considered along with the various authorities presented.

The Law

Constructive Dismissal

69. *Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.*
70. *The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employer is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends*

to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of a resignation and the employee must not affirm the contract.

71. The case: *Malik v Bank of Credit and Commerce International SA* 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
72. In *London Borough of Waltham Forest v Omilaju* [2005] ICR 481, the Court of Appeal stated that a final straw should be an act in a series whose cumulative effect amounts to a breach of trust and confidence and it must contribute to the breach. An entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.

National Minimum Wage

73. Section 1(1) of the National Minimum Wage Act 1998 (NMW) provides that a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.
74. Section 2(2)(a)(ii) National Minimum Wage Regulations 1999 (NMWR), since superseded by section 57 of the National Minimum Wage Act 2015, provides that the national minimum wage is not payable for work relating to the employer's family household done by a worker who is not a member of the family but is treated as such, particularly with regards to the provision of accommodation, meals, sharing of tasks and leisure activities.

Unlawful Deduction of Wages

75. Section 13 ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the deduction.

Working Time

76. Regulation 11 Working time Regulations 1998 (WTR) provides that a worker is entitled to an uninterrupted rest period of not less than 24 hours in each 7 day period during which he works for his employer.
77. Regulation 13 and 13A WTR provides that a worker is entitled to 5.6 weeks annual leave in each leave year.
78. Regulation 14 WTR provides that where a worker's employment terminate during the course of his leave year, he is entitled to payment in lieu of proportion of the accrued leave which is untaken.

Conclusions

79. Having considered our findings of fact, the relevant law and the parties submissions, we have come to the following conclusions on the agreed issues:

Constructive Dismissal

80. The Claimant relied on 6 separate matters as individually or cumulatively constituting a breach of her contract and our conclusions on these is below:

Withholding of passport

- a. Based on our findings at paragraphs 13-17, this complaint is not made out.

Failure to pay national minimum wage

- b. Based on our findings at paragraphs 19-32 above, and having considered the the case: Nambalat v Taher and another, Udin v Chamsi-Pasha and others [2012] EWCA Civ 1249 we find that the claimant was treated as a member of the family for the purposes of Regulation 2(2)(a)(ii) NMWR Regs 1999 and that the other provisions of Regulation 2(2)(a) are satisfied. In those circumstances, the respondents were exempt from paying the claimant the national minimum wage and did not breach her contract by failing to do so.

Requiring the claimant to work onerous hours/failure to give weekly rest breaks

- c. The claimant's contention that she worked 18 hours a day, 7 days a week is rejected for the reasons at paragraphs 29-31 of our findings. In determining the claimant's likely hours of work, we have worked on the basis that her contractual duties were limited to childcare and tasks associated with this i.e. feeding, bathing, dressing, school run etc. we have identified those duties, as best we can, from the claimant's Schedule of Activities and applied, what we consider to be, a reasonable amount of time for their completion. Having done so, we have concluded that the claimant would have spent an average of 6 hours a day on her duties and was not required to perform these at the weekend. The average hours take into account the birth of the 2 additional children, Johann and Megan, though we don't believe that this impacted significantly on the claimant's hours as by the time they were born, Ryan had started school full time and R2 undertook most of their childcare while on maternity leave. As the claimant was not required to work at the weekend, it follows that she was not deprived of her Reg 11 WTR weekly rest break.

Failure to give the Claimant paid time off

d. For the reasons at paragraphs 65-66 above, this complaint is not made out.

Subjecting the Claimant to verbal abuse

e. For the reasons at paragraphs 51-54 above, this complaint is not made out.

81. Given our conclusions at paragraph 80, it follows that the claimant has not proved, on balance of probability, that there has been a fundamental breach of her contract. Her constructive dismissal claim therefore fails at this point.

Did the respondent make an unlawful deduction from the Claimant's wages by not paying her contractual pay throughout her employment

82. This complaint was mainly predicated on the claimant being contractually entitled to the national minimum wage, which we have found not to be the case. Further, based on our findings at paragraphs 34-49 above, the unlawful deduction of wages complaint is not made out.

Breach of Reg 14 WTR

83. It was submitted for the respondents that the claimant was on leave between 24 March - 19 April 2013 as she was not required to carry out any work. This was the period that the claimant was in the house on her own because the respondents and their children were in India. The claimant had not chosen or requested to take that time as leave. It would have been open to the respondents to designate that period as leave in advance but they did not do so. As such, they cannot now seek to designate it as leave retrospectively. We are therefore satisfied that the claimant did not take any leave in her final year.

84. At the date of termination, the claimant had worked 23 weeks of her leave year. Her weekly wage was £120 so her pay for leave accrued up to termination is: £120 x 5.6 wks x 23/52 = £297.23.

Failure to provide particulars of employment

85. The various contracts given to the claimant contain very basic details of her employment (i.e. job title, duties, salary and notice provisions). This falls far short of the requirements of section 1 of the Employment Rights Act 1996 as most of the prescribed information

required to be given to employees is missing. For instance, there is no information about hours, holiday, sickness provisions or disciplinary rules. We therefore find that the respondent failed to provide the claimant with a statement of particulars of employment and the claim under section 38 Employment Act 2002 is made out. The Tribunal awards the claimant 2 weeks' pay totalling £240, this being the minimum award available and there being no just and equitable reasons to justify awarding the higher figure of 4 weeks pay.

Failure to provide Payslips

86. It is common ground and we hereby declare that the respondent did not provide the Claimant with payslips throughout her employment. There is no award in relation to this breach.

Judgment

87. The unanimous judgment of the Tribunal is that:

- a. The constructive dismissal claim fails and is dismissed
- b. The claimant is not entitled to the national minimum wage by virtue of section 2(2) of the National Minimum Wage Regulations 1999.
- c. The claimant is entitled to holiday pay of £297.23 in respect of her final leave year. All other claims for unlawful deduction of wages fail and are dismissed.
- d. The respondent failed to provide the claimant with a statement of employment particulars. The Tribunal awards 2 weeks pay in the sum of £240.
- e. The respondents failed to provide the claimant with payslips in breach of section 8 Employment Rights Act 1996.
- f. The respondents are ordered to pay the claimant the total sum of £537.23

Employment Judge Balogun
Date: 3 February 2017

