EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Mrs S Howle	Tracey Gascoigne Geoff Gascoigne, and Timothy Gascoigne trading in partnership as Little Munchkins Day Nursery

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Stoke on Trent **ON** 25 September 2017

EMPLOYMENT JUDGE Anstis (sitting alone)

Representation:
Claimant: In person
Respondent: Mr P Holmes (consultant)

RESERVED JUDGMENT

1. The name of the Respondent is amended to Tracey Gascoigne, Geoff Gascoigne and Timothy Gascoigne trading in partnership as Little Munchkins Day Nursery.

2. The Respondent must pay to the Claimant a total of £1,216.80, comprising:

   a. £352.80 as money due from her employment, and
   b. £864.00 as an increase under section 38 of the Employment Act 2002.

3. The Claimant's complaint of unfair dismissal is dismissed.

REASONS

A. INTRODUCTION

1. On 14 September 2016, the Claimant lodged a claim for notice pay, holiday pay, arrears of pay, other payments and unfair dismissal.

2. It is not in dispute that her relevant employment began on 3 May 2016 and ended on 25 July 2016. Accordingly, she had under two years' service and the only unfair dismissal claim that she could bring is one which does not require two years' service. This is acknowledged by the Claimant who said on her claim form that she was claiming automatic unfair dismissal. In the circumstances of her case, this could only

arise under section 104 of the Employment Rights Act 1996 – that is, dismissal for asserting a statutory right.

3. It is not in dispute that the Claimant was employed as an apprentice early years practitioner by a nursery which went by the name of "Little Munchkins", and that this nursery was owned by members of the Gascoigne family. The Claimant originally issued her claim against "Little Munchkins". As matters progressed, this became Tracey Gascoigne trading as Little Munchkins, and then Little Munchkins Day Nursery Limited. A check at Companies House revealed, however, that Little Munchkins Day Nursery Limited had only been established in June 2017, so could not have been her employer at the time of her dismissal.

4. Mr Holmes said that the correct respondent, and employer at the date of dismissal, was a partnership consisting of Tracey, Geoff and Timothy Gascoigne, which had traded as Little Munchkins Day Nursery at the time. With the consent of all parties the name of the Respondent was amended to Tracey Gascoigne, Geoff Gascoigne and Timothy Gascoigne, trading in partnership as Little Munchkins Day Nursery.

5. I then heard oral evidence from Tracey Gascoigne and Geoff Gascoigne and the Claimant, each of whom gave evidence by adopting their statements as their evidence-in-chief and then being cross-examined. The Claimant submitted emails from the former manager of the nursery and a former colleague, and both parties submitted bundles of documents which I have considered in deciding this case.

B. THE MONEY CLAIMS

6. At the outset of the hearing, I spent some time going through with the Claimant and Mr Holmes the email of 24 September 2017 (at page 13 of her bundle) where the Claimant had set out the nature of her claim for money owed by the Respondent.

7. Mr Holmes accepted that £7.20 was the correct hourly rate, and he also accepted (i) the hours the Claimant as given as her basic hours, (ii) the amount claimed as holiday pay, (iii) the amount claimed for notice pay, (iv) the amount claimed as wages for a training course attended on the weekend. Taken together, these came to £2,644.20. This ignored the claim for £93 said to have been deducted from her wages as the cost of a training course and also the Claimant's claim to overtime. It was evident from her P45 that the Claimant had only been paid £2,291.40 while employed by the Respondent, and it was not apparent why this did not match the £2,644.20 acknowledged by Mr Holmes to be due on the basis of the Claimant's calculations.

8. After a short adjournment to take instructions, Mr Holmes accepted that the difference between these figures was owed to the Claimant by the Respondent. The difference is £352.80, and judgment for that amount is accordingly given.

9. That dealt with any question of the deduction for the training course, so the only matter then outstanding was the question of the Claimant's claim for overtime. She went through the Respondent's time record at p69 of their bundle, pointing out where the records in her diary were different. In general, this was finishing ten or fifteen minutes later than recorded, on account of the need to provide the correct ratio of adults to children. There were a few occasions on which she had stayed behind for an hour or more to work on specific tasks such as cleaning up before an open day, or providing cover for other members of staff. Mr Holmes said this totalled around seven hours. I have not done the calculation myself, but it appears to be of that order.

10. The Claimant said that she had been told by the manager of the nursery that she should record any overtime in order that it could later be taken off as time in lieu for, for instance, appointments outside the nursery.

11. I find that the Claimant has not proven on the balance of probabilities that she is entitled to this additional money as overtime. This is because:

a. On her account, the time was to be recorded to be later taken off in lieu. There was no mention at the time of this being paid as overtime, and I do not consider that there is any general rule or law that would convert such a bank of time off in lieu into an overtime payment on termination of her employment.

b. In support of her claim to have worked those additional hours the Claimant was relying on diary entries which did not appeal to have been disclosed to the Respondent, in breach of tribunal orders for disclosure. This made it difficult for the Respondent to reply in any detail to the claims.

12. Accordingly, whilst the remainder of her money claims succeeded, the Claimant's claim in respect of overtime fails and is dismissed.

C. THE UNFAIR DISMISSAL CLAIM

13. Section 104 of the Employment Rights Act 1996 provides that:

> *"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee … alleged that the employer had infringed a right of his which is a relevant statutory right."*

14. The right to paid holiday under the Working Time Regulations 1998 is a relevant statutory right, and there does not appear to be any dispute that the Claimant alleged that the Respondent had infringed that right. Even if not done before, it seems clear that this was done in the meeting with the accountant on 15 July 2016. The focus is thus on the reason why the Claimant was dismissed, with her having to show that the reason for the dismissal (or principal reason for the dismissal) was her making the allegations.

15. On the evidence that I heard, the nursery was a new business. The Gascoignes had formed the business, but had no experience of day-to-day management of a nursery. They recruited a manager and a deputy manager. The manager in turn recruited the Claimant. The Claimant held qualifications as a teaching assistant, but none as an early years practitioner.

16. It was not in dispute that shortly after (if not during) her recruitment she was told that she would have to work towards a qualification while employed by the nursery. This required her to undertake college training. She originally intended to carry this out though an online training provider, but the manager wanted her and a colleague to be trained by a local college. A representative of the local college visited, and the Claimant says that she completed the necessary application forms and posted them to the college in early July as required, with an assessment to be done by the college over the summer and her training to start in September.

17. The Claimant was to work term-time only – 30 hours a day, 39 weeks a year. The written contract she received adopted an approach of adding on 4.7 weeks to that 39 weeks (as a result of her statutory holiday entitlement), with the resulting amount being paid in equal monthly instalments throughout the year.

18. In fact, that was not what happened. It was not necessary for the parties to explain to me exactly how the pay was calculated, but my impression was that the pay practice was for the Claimant and her colleagues to be paid in any month for the hours worked in that (or a previous) month, without the amount being paid in equal instalments over the year.

19. Tracey Gascoigne and Geoff Gascoigne gave evidence. It was their position that they were not involved in the day-to-day running of the nursery. Tracey Gascoigne said she would visit or be called in by the manager about twice a week, and Geoff Gascoigne said that he would visit or be called in by the manager about once a week. I accept that they were not involved in the day-to-day running of the nursery.

However, if difficulties arose which could not be resolved by the manager, they would be the only people who the manager could escalate matters to, so they would need to get involved in the nursery on a regular basis.

20. It appears that from the start there were difficulties with pay, with salaries either being paid late or in instalments. The Claimant says, and I accept, that in early July she spoke to the manager and to Tracey Gascoigne about her holiday pay. She told them that she had been speaking to ACAS and considered that she was due holiday pay.

21. On 14 July the Claimant says that she told Tracey Gascoigne that she was worried about being sacked for having raised the holiday pay point. She says that Tracey replied "*don't worry I'm not going to sack I wouldn't of enrolled you on a college course*".

22. On 15 July Tracey Gascoigne arranged for the Respondent's accountant to come to the nursery. It appeared that this was to deal with the pay difficulties that had arisen. The accountant met with each employee over a total of four hours. The Claimant was the last to be seen. The essence of the conversation as described by the Claimant was that she insisted she was due to be paid holiday pay, the accountant said that she was not, and then, when the Claimant further insisted, the accountant checked online and found that she was actually due to be paid holiday pay. The Claimant's statement on that point concludes "*Tracey did say don't worry it will be all sorted for when I get back in September*".

23. 15 July was the end of term so the Claimant was not due back at the nursery until term resumed again in September.

24. Up to this point (except perhaps for the question of whether the Claimant had submitted her college application) there is little if any difference in the evidence given by the various witnesses. After that, there is a clear divide in the evidence.

25. From the Claimant's point of view, the next thing that occurred was having a letter of dismissal hand-delivered through her letter box. That letter is not dated. It read:

> *"We are sorry to inform you that under the terms of the contract we are having to terminate your employment and we are formally giving you one weeks notice."*

26. The evidence of Tracey Gascoigne and Geoff Gascoigne is that the letter came about in the following manner:

    a. The nursery manager had been called by the college to say that while the Claimant's colleague had enrolled with the college the Claimant had not. Given that no application has been received, it "*could not be guaranteed*" whether she would now be able to start her course in September 2016.

    b. On being told this, the manager had contacted Tracey Gascoigne. Tracey Gascoigne says the manager "*seemed in a bit of a state at the time and wanted to dismiss the Claimant on two grounds. The first was that she had failed to comply with the contract in signing up to the college course, and the second was that she had lied to us by previously confirming with us that she had signed up to the course*".

    c. Tracey says that she told the manager to get more information and confirmation from the college. She says that the manager later told her that the college were unwilling to provide further information for data protection reasons, and "*I asked* [the manager] *what she wanted to do and she was still very clear that she wished to dismiss the Claimant …*". Tracey Gascoigne said that "*we would stand by her decision*".

d. Geoff Gascoigne reports being told all of this by the manager and deciding to go into the nursery to speak face-to-face with the manager. He told me that he had on three occasions rejected plans by the manager to dismiss staff. On being convinced by the manager that dismissal was the correct course of action, together with the manager he prepared the letter of dismissal. He says that the manager "*wanted to resolve the matter that day*". He says "*it was* [the manager] *that pushed the speed and reasons for the dismissal, and Tracey agreed to dismiss based upon those reasons … with hindsight, perhaps it would have been better to slow it down, proceeded through a process and discussed it with* [the Claimant]*.*"

27. The nursery subsequently persuaded the college to send an email setting out more fully the position, and there is in the papers an email from the college saying that no application had been received from the Claimant. Following this the nursery sent the fuller letter of dismissal dated 5 August 2017. It appeared that at one point after the dismissal the college suggested that the application might still be awaiting processing, but nothing turns on this. If the reason or principal reason for the dismissal was the information received from the college then unfortunately for the Claimant it is immaterial in this case whether that information was correct or incorrect.

28. The Claimant was not, of course, party to these conversations and cannot know first-hand whether they occurred or not. She has, however, submitted as evidence two emails from the manager (dated 8 March 2017 and 6 May 2017) which cast matters in a different light.

29. In the email of 8 March 2017, the manager describes the college course as being "supposedly" the reason for dismissal, and that "*at the time of* [the Claimant's] *dismissal she questioned her holiday pay, which appeared to of caused some aggravated feelings to the owners. In my personal opinion* [the Claimant] *should not have been dismissed.*"

30. In the email of 6 May 2017, the manager suggests that she left the nursery because of differences of opinion with the owners on the management of the nursery, her role in it, the owners' treatment of others including the Claimant and late payment of wages. She says, "*I truly believe* [the Claimant] *was dismissed due to her questioning her holiday pay, my reasons for this are because* [the Claimant] *never did anything wrong and tracey said numerous times that* [the Claimant] *was 'doing her head in' in regards to holiday pay*". She quotes Tracey Gascoigne as saying after the meeting with the accountant "*that's it she has gone, she can't talk to the accountant like that*". She says she was asked to call the college about the enrolment, and Tracey then said, "*that's it we can have her for that*". She concludes "*my personal opinion is that they used the college enrolment as an excuse but the real reason in my eyes was that it was down to holiday pay.*"

31. These points, and the words attributed to them, were denied by the Gascoignes in cross-examination.

32. The evidence of the Gascoignes and of the manager are impossible to reconcile. On the account of the Gascoignes they were persuaded to dismiss the Claimant by the manager because of the college enrolment problem. On the manager's account, they deliberately sought out the college enrolment problem as an excuse for the Claimant's dismissal, which was really about the holiday pay.

33. I accept the account given by the Gascoignes rather than that from the manager. The reason for this is that the Gascoignes were at the tribunal, gave sworn evidence and were cross-examined without their account being disturbed. I note that the Claimant did apply for a witness order in respect of the manager, which was refused for reasons given at the time. I only have the emails as the manager's account of events. They are not signed by the manager and I consider them to have a much lower evidential value than the live evidence given by Tracey and Geoff Gascoigne.

34. Because I accept the evidence of the Gascoignes rather than the manager, I find that the reason or principal reason for the dismissal is not the Claimant's assertion of a statutory right and her unfair dismissal claim does not succeed.

35. I note in passing that Mr Holmes himself accepted in his submissions that the decision to dismiss could be described as rash, and would not survive scrutiny as a fair dismissal if the Claimant had the necessary two years' service. I have cited above that Mr Gascoigne himself seemed to be having second thoughts about the way in which the decision was made, but unfortunately for the Claimant this has no legal effect where her rights are limited to the small category of automatically unfair dismissals which do not require two years' service.

D. SECTION 38 OF THE EMPLOYMENT ACT 2002

36. Shortly before the adjournment to take instructions on the Claimant's financial claims, I indicated to Mr Holmes that if any of the Claimant's claims succeeded I felt I would have to consider an award under section 38 of the Employment Act 2002 on the basis that the Claimant's contract of employment did not meet the requirements of section 1 of the Employment Rights Act 1996. There were clear defects, not least the failure to give the name of the employer and the fact that the holiday pay arrangements outlined in the contract were not the ones operated by the Respondent.

37. While the Claimant's claim for unfair dismissal has not succeeded, her claim for other payments due from the Respondent has largely succeeded. Those are claims under Schedule 5 of the Employment Act 2002 and so under section 38(3) I must (subject to s38(5)) increase the amount awarded by the minimum amount and may increase it by the higher amount. Mr Holmes did not suggest that no award was appropriate, but urged me to make only the minimum increase on the basis that this was a small family employer with very limited administrative resources, and the difficulties with the contract had arisen at the very start of its operations.

38. I accept Mr Holmes's submission that this is a small family business with limited administrative support and that the issues with the Claimant's contract arose when it was just starting business. However, in my judgment there are other factors which mean that it is correct for me to make award the higher amount.

39. The first of these factors is that the contract omits the name of the employer. This is a matter of fundamental importance, and one that even the smallest operation ought to be expected to include in a contract. This is not an academic or theoretical problem since, as outlined above, the tribunal file contains a number of amendments to the name of the Respondent – it not being until the full hearing of the case that the proper name of the Respondent is agreed between the parties. All of that could have been avoided if the employer had been properly named in the original document.

40. The second factor is that the contract failed to state properly the way in which the Respondent was to deal with holiday pay. While I have found that raising her holiday pay complaints was not the reason for the Claimant's dismissal, the Respondent has not suggested that the Claimant brought her claim in anything other than good faith. If holiday pay had been dealt with properly in the contract then the initial dispute to which the Claimant later attributed her dismissal would not have arisen. One of the reasons behind section 38 must be to encourage good practice by employers to try to avoid problems arising which then cause further aggravation, dispute and eventually employment tribunal claims. The failure to provide a proper contract of employment undoubtedly in this case contributed towards the substantial amount of time and energy that both parties have had to put into the conduct of this case, and that is a second reason why the award should be of the higher amount.

41. The higher amount under section 38(4)(b) is four weeks' pay. A week's pay for the Claimant was £7.20/hour x 30 hours = £216 and I therefore increase the amount awarded by 4 x £216 = £864.

E. TRIBUNAL FEES

42. The Claimant has paid fees in connection with this claim. In R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be returned to the Claimant. The details of the repayment scheme are a matter for HMCTS.

signed on 25 September 2017
Employment Judge Anstis

Judgment sent to Parties on

28 September 2017