EMPLOYMENT TRIBUNALS

Claimant: Miss S Law

Respondent: Embrace Childcare Ltd

HELD AT: Manchester **ON:** 29 August 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person (accompanied by her mother)
Respondent: Miss E Rowley, Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unlawful deductions of wages fails and is dismissed.

REASONS

1. The claimant brings a claim of unlawful deduction of wages. The claimant contends that the respondent suspended her on 5 December 2016 and promised that she would be paid her salary until either the respondent's own investigation had finished or matters were resolved in respect of difficulties the claimant had with a neighbouring family which had led to her being involved with the police. The respondent submits that the claimant was dismissed on 7 December 2016 and no promise to pay suspension pay was made save from 5-7 December 2016.

The Issues

2. The issues for the Tribunal to decide are:

   (1) Was the claimant dismissed on 7 December 2016?

   (2) If not, was the claimant promised suspension pay?

   (3) If so, did that obligation end on 2 April 2017?

Witnesses

3. The Tribunal heard for the claimant from the claimant herself and for the respondent Ms Tracy Monaghan, owner and Managing Director.

Credibility

4. This case turned mainly on whose evidence I believed. Whilst I consider there may be some element of misunderstanding taking place in the course of the parties' communications at the time, in relation to the main issues I prefer the respondent's evidence as it was corroborated by documentary evidence.

Findings of Fact

5. The respondent is a childcare facility providing pre-school education from 2 to 11 years old. It is owned and run by Ms Monaghan. Ms Monaghan was a good friend of the claimant's uncle and I accept her evidence that he asked her to give the claimant a chance because she really wanted to work with children, and although she did not have any qualifications Ms Monaghan was prepared to take her on and sign her up for relevant training. At the time the claimant was working in vulnerable adult care and continued to do so in the mornings whilst undertaking to work for the respondent 2.30pm to 5.30pm Monday to Friday during term time.

6. The respondent was aware that the claimant had had some ongoing difficulties with a neighbouring family and took the view that this was acceptable as long as nothing affected the nursery.

7. The claimant began working for the respondent on 21 October 2016; however on 5 December 2016 an issue arose as a member of the public phoned the respondent and stated they had a video of the claimant threatening a child in a buggy. The claimant stated she had had an altercation with an adult member of the neighbouring family but there was no child present. On 5 December 2016 the respondent suspended the claimant in order to investigate the allegations. . Ms Monaghan spoke to the claimant outside the business when she attended to do her shift and advised her that she was being suspended while she found out what was going on. Prior to this the claimant had advised Ms Monaghan in relation to the police officer who knew what the situation was.

8. The respondent was then threatened with the destruction of her business if she carried on employing the claimant

9. There was a series of text messages that was used to support both parties' cases. Of all of these the ownership of one was disputed. The claimant stated the respondent had sent it, and one the respondent said the claimant had sent it. This was a text message sent on 5 December 2016 at 16:05 after the suspension. It simply said:

> "All signed up to course. She's next coming in on 15th. Any more news from nasty Nicholls or the police?"

"She" was a lady called Julie who was undertaking to train the claimant in childcare.

The respondent stated that the text messages in dark grey were hers, the ones in light grey as this was emanated from the claimant. MS Monaghan explained that 'Julie' had visited the claimant at home to arrange the course and the claimant was advising her, Ms Monahan, of that.

10. At 21:05 Ms Monaghan told the claimant "not to come into work tomorrow" and to see what happened.

11. The respondent in her witness statement also claimed that the claimant had confirmed by text message that she had retaliated against the said family and been arrested for affray and bailed, and that she had caused physical harm to the family. There was no text message to this effect. The claimant denied that she had caused any physical harm and stated that affray meant a breach of the peace and did not refer to any physical harm. Ms Monaghan said she was unaware of this as it was a legal technicality, which I accept, but believed the claimant had told her that she had harmed the other person or persons in the course of a phone call. I find that the respondent assumed affray involved some physical harm.

12. The claimant then went on social media and made some comments which disturbed the respondent. The claimant said she was simply seeking any witnesses to what had happened on 5 December 2016 and that there was no link with the respondent's business. The respondent stated that anyone going on the claimant's Facebook page would see that she worked for Embrace and there were pictures of her wearing an Embrace hoodie. This then led to a discussion about whether the claimant had an Embrace hoodie which she denied. The respondent said that she had found one for the claimant so that although it took six weeks to order one she had been able to provide the claimant with one. I prefer the respondent's evidence on this.

13. The respondent then decided that it was too difficult to employ the claimant and somewhat inadvisedly spoke with the claimant's cousin, an Ellie Sandbach, whose child attended the nursery, and stated that she was dismissing the claimant. Unfortunately the claimant found out from Miss Sandbach before Ms Monaghan had a chance to speak to the claimant and as a result at 22:00 on Wednesday 7 December 2017 the claimant sent the respondent a text message. This text message said:

> "Hi Tracy, just an update. They have interviewed and took statements from us all. X are still in custody and being questioned. Also I believe I no longer have a job? Something to do with Facebook? Firstly I was asked to ask around for any witnesses about me being run over. Secondly I totally understand you have to do what you have to do but it just would have been nice to have heard it from you and been told first. Thanks for the opportunity though, Tracy, but my family is absolutely 100% my priority and if asking for witnesses on Facebook causes problems for your business then you have to do what you have to do. Would have been nice to hear it from you though. Thanks again, Tracy.

14. Ms Monaghan replied:

> "Hi Steph, so sorry I wanted to speak to you personally. Hopefully we can sort something out when everything settles down, it's just at the moment I have to think of Embrace. I totally understand about you putting your family first. I would have done the same. I'll catch up with you later. Good news about the X. Hopefully they will take things seriously now and get something permanently done for all of you. They are such tramps."

15. The conversation continued:

> "It's so crap for you all, I feel bad as you didn't need this especially with Embrace. It's not forever it's just not at the mo. I am still here for you all. Still the same. Just publicly I need to distance myself."

16. The claimant stated that this exchange showed she was not dismissed as the respondent did not specifically say so. I find that the respondent was unambiguously confirming the dismissal just apologising for the way in which the claimant had found out.

17. It was the claimant's case that on 7 December 2016 she had spoken to Ms Monaghan directly on the phone later in the day after the text message exchange and that Ms Monaghan had said:

> "Don't worry, you are still suspended. You will still be paid. It's just temporary."

18. The claimant had never mentioned before that there had been a telephone call where this had been said.

19. The claimant in her witness statement had said, referring to after 7th December :

> "I had bumped into TM in the local area multiple times after this and she assured me I would be returning to my place of work as soon as everything has blown over, at which point I had still received no suspension pay from TM that I had been promised. I was happy to wait for this until I returned to the playgroup. TM also agreed I would be paid in full on my return."

20. Prior to this in the claimant's statement she says:

> "On 6 December I arrived at 2.30pm for my normal three hour shift at the nursery. I was greeted by TM who told me she had to temporarily suspend me on full pay as one of the members of said family had come into the playgroup that day and said she had a video of me abusing a child. From what TM had told me she had watched a video which contained no such actions that were being alleged. I also gave TM the number of the police officer dealing with this family who then told TM that it was in fact a false allegation and she should not take any action against me for this. I would also like to add that I have never received any confirmation about any internal investigation that TM has carried out."

21. From this it is clear that it was never said in terms at the time that the suspension was indefinite.

22. In view of my findings on credibility I find that I do not believe such a telephone call took place. The reasons for finding the claimant less than credible on this are:

(1) That she had not referred to this telephone call in her pleadings or a witness statement.

(2) That there was absolutely no mention in the text messages whatsoever of the claimant being suspended on full pay indefinitely.

(3) It is inherently unbelievable that a small employer would undertake to indefinitely pay somebody until everything has "blown over".

(4) The text message exchange described above appears to me to be clear that the claimant has been dismissed. Insofar as the claimant believed it was not confirming she was dismissed, she has unreasonably misunderstood this.

23. In addition the claimant never mentioned until after she was advised in April (see below) that she would not be offered another job that the respondent had agreed to pay her suspension pay. It is inherently improbable that this would not be mentioned by the claimant from December to April. The claimant stated the respondent had said it would all be paid when she returned to work but again the respondent denied this and there was no corroborative evidence of it.

24. In addition the claimant brought two witness statements to the Tribunal but did not call the witnesses to establish that she had been promised indefinite paid suspension:

(1) From an ex boyfriend who said he had been present when Ms Monaghan had promised the suspension pay and the claimant her job back. However, Ms Monaghan convincingly said that she had only ever spoken to the boyfriend once and about a matter related to the claimant's mother. He had not been present when she had spoken to the claimant on any other occasion.

(2) From a friend of the claimant called Katie Murray who said that she had known the claimant for three months. Although the claimant tried to resile from this in evidence it was clear that if this was correct then she would not have known the claimant prior to the matters arising which led to the claimant bringing this claim i.e. from early April in order to be present when the alleged suspension pay promise was reiterated by the respondent.

Accordingly I attach no weight to these statements and in any event do not regard them as true.

25. On 8 December 2016 a conversation began about being paid and the claimant asking if she would be paid on 10 December, and the respondent saying that £300 had been put in. The claimant queried this saying that it was £400, that she had worked five weeks at £100 a week and she had been subbed £100. Ms Monaghan replied:

> "I'll give you the other £100 Monday. Parents have paid by vouchers and need to clear them."

26. On 14 December 2016 the wages had still not been transferred, at least the outstanding £100. There was then a discussion about what hours she had worked, including a screenshot of a handwritten note setting out the claimant's hours which, on 5 December 2016, was recorded by the Assistant Manager, Amy, saying "dismissed pending investigation/allegation made by member of the public".

27. On 15 December 2016 Ms Monaghan said that the accountant had advised they had overpaid the claimant but Ms Monaghan would make sure she did not have to pay any money back. However, the claimant believed that she was still owed £95. This seems to have been resolved and there were no further text messages about it. There was no further contact then until 3 February 2017.

28. There was then a conversation on 9 February 2017 about the claimant possibly bringing in a DVD and Ms Monaghan returning the claimant's driving licence. Nothing then happened until 30 March 2017 when the claimant contacted the respondent to say:

> "Bail has been cancelled and no further action, but we knew that was going to happen anyway as we were the victims in all this, so I'm in the all clear to come back to Embrace. Got lots of stuff to sort with Bluebird this week but free to start on Monday and back, to normal?"

29. The respondent replied:

> "Woohoo, that's ace. We don't need anyone until September so can we do then? Hope you're celebrating in style…"

30. On 7 April 2017 Ms Monaghan sent the claimant a further text message as follows:

> "Hi Steph, I've given it a lot of thought since you contacted me on Thursday. I am so sorry but I won't be able to reinstate you. I cannot put Embrace in any situation that could jeopardise the future of the business. I will ask about the contacts I have in childcare and see if there are any available positions for you to apply to. I hope you understand. I will help you in any way I can. Thanks, Tracy."

31. The claimant was unhappy about this, of course, and sent the respondent a message asking for a copy of her contract, which Ms Monaghan said she would provide. Ms Monaghan said that after this she was advised by her solicitor not to have any contact with the claimant.

32. The claimant asked for the contract on a number of occasions, and on 10 April 2017 she wrote to the respondent saying:

> "Still waiting for written confirmation of termination of employment stating grounds of dismissal. Also the copy I signed when you gave me the job at Embrace, please. It's been well over a week now and all I have had is an

email telling me you will send across. I need this for my records as soon as possible."

33. On 10 April 2017 the respondent sent a long letter to the claimant which said:

"I am in receipt of your text messages wanting a contract of employment and reason for termination of your employment with Embrace. As previously notified a contract of employment was not yet issued to you as you were within the first two months of employment. However I did forward a copy of your offer letter which gave details of the employment. The reasons for termination were detailed in our letter of 7 December 2016 but for avoidance of doubt I have detailed these below. We had serious concerns about your involvement in an ongoing family feud with a local family. Whilst we appreciated that you volunteered the information that you had just come back from the police station after being cautioned and that I said that having a caution would be ok as long as nothing was brought into Embrace or anything became of it further.

Unfortunately this was not the case as on Monday 5 December 2016 we had a member of the public phoning in to say they had a video of you threatening a child in a buggy. You later admitted it was the adult and not the child you had an altercation with and for which you were cautioned for. We suspended you on full pay following an internal investigation on the same day due to safeguarding concerns, as whilst we accept that you did have an altercation with an adult you did so in the presence of a child which we deem to be unacceptable.

Furthermore, the member of the public then threatened myself and also to destroy Embrace Childcare as a result of you being employed by us. On Tuesday 6 December we received another phone call from a member of public saying you had been arrested last night due to affray. Ongoing texts with yourself, Stephanie, you confirmed you had been bailed and admitted you retaliated and caused physical harm to the feuding family which resulted in you being arrested. Also the final factor which resulted in your employment being terminated was when you publicly became unprofessional in posts made on social media website about this matter.

Taking into account all the above factors, Stephanie, and your length of service being six weeks and three days we decided that you, Stephanie, are an unsuitable person to work in Embrace Childcare. Our setting as the safeguarding in our care is paramount. We therefore consider that your probationary period with Embrace was unsatisfactory.

In relation to your dates of employment I can confirm that your actual dates of employment and days worked are from 21 October to 7 December 2016. I have checked with our accountant and can confirm you have been paid in full for the hours of work but you stated in a text to me from when we were discussing your pay on Wednesday 14 December at 2.37pm 'I remember thinking when I properly started that it was seven weeks to Christmas'. Our accountant has issued and posted your P45 out to your home address.

> In addition as we are a supportive and caring employer we agreed to pay for your DBS, your online membership training scheme, in order for you to gain knowledge and qualifications and we provided a uniform at our own expense as well as arrange for you to gain a Level 2 in Early Years qualifications.
>
> I hope this covers all your questions and requests and I must advise you that we now consider the matter closed and will not enter into any further communication regarding this matter."
>
> The respondent was unable to produce the alleged letter of 7 December 2016 and no explanation was forthcoming. Ms Monaghan said she had sent it to her solicitor; however it was not in the bundle and the representative had no explanation for that.

34. The claimant replied:

> "In the email it says you terminated my contract on 7 December 2016. That's incorrect. You temporarily suspended me without notice or explanation on this date. My employment has not been terminated until I have SMA formal letter or email stating grounds of dismissal. A text message is hardly the most professional of ways to do this as I am sure you are aware. I need something formal."

35. On 12 April 2017 the claimant said:

> "You did not terminate my employment on 6 December 2017. You told me I was suspended on full pay, of which I have not yet been paid for, but thank you for staying in the letter that we did agree this. Also no member of the public phoned you to tell you I had been arrested. I offered that information myself and I certainly did not tell you I had caused harm…and now you have made me unemployed. I am now entitled to free legal aid so I will taking this as far as I need to now strengthened by the emails you have sent. I didn't wish to carry out proceedings, Tracy, until you so cowardly and unprofessionally ended my employment by a text message and stating no grounds. After reassuring me on numerous occasions that I will be rejoining the business after some time I still obtained this messages also, which actually means that until you sent that text I was still working for you, which means that I have been part of Embrace team for six months before you ended my employment by text message. I will taking this to court, Tracy, unless I am paid the full pay you said I would receive while suspended. Look forward to hearing from you."

36. There was some correspondence with the respondent's accountants where they confirmed that a P45 had been raised for the claimant on 15 December 2016. The evidence included a photocopy of the accountant's post book saying "P45" on 15 December 2016 for Embrace, and postage of 55pence. The respondent argued this was the claimant's P45.

37. The claimant pointed out that her P45 said her employment finished on 16 December 2016 so how could it be sent on 15 December? The respondent's

explanation was that 16 December was when the claimant was going to be paid but all the information had been provided earlier.

38. In an email exchange on 20 April 2017 the accountant confirmed that the P45 was sent to the claimant on 15 December. The respondent, however, did not produce the original 15 December P45. However, in the lunch break they obtained further information from the accountant which showed a confirmation email from HMRC from the respondent's accountant's own system. This stated the respondent's company number and confirmed that document reference 475/MA65358 had been received at 11:02 on 15 December 2016. The submission type was "FPS adjustment". The respondent said this was evidence that the P45 had been lodged with HMRC that day and then it would have been sent out by post to the claimant. On the balance of probabilities I accept this as corroboration that a P45 was sent.

39. Further Ms Monaghan said she saw the claimant in a local pub the week after the P45 had been issued and she asked to have a word. They went to the back door of the public house and she said "I got something in the post". Ms Monaghan said, "Was it your P45?". The claimant began crying and said, "Yes, something like this. Does it mean I've definitely lost my job for good?". Ms Monaghan replied, "Yes, sorry, I've got to distance myself from you all now but we will see what happens after the court case". Ms Monaghan said she would buy the claimant a drink and the claimant said "thanks" and Ms Monaghan proceeded to buy the claimant a drink and it was all very amicable.

40. The respondent's accountant sent the claimant a duplicate copy of the P45 on 11 April 2017. I heard no evidence about the process relating to duplicate P45s.

41. The claimant agreed she had initially thought she could bring an unfair dismissal claim. She was unaware 2 years service was required until making enquiries in April.

The Law

42. Section 13 in Part II of the Employment Rights Act 1996 states that:

> "An employer shall not make a deduction from the wages of a worker employed by him excluding deductions authorised by statute or the employee/worker's contract or where the worker has previously agreed in writing to the making of that deduction."

43. A deduction is defined under section 13(3) as follows:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion."

44. Under section 23 an employee/worker can bring a claim of unlawful deductions in the Employment Tribunal.

45. Therefore it has to be established whether the amount in issue was "properly payable" to the worker/employee. This was the main issue here as the respondent stated that the claimant had been dismissed with effect from 7 December 2016.

46. It is also relevant in this case also to decide what was the effective date of termination.

47. Section 97 of the Employment Rights Act 1996 defines the effective date of termination in the following terms:

> "(1) Where a contract of employment is terminated by notice whether given by the employer or the employee, the effective date of termination is the date on which the notice expires.
>
> (2) Where a contract of employment is terminated without notice the effective date of termination is the date on which the termination takes effect."

48. The respondent's case here was that the claimant was dismissed via the claimant's cousin confirmed the same day by text message. Although the respondent averred that notice had been paid, there was no evidence of this. Accordingly it appears it was a dismissal without notice.

49. The legal situation is complicated. A dismissal without notice is in most cases wrongful at common law since the employer's action is regarded as a fundamental or repudiatory breach of contract, except where the dismissal is for gross misconduct – **Laws v London Chronicle (Indicator Newspapers) Ltd [1959] Court of Appeal**.

50. In contract law a repudiatory breach is only effective in terminating a contract if the innocent party accepts the repudiation or is deemed to have accepted it (the elective approach). It is uncertain how this applies to contracts of employment: some cases have held that it does and others have taken a different view.

51. As far as common law is concerned, in the Supreme Court decision of **Geys v Société Générale [2012]** they held that the elective approach protects the innocent party from the effects of the breach of the other party. However, this will only entitle the claimant to their notice pay. In **Geys** a large notice payment and bonus was at issue.

52. Regarding statutory rights, the so-called "automatic approach" is preferred. In the EAT decision in **Robert Cort & Son Limited v Charman [1981]** it was ruled that the EAT for statutory purposes of the date on which the termination takes effect, meaning the date on which the employee is actually dismissed.

53. The question then arises: when does summary dismissal take effect? If one of the parties to a contract terminates it in circumstances where the other party is immediately made aware of the termination, then the termination is regarded as taking effect on the same day. If an employee is informed that he or she has been summarily dismissed by letter then the effective date of termination will be the date on which the letter is received and read. **Brown v Southall & Knight [1980]** states that a summary dismissal would not take effect until the letter reaches the employee or until he or she has had a reasonable opportunity to read it.

54. This was examined and approved by the Supreme Court in **Gisda Cyf v Barrett [2010]**. The letter advising the claimant that she had been summarily dismissed was not read by the claimant until several days later after it was sent as she was visiting a relative and only arrived late but did not read the post until the next day. The day she read it was the date that the Tribunal found was the effective date of termination, and this was upheld by the Court of Appeal and the Supreme Court on appeal.

55. Regarding a third party conveying the fact of dismissal the respondent referred to **Robinson v Bowskill EAT [2012]** as authority for a dismissal being effective in those circumstances. However in that case it was a solicitor who conveyed the dismissal rather than the employee's cousin who had no professional standing.

Conclusion

56. The respondent here did not rely on the alleged letter sent on 7 December 2016 but on communication to a third party and the confirmation of dismissal in the text messages after this had been communicated to the claimant by her cousin. They did not rely on the P45 as proof of the date of dismissal, just corroboration that the claimant had been dismissed and this was the respondent's intention.

57. The main issue then is the consideration of the email exchange. It was not disputed that the respondent had told the claimant's cousin, Ellie Sandbach, that the claimant was dismissed. I do not accept that such a communication was effective, certainly not by itself. However it is abundantly clear to me that the respondent was confirming that the claimant was dismissed in the text message exchange. I cannot see how those text messages could have been misunderstood. If the claimant believed that because the dismissal was in a text it could not be effective, that is not the case.

58. I accept that the respondent said that matters would be hopefully sorted when the feud with the neighbouring family was resolved or the claimant exonerated, but this is a separate matter to the claimant claiming that she was suspended with pay. There was some promise of her job back but no legal claim is brought in relation to that (it is possible a notice pay claim might have been made).

59. I have found above that I prefer the respondent's version of events in any event and I have set out the reasons for this. It is simply ultimately inherently improbable that the respondent would have offered this to the claimant. The claimant said she thought the respondent was simply being nice. No small employer can afford to be nice to this extent. It may have been a year before the claimant was exonerated by the police, or even longer. Sadly we are aware this can occur when postponing unfair dismissal claims which are also subject to police investigations.

60. I have, however, enumerated many other reasons above why I prefer the respondent's version of events.

61. I find, therefore, that the claimant was dismissed on 7 December 2016; that she was aware she was dismissed on 7 December 2016, and it was only when the respondent refused to have her back when she was exonerated at the end of March

that she cast her mind around considering what action she could bring against the respondent, initially feeling she could bring an unfair dismissal case but being totally unaware she needed two years' service at the time.

62. However once she learned this I find she was considering what other legal action she could take and at this point, being alerted by the use of the word "suspension" in the respondent's letter of 10 April 2017 she decided that as she had not been given formal notice of dismissal her suspension must be continuing throughout this period and that she was entitled to be paid. I find this because of her evidence on the two years' service point and the failure to mention anything to do with suspension pay until it had been mentioned in the respondent's letter of 10 April.

63. Accordingly the claimant's claim fails and are dismissed.

64. I did point out to the respondent, however, that the claimant might be entitled to notice pay for wrongful dismissal as there was no convincing proof that the claimant had been paid for this and there was no evidence, although this was not the issue before me, of gross misconduct.

Employment Judge Feeney

Date: 4th September 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 September 2017

FOR THE TRIBUNAL OFFICE