



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A De Beauville

**Respondent:** Mr G Mrkusic

**Heard at:** London South, Croydon

**On:** 17<sup>th</sup> August 2018

**Before:** Employment Judge Tsamados (sitting alone)

## Representation

Claimant: In person

Respondent: In person

# REASONS

These are the written reasons for the Judgment made on 17<sup>th</sup> August 2018 which was sent to the parties on 16<sup>th</sup> October 2018. These reasons were requested by the claimant.

## Claims and Issues

1. By a claim form received by the Employment Tribunal on 16<sup>th</sup> May 2018, Miss De Beauville, the claimant, brought a complaint of damages for breach of contract for wrongful dismissal against Mr Mrkusic, the respondent. In his response, Mr Mrkusic, denied the complaint.
2. The issues for the Tribunal to determine are whether the respondent was in breach of contract and if so what sum was the claimant entitled to as damages. The dispute was essentially about whether the claimant was entitled to payment for the period of her notice to include overtime as well as standard hours. The respondent paid only the standard hours to the claimant.

## Evidence

3. I was provided with a bundle of documents for each party which I will refer to as "C1" in respect of the claimant's bundle and "R1" in respect of the respondent's bundle. In addition, the claimant provided me with a copy of her contract of employment as well as various emails between her and the respondent, which I refer to as "C2" where necessary. The respondent

provided me with a document setting out a schedule of the payments made to the claimant which I refer to as "R2" where necessary.

4. I heard oral evidence from the claimant and the respondent.

### Findings of Fact

5. I set out below the findings of fact that I consider relevant and necessary to determine the issues that I was required to decide. I do not seek to set out each detail provided to the tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.
6. The claimant was employed as a Nanny by the respondent and his wife from 4<sup>th</sup> September 2017 until the claimant's resignation on 22<sup>nd</sup> March 2018.
7. She was provided with a written contract of employment by the respondent setting out the terms and conditions of her employment. Her duties are set out at clause 1.2 of that document as follows: caring for the respondent's children (then aged eight and five); collecting them from school during term time and taking them to and from after-school activities and outings agreed in advance and during school holidays; preparing the children's meals; organising the children's activities after school during term time and throughout the day during school holidays; general nursery duties including washing and ironing children's clothes, tidying and organising their bedrooms and playroom, and lighter household chores; and babysitting at times agreed in advance .
8. The claimant's days were expressed to be normally Monday, Tuesday, Wednesday, Thursday and Friday (as at clause 1.3).
9. Clause 1.4 set out hours of work as follows :  
  
*"Normal working hours shall generally be 2 pm to 7:30 pm. During School Holidays, over time will be required from 7:45 am to 2 pm. Additional overtime may be worked ad hoc by mutual agreement."*
10. At the time of the events in question the claimant's normal hours of work had been varied from 2.00 to 7.30 pm to 2.00 to 6.30 pm Monday to Friday. She therefore worked standard hours of 4.5 per day for 5 days which amounts to 22.5 hours per week.
11. The claimant's gross salary was £392.43 per week which was equivalent to £14.27 per hour and overtime was paid at an hourly rate which was 11% higher than the standard rate (as at clause 2.1). This was payable in arrears on the last working day of each week (as at clause 2.2).
12. Termination of the contract was by way of not less than four weeks' notice in writing by either party subject to the statutory minimum (clause 6.1). There was also provision for summary dismissal with or without notice (as at clauses 6.2 and 6.3). The contract contains no clause entitling the respondent to make payment in lieu of working the notice period.

13. The events in question happened over a short period of time and are almost entirely set out in a number of WhatsApp text messages between the parties. In particular, the circumstances giving rise to this complaint. I was provided with screen shots and typed versions of these text messages.
14. On 20<sup>th</sup> March 2018, the claimant was not at work, having requested time off as a result of someone close to her passing away. On 21<sup>st</sup> March 2018, she initially indicated that she would be able to attend work, but later felt unable to do so and informed the respondent of this approximately 2 hours before she was due to start work. The respondent responded with an “ok” at that time. This exchange took place by WhatsApp messages and is largely captured in the copy texts at C1 3.
15. On 22<sup>nd</sup> March 2018 at 07:17 hours, the respondent sent the following text to the claimant (C1 1 and R1 2):

*“Nikki, I need to warn you something we need to discuss. We absolutely need you to come to work every day when you are expected. I understand things happen, but, as you are paid to look after our kids and Sarah and I both have full-time job, we need you to do whatever it takes to be there. There have been several occasions where you are unable to make it at short notice (especially yesterday, when you told us you would work, and then, less than two hours before you were due, changed your mind). We appreciate your care of the kids, but we also need you to be completely reliable if you are going to continue to do this. I do need you to tell me whether you are able to commit to doing this going forward. Let’s discuss this in person this evening or tomorrow evening. Thanks, Greg”*

16. The claimant responded by text at 08:04, as follows (C1 1 and R1 2):

*“Hi Greg, to be honest, I find this message very insensitive & I’m not up for explaining why I needed Tuesday and Wednesday off to mourn the loss of someone close to me. I don’t believe aside from yesterday there have been several occasions where I have been unable to make it to work at short notice but may remind me of them if you do. Actually, the last time I requested a day off I had a doctors note, the days before that were related to the same incident, and I recall maybe two other days before then with the glass and the (I have redacted the name of the Respondent’s child) incident. All other days off work were by mutual agreement, or at least this is how I perceived it (if they weren’t, I feel you or Sarah should’ve have made this clear). I can’t commit to these things not happening going forward and particularly given the days I take off for sickness or otherwise are usually unpaid, I expect to be able to make my health a priority when I make the call that it is necessary. Unfortunately I feel as though I am finding myself bending to accommodate you and Sarah when necessary, fulfilling overtime out of my contract etc and being very available when I am fit to do so, yet when the tables are turned I am usually met what can confirm now is hostility from your end. I feel this one sided quality maybe the local trend with nannies/employers, but personally I don’t like it and I believe very strongly that mutual understanding is necessary in setups like these. There is also something upsetting about the fact you sent this message at 7am and woken me up, all things being considered, given I don’t start my shift with you until 3. As you can imagine this threat of being in ‘trouble’ along with whatever else I’m dealing with for me to even request a day off in the first place becomes way too much to deal with.”*

17. The respondent replied by text at 10:02 hours as follows (C1 1 and R1 2):

*“Nikki – I am not asking you to explain why you needed time off – either now or on previous occasions. The point is that we needed you to be reliable if you do this role since we are not able to make alternative arrangements at short notice (apart from – extremely rare – exceptions). I do therefore need you to understand that this is a requirement of the job. The only time that we require overtime of you is in school holidays, as you are aware when we interviewed you. I do need you to commit to being fully reliable going forward (and to overtime in school holidays). I would be delighted if you are able to do so: if so, you will*

*continue to have our full support! If not, this would mean that you are not able to perform the role we need. As mentioned earlier, let's discuss in person later today."*

18. The claimant replied by text timed at 11:08 as follows (C1 1 and R1 2):

*"Greg I will come in today but I don't want to talk about this, particularly given the current circumstances, I'm not up to it. Please consider this the first day of my notice to end the week ending on the 20<sup>th</sup> April."*

19. The respondent responded by text timed at 11:33 as follows (C1 1-2 and R1 2):

*"Okay – thanks to confirm you will come in. I will ask Sarah to confirm what's on today. I do accept it if you don't want to talk about any of this, but will do so if you decide that you do want to. I do also accept your resignation but am obviously open to discussing this if you want to."*

20. The respondent further responded to the claimant by a text timed at 13:14 hours as follows (C1 2 and R1 2):

*"Nikki – I have spoken to Sarah about the above. To be honest, we feel extremely upset about some of your points above, especially the accusation of hostility. I therefore think it would be better if you did not come in during this period (including today). We will of course pay you for your standard contractual, until the 20<sup>th</sup> of April. I will send you a formal acknowledgement of this over the weekend, since it is absolutely not my intention to have this discussion by WhatsApp."*

21. At 15:58 hours the claimant replied with the following text (C1 2 and R1 2):

*"Hi Greg, unfortunately there is no clause in my contract for payment in lieu of notice, so the termination of my contract today without the 4 weeks stipulated notice period for no reason other than you and Sarah are very upset I felt you'd been hostile about previous absences constitutes a breach of contract - this doesn't fall under any sort of gross misconduct or even misconduct at all. (Also very confusing since long after I made the comment, you still requested that I come in and even asked if I'd be open to discussing my resignation). In any event, this means the monies owed to me notice are actually damage payments for breach of contract, but I'm happy to concede so long as they are a reflection of the next 4 weeks of my employment (which was to include overtime). Thanks, Nikki."*

22. The respondent responded by email timed at 21:09 as follows (C1 2 and R1 2):

*"Nikki – my response above was in reaction to your giving notice. Whilst I thought it might be better if we paid you your standard contractual pay during your notice period and not require you to come in, this was intended as a generous offer, given that you had given notice. It is great if you would rather come in and work your notice (including the overtime we agreed). Assuming you'd prefer to work your notice period, please could you pick up the children at 12 noon tomorrow and work the holiday hours we agreed by email (12 – 6.30 tomorrow and 7.45 – 6.30 on the other holiday days until and including 17 April, with normal school hours from the 18<sup>th</sup>). If you'd prefer not to work your notice and instead get paid for your standard contractual hours during the notice period, the offer is still open. Unless you tell me otherwise, I will assume you are working the hours we agreed, and you have our full support, as always, during your notice period. Thanks, Greg."*

23. The claimant replied by text timed at 21:30 as follows (C1 2):

*"Greg, my contract was terminated today when you told me you'd prefer I left without fulfilling my notice, because of your personal feelings, and I acted upon this. You explicitly said that you'd prefer I didn't come in because on second thoughts I had upset you and Sarah, and*

*then made me an offer, in acknowledgement that you had terminated (and breached) our contract and I was owed notice. I was already on my way to work at quarter to 2, something you and Sarah would've been aware of. This attempted revision is unfair and dishonest. I can no longer work a notice period, because the contract between us no longer exists and ceased to exist from the moment I followed your instructions and didn't turn up today for my shift. You can proceed how you feel is best regarding this, but I maintain this stance and will continue to"*

24. The respondent sent an email to the claimant on 26<sup>th</sup> March 2018 at 7:38 pm in which he said as follows (at C1 7):

*"Dear Nikki,*

*Sadly, we accept your four weeks' resignation. Your final date of employment was 23<sup>rd</sup> March 2018. By mutual agreement you are not working your notice and we will pay you your basic salary in the notice to 20<sup>th</sup> April 2018. Please note that pay in lieu of notice is free of tax."*

25. The email then went on to set out the calculation of the claimant's final payment of wages in the total sum of £988.91 gross. This represented the claimant's normal weekly salary of £321.08 gross for four weeks from 26<sup>th</sup> March to 20<sup>th</sup> April 2018 of £1284.32 less holiday entitlement taken in excess of that accrued in the sum of £295.41.
26. The claimant replied by email dated 27<sup>th</sup> March 2018 timed at 09:26 hours as follows (at C1 8):

*"Hi Greg,*

*Unfortunately as I expressed over WhatsApp, I cannot accept payment that doesn't reflect the next 4 weeks of my employment accurately, particularly now given the massive deductions for holiday I hadn't initially taken into account. This is not to be intentionally problematic, but because I have expenses, which is why I offered to work my notice period, taking overtime into account. I think it's obvious that last week Thursday marked the end of our contract, and the legal reasons from my end and personal from your end as you had initially let me know, working a notice period wouldn't be possible after the point of the contract terminating. As pointed out before, there is no pilon clause in my contract, so this reduced payment over these 4 weeks was a completely unforeseeable event from my end, and as a result will cause me a lot of issues.*

*I really would like to keep this situation from escalating, but losing about half of my expected wages for the next 4 weeks isn't something that practically I can afford to do.*

*Please let me know if you understand my perspective, and if you're willing to reconsider.*

*Nikki"*

27. The respondent replied by email on 27<sup>th</sup> March 2018 setting out his understanding of the position between the parties based on their WhatsApp conversation on 22<sup>nd</sup> March 2018, as follows (at C1 9):

*"1. You resigned on Thursday morning, giving that day as the first day of your notice  
2. I indicated that you would not need to come in during your notice period, and that we would pay you for your contractual hours until 20 April – two days longer than your 4-week notice period. Please note, this was not an offer of payment in lieu of notice, but rather to pay you through your notice period on the basis of your contracted hours, without the requirement for you to come to work.  
3. Your response talked of payment in lieu of notice and that you want to be paid on the basis of overtime you might have worked during school holidays, in addition to your normal*

*contracted hours. I said that you would be welcome to work your notice period (including paid overtime), with our full support.*

*4. Late on Thursday, you indicated that you would not become back to work and thereby terminated your contract without notice. This was a breach of contract by you.*

*5. Given your decision, I was not under any obligation to pay you after you did this late on 22 March*

*6. Notwithstanding the above, we have paid you in full as if you had worked up to and including 23 March, and, in addition, have offered to pay you in lieu of notice for your standard contractual hours for the four weeks to 20 April as a gesture of goodwill*

*7. The amounts deducted for holiday purely reflect the fact that you took more paid holiday during your employment than you are entitled to, given that you left part-way through the holiday year”*

28. The email ended with a repetition of the offer to pay for weeks wages in lieu of not as a gesture of goodwill.

29. The claimant responded to this email on 3<sup>rd</sup> April 2018, as follows (C1 10):

*“After speaking with various external employment sources and relaying the messages between us since the 23<sup>rd</sup>, I’ve been advised that I was initially correct and I am legally owed my overtime from you.*

*Whether or not you would like to reach an agreement between us remains your decision, otherwise I would like to invite you that I will be pursuing it– I see no legitimate reason for me to miss out on the notice I was legally due because you and Sarah were ‘extremely upset’ at my non provocative, non explicit messages and decided you’d like me not to come in during my notice period. Your change of mind at 9 pm that evening had absolutely nothing to do with me, and I was under no legal obligation to accept it. In addition to this, because I would no longer feel comfortable returning to work after you let me know you were ‘extremely upset’ and wouldn’t like me to. It’s very obvious that you are the one who breached the contract, and the assertion I am to blame for not coming in on Friday after you explicitly instructed me not to on the Thursday is very, very inaccurate.*

*This situation will undoubtedly become very uncomfortable and time consuming for both parties, and I think that’s very unnecessary considering how clear the law around situations like this is. However, I respect your decision to decline – this email is only to confirm that you will not willingly be paying me overtime that I am legally due.”*

30. The respondent made a final payment of salary to the claimant on 29<sup>th</sup> April 2018 in respect of her standard contractual hours to 20<sup>th</sup> April 2018 (not including payment in respect of overtime). The claimant received this payment.

31. The final payment of salary for the notice period is for the normal days that the claimant was contracted to work for four the four weeks. The calculation of this payment is set out in the respondent’s email to the claimant dated 26 March 2018 (C1 7). The breakdown of the payment is also set out in R2 which in addition sets out the disputed overtime days and payments at 6.25 hours per day). There was a dispute between the parties as to whether or not the claimant had booked two days holiday in respect of 28<sup>th</sup> and 29<sup>th</sup> March 2018, the respondent saying she did and the claimant saying she did not. However, it appeared that the respondent included these days in the payment made and so it was not necessary to resolve this dispute of evidence.

32. Whilst it was initially in dispute, the claimant accepted that she was paid for 22<sup>nd</sup> and 23<sup>rd</sup> March 2018.

33. The claimant mitigated her loss during the notice period but was unable to find alternative work. She did not claim any social security benefits during this period.
34. From the evidence I find that the claimant resigned on 22<sup>nd</sup> March 2018 and gave notice of termination to end on 20<sup>th</sup> April 2018 although in fact her notice period would have expired on 18<sup>th</sup> April (4 weeks to the day). She gave notice on the basis that she would attend work during that period. Whilst the respondent initially agreed (although a resignation is a unilateral act and does not require the other party to the contract to agree to it), he subsequently replied, most likely having spoken with his wife, stating that given what the claimant has said in her earlier text, he and his wife do not feel it appropriate for her to come to work and will pay standard contractual hours. The claimant responded stating that there was no payment in lieu of notice clause in her contract and no grounds to deny her the right to come to work or not to pay her in full including overtime hours, but she was happy to concede the point if she is paid in full including overtime. The respondent then replied late that evening, in essence stating, come in to work then or if not we will pay your standard contractual hours and not the overtime hours. The claimant did not attend work that day. Later that evening the claimant replied to the respondent's text message to the effect that she found his actions (in his text) amounted to a termination of her employment and she could no longer work the notice period. Whilst the email of 26<sup>th</sup> March 2018 from respondent to claimant records her as not working her period of notice by mutual agreement, I appreciate from the text messages sent on 22<sup>nd</sup> March 2018 that this was not the case.

### **Relevant law**

35. The Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

### **Conclusions**

36. This is a matter of construction as to the termination of employment between the claimant and the respondent.
37. Having considered the evidence before me, which unusually is well documented within the contemporaneous text messages between the parties, I find as follows.
38. The claimant resigned on notice of 4 weeks in her text message timed at 11.08 hours (C1 1 and R1 2). The text message from the respondent timed at 13.14 hours (at C1 1 and R1 2) is not a termination of employment/dismissal but simply states that he and his wife feel it better if she does not work her notice period and she will be paid her standard contract hours. The claimant responded at 15.58 hours (C1 2 and R1 2) challenging the respondent's right to prevent her working her notice period but stated that she was willing to concede this point as long as gets paid her standard and overtime hours. The respondent replied at 21.09 hours (C1 2 and R1 2), in essence, if you would prefer to come to work that is fine you can work your notice period otherwise the offer to pay standards hours is still open. The claimant replied 21.30 hours (C1 2 and R1 2), essentially, that the respondent

had terminated her employment in his email timed at 13.14 hours and that she could no longer work her notice period as the contract of employment no longer exists, having followed his instructions not to return to work.

39. From this I reach the conclusion that the claimant resigned on notice and by not attending work during her notice period, the claimant was in breach of contract and actually had no entitlement to be paid at all. She was fortunate that the respondent paid her. But in terms of the complaint before me, by not working her notice period the claimant has no entitlement to be paid damages in respect of the overtime payments that she seeks.
40. I therefore find that her complaint in respect of damages for breach of contract fails and her claim against the respondent is dismissed.

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Employment Judge Tsamados

Date: 30<sup>th</sup> October 2018

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