RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr S James**

Respondent: **Laurel Leaf Homes Limited**

Heard at: **East London Hearing Centre**

On: **28 February and 1 March 2019**

Before: **Employment Judge S Moor**

Members: **Mr D Ross**
Mr P Quinn

Representation

Claimant: In person
Respondent: Mr M Baulackey (Director)

JUDGMENT having been sent to the parties on 25 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 These claims arise out of the short employment of the Claimant as manager of a care home for children run by the Respondent.

Issues

2 The claims, clarified on the morning of the first day of the hearing, are as follows:

2.1 deduction of wages;

2.2 annual leave accrued on termination of employment;

2.3 breach of contract (wrongful dismissal) i.e. notice pay; and

2.4 direct discrimination because of religion.

3 There was originally a dispute over the Claimant's employment status. The Claimant originally described himself as a 'contractor with employee rights' but by the time of our hearing all agreed that he had been and was an employee.

4 In respect of outstanding wages and accrued holiday pay the Respondent agreed that it owed the Claimant some money but, despite our giving them time and encouragement, the parties were unable to agree a final figure and left that decision to us.

5 The Claimant confirmed that he was no longer claiming the figures he set out in his claim form in respect of an Ofsted registration payment.

6 The Claimant clarified that, in respect of his breach of contract claim, his contention was that he was entitled to leave his employment immediately on 26 May 2018 because wages, which were due the previous day, had not been paid. He claimed that this was a fundamental breach of contract, which allowed him to treat himself as dismissed. If he succeeded in this argument, then he would be due one week's pay in respect of lost notice. He clarified at the outside that this failure to pay on time was not a claim of religious discrimination.

7 In relation to his discrimination claim he clarified at the outset the acts and omissions he complained about. The Claimant confirmed at the outset of the hearing, as he had done at the previous Preliminary Hearing, that he was not pursuing the race discrimination claim he had raised in his claim form. In respect of his religious discrimination claim:

7.1 First, his complaint was that the Respondent, through Ms Gokol-Hoota, Deputy Director, had orchestrated a complaint against him.

7.2 Second, he complained about the way in which the Respondent had dealt with his own complaint, specifically by appointing a non-independent investigator and by that investigator not interviewing all relevant witnesses.

7.3 He argues that those acts were because of his religion. He is a Christian. As background to that and in support of it, he alleged he has not been allowed to wear a faith necklace (a cross) at work and made allegations that Mr Baulackey had made remarks concerning Islam and jihad at work.

8 The parties came to the hearing without an agreed trial bundle. They disagreed as to who was responsible for its preparation. In the absence of a written Case Management Order, and in order to avoid a postponement, we used the Tribunal facilities to copy the necessary documents and enable the hearing to go ahead.

Findings of Fact

9 Having heard the evidence of the Claimant, Ms Gokol-Hoota and Mr Baulackey and having read the documents referred to us, we made the following findings of fact.

10 The Respondent ran a home for children. Mr Baulackey was its Director and Owner and Ms Gokol-Hoota its Deputy Director. They are both Muslim. Mr Baulackey stated that he was not particularly religious and we accept that. He did not pray at work. He has close family members, including sisters, who are Christian. Ms Gokol-Hoota wears a headscarf and prays at work. Currently at the home are nine other members of staff who follow a number of different religions, two are Muslim, one is Hindu and others are Christian both in the Catholic tradition and the Church of England. (They also come from a variety of racial and ethnic backgrounds.)

11 The Claimant is a Christian. He started employment at the home on 9 February 2018, having been recruited via an agency. His gross annual salary was agreed to be £40,000. He was provided with a draft written contract of employment, which was not signed, but ultimately the Claimant agreed the terms of it, while seeking to negotiate an additional term about bonus. We have decided that the Claimant did not wear a cross or faith necklace at work. Nor do we find that Ms Gokol-Hoota ever told him not to wear one. We do not accept the Claimant's evidence about this. In reaching this decision we have taken into account the evidence in the bundle from the independent inspection, made by Ms Carter, that other staff wear faith necklaces. The wearing of faith necklaces was not discouraged by the Respondent. Furthermore, this allegation was not mentioned in the claim form or in the Claimant's formal email complaint. We find it likely that, had he been requested not to wear a faith necklace, this allegation would have been included both in his internal complaint and at least in his complaint to the Tribunal. We find it equally not credible that the Claimant sold his necklace subsequently as he told us in his oral evidence. This seemed to us not credible because it was item he had already told the Tribunal was very important to him. The two statements do not sit well together. Overall, bearing in mind all the evidence we have heard, we accept Ms Gokol-Hoota's evidence that the Claimant did not wear a faith necklace and that she had never asked him not to do so.

12 There was an argument at work between the Claimant and Mr Baulackey about a proposed colour scheme at the home. The Claimant wanted a variety of blues because he thought that that would be relaxing. Mr Baulackey did not agree because he thought they looked institutional. He also wanted the Claimant to consult the residents before choosing a colour scheme.

13 The next day they held a meeting along with Ms Gokol-Hoota, in an attempt to reconcile their differences. We do not accept the Claimant's evidence that at this meeting Mr Baulackey made any comments about religion, Islam or jihad. We accept Mr Baulackey's denial about this and that of Ms Gokol-Hoota. They appeared genuinely flabbergasted by these allegations. We find the alleged remarks do not fit with our finding that Mr Baulackey is not that religious. Nor did the Claimant refer to them in his internal complaint or in his claim form as we find he would have done or at least is likely to have done had they taken place. Likewise, we do not find that there was any change in attitude towards the Claimant after this conversation. In fact, Ms Gokol-Hoota and the Claimant continued to have a very good working relationship until she was required to have an informal word with him about the following matter.

14 At a meeting about restraint, where several staff members attended, the Claimant looked at a colleague Ms P and said something to the effect of 'oooh those red lips' and went forward to kiss her. Ms Gokol-Hoota did not see exactly what happened but we find

she heard him say those words and saw him go over to Ms P and heard a kissing sound. We accept all of that evidence. We found her to be credible witness who did not embellish her recollections.

15 At one point of his evidence, the Claimant sought to explain his behaviour by suggesting that it was Ms P's birthday but later he changed that. We did not find his evidence about why he had gone to kiss Ms P credible. Be that as it may it is admitted by him that he kissed her on the cheek and he also admitted that on another occasion, when he bumped into her and her children at Westfield shopping centre, he also kissed her on the cheek.

16 At the meeting everyone carried on as if nothing had happened but afterwards a staff member who we shall refer to as AF raised a concern with Ms Gokol-Hoota about the Claimant's behaviour towards Ms P. We reject absolutely the Claimant's assertion that Ms Gokol-Hoota had simply made this up. We accept her evidence that AF raised a concern. This is because we find it unsurprising that a staff member would raise a concern about such matter it being uncomfortable for some staff members to be faced with intimacy at work by a manager. Ms Gokol-Hoota thought she should deal with the matter informally and therefore spoke to the Claimant about it. He confirmed he had kissed Ms P as it was part of his culture. Ms Gokol-Hoota replied that that might be so but try to explain to him that in a workplace environment he really should not do so; that he should understand that some staff members may not feel comfortable; and that some would not be comfortable in telling him because he was in a senior position and therefore one of power. She reassured him that there had been no formal complaint but another person had mentioned it and she advised him to apologise to the particular staff member. She explained to us she was trying to nip the matter in the bud. We find that is exactly what she was trying to do and sensibly so.

17 The Claimant called back Ms Gokol-Hoota later in the day to say that Ms P did not have a problem with being kissed. He then sought to escalate the issue by asking who had raised the concern. He tried to pressurise Ms Gokol-Hoota into telling him. She refused. The conversation culminated in the Claimant threatening to have staff meeting to find out who the informant was. Ms Gokol-Hoota reminded him not to be so sure that Ms P did not mind as she had heard from another staff member that Ms P had said he had kissed her in front of her children. He accepted this but could not cope with staff talking about the issue.

18 On 14 May 2018 the Claimant then raised a formal complaint about Ms Gokol-Hoota specifically "*the gossiping culture that I have found to be orchestrated by Noor which has targeted my person and integrity*". Mr Baulackey, upon receipt of his complaint, organised for Mr Rodney Smith to investigate it. Mr Smith was a freelance trainer occasionally used by the home. He was not on its payroll but someone known professionally to Mr Baulackey for a long time. We accept his evidence that they were not friends. Mr Smith investigated the matter. On 23 May 2018 he interviewed Ms P, AF, Ms Gokol-Hoota and the Claimant. The Claimant complains that Mr Smith did not interview a staff member called Linus and two others who were present at the meeting.

19 We find it likely, from what she told Mr Smith and from her statement dated 27 November, that on 18 May 2018 Ms P began to write but did not complete a formal complaint. Nor did she send that complaint on 18 May. That is where we leave the issue

of Mr Smith's investigation because it had not been completed before the Claimant left work by resigning. We shall next make findings about his reasons for doing so.

20 We find the Claimant asked towards the end of February to become self-employed. We do not accept his evidence to the contrary, namely that Mr Baulackey asked him. It was the Respondent who offered him the job as an employee and the Respondent who asked for his P45 and the Respondent who gave him a written contract calling the work 'employment'. We find it is not credible, therefore, to suggest that it was the employer's idea that the Claimant go self-employed. It was the Claimant who requested it, knowing the tax benefits of self-employment, and Mr Baulackey who agreed. Therefore, from the first month onwards the Claimant invoiced the Respondent for his work and was initially paid gross for that work. The usual pay day was 28th of the month. The terms of the contract, however, provide that salary is "*payable monthly on or around the last working day of each month*".

21 On Friday 25 May 2018 the Claimant informed the Respondent by email that he would be taking annual leave the following week. One day of which what he described as a day in lieu. He had not given any prior notice of his wish to take holiday. We accept Ms Gokol-Hoota's evidence that the practice at the Respondent was to give four weeks' notice of holiday. The Claimant's email led Mr Baulackey to query with the Claimant whether, now that he was a contractor, he was entitled to paid annual leave at all. The Claimant stated that he could be both the contractor and be entitled to annual leave. Mr Baulackey then sought advice from his accountant and sent a further email to the Claimant on the same day stating that unless he can provide a certificate from HMRC to prove that he was self-employed and his unique tax reference (a ten-digit reference number for tax self-assessment), then the Respondent should treat him as an employee. He strongly advised the Claimant to get some advice. In his final email of 26 May the Claimant told Mr Baulackey that it was none of his business and refused to supply his unique tax reference number. He claimed he was entitled to holiday. He resigned 'with immediate effect' because he had not been paid the day before. He expected wages on 25 May because 28 May was a bank holiday. He gave Mr Baulackey 24 hours to pay what owed or he would take legal action.

22 The Respondent continued to be concerned that the Claimant had not provided any evidence of his self-employment tax status (no UTR or certificate) and it therefore decided, on its accountant's advice, to deduct national insurance and tax and to do so in respect of all the months of the Claimant's employment. It informed the Claimant of this by email and provided payslips for each month of his employment showing the relevant deductions. This meant that the final payslip for May was not what the Claimant was expecting. The Claimant was extremely unhappy about this, so much so that in an email of 31 May he accused Ms Gokol-Hoota of theft. In an admirably restrained reply she explained that it was necessary to treat him as an employee without proof from the revenue that he was in the self-assessment scheme. The Claimant complained in his claim form to the Tribunal of this change in the terms of payment by which he meant the decision to deduct tax and national insurance. However, by the time of the hearing the Claimant accepted that he was an employee and it was therefore appropriate for the Respondent to deduct tax and national insurance for all the period of his employment.

23 Mr Baulackey explained, and we accept, that because the Claimant's P45 did not give a day-to-day gross earnings figure it was not possible in respect of the months of

February and March which fell in previous tax year to use the tax code because there was no way of knowing whether the personal allowance had been used up. Therefore, the software programme that the Respondent used for payroll had applied default tax code 'week one, month one'. This is only in respect of the first two months of employment. In the next tax year, 2018/2019, it was possible to use the appropriate tax code and there is no dispute about the deductions that were made for those periods.

24 The Respondent has accepted that it owed the Claimant further money namely the five days of work, which were not included in the May payslip and outstanding holiday pay. The delay in paying was caused by having to check with HMRC the appropriate way of going about deducting tax and national insurance.

25 The Claimant disputed at the Tribunal whether the Respondent had actually paid the tax and NI it had deducted to the revenue. However, the Tribunal explained to the Claimant that it did not have the power to decide this question and that that was a matter he must take up with HMRC.

26 The Claimant had not yet completed his probationary period. This affected the notice provisions in the contract in that they do not apply until the probationary period is over. Therefore, the Claimant's notice period was the statutory minimum of one week.

Law

27 The legal principles are relatively straightforward in this case.

28 A breach of contract claim can be brought to the Tribunal by employees in respect of the termination of their employment.

29 An employee who has resigned can claim their notice pay if they resigned in response to a repudiatory breach of contract by the employer. A repudiatory breach is a very serious breach of contract showing that the employer does not intend any longer to comply with the contract. (This is sometimes known as constructive wrongful dismissal.)

30 In relation to religious discrimination. Section 13 of the Equality Act 2010 requires the Claimant to show that, because of religion, the Respondent treated the Claimant less favourably than it would have treated others. In the employment context according to section 39 of the Equality Act 2010 that less favourable treatment must amount to at least a detriment. A detriment means something that has happened to an employee whereby a reasonable employee would consider himself disadvantaged at work in the future. It is therefore only if the Claimant establishes that he has been subject to a detriment that we would then need to go on and consider whether that detriment was because of religion. If so we would ask ourselves whether, had the Claimant been Muslim, he would have been treated any differently.

31 In respect of annual leave I described the relevant regulations to the parties during closing submissions. Regulation 15A deals with leave in the first year of employment. One twelfth of the entitlement accrues on the first day of each month of that first year of employment. Therefore, here, 3/12 of the annual paid leave entitlement had accrued by the time the Claimant had left (i.e. on 9 March, 9 April and 9 May). He was entitled to 5.6

weeks' paid leave. This means that he was entitled to 5.6 x 3/12 = 1.4 weeks net pay in respect of accrued but untaken leave at the point of termination.

32 As for interest the Tribunal has a power to award interest on any discrimination award or breach of contract. It does not have the power to award interest in respect of a deduction of wages or holiday pay claim. In respect of the breach of contract claim, the Tribunal had a discretion to award interest as it thinks fit.

Application of facts and law to issues

Breach of contract claim

33 We do not consider that a delay in or failure to pay wages of 24 hours from when pay was expected is a fundamental breach of contract. Even if there had been no specific terms of the contract, it is not a significant enough or serious enough breach to amount to a fundamental breach.

34 In any event, in this case, whatever the expectations, the contractual terms are clear. Payment is on or around the last working day of the month. The last working day of the month in May 2018 was 31st, the following Thursday. Therefore, under the terms of the contract the Respondent had not failed or delayed payment. There was no breach of contract in this case and certainly nothing serious enough to repudiate the contract. The Claimant therefore resigned. He was not entitled to treat himself as dismissed and was not entitled to notice pay.

Outstanding Holiday Pay

35 By closing submissions there was a broad measure of agreement between the parties. The Respondent agrees that 1.4 weeks of salary is due, net of tax and national insurance contributions. We set out the legal principles above. 5.6 (weeks) x 3/12 (so far accrued in the first year) = 1.4 weeks.

36 Gross annual salary of £40,000/52 = £769.23 gross per week.

37 We then used an online salary calculator for the relevant tax year and the tax code for that year on the payslips to find the weekly net pay of £588.09.

38 The outstanding holiday pay is therefore 1.4 x 588.09 = £**823.33**.

Deduction of Wages

39 Given the Claimant's submission that he was an employee throughout, then it was correct for the Respondent to deduct tax and national insurance, as its accountant had advised, for the whole period even though that was done retrospectively. It was appropriate to undertake a reconciliation of what was paid gross with the correct net figures.

40 We have also decided that, given that the Respondent did not know the year to

date earnings of the Claimant and it is uncertain what earnings if any he had in the tax year 2017/2018, then it was appropriate for them to use the default tax code that they did. (It is then for the Claimant to take up with HMRC whether those deductions have actually been paid to HMRC and it is also for the Claimant to take up with HMRC whether because of that use of the tax code he is due a refund of tax and national insurance for 2017/2018 on the basis of any other income he may have earned. He will not therefore ultimately lose out by any tax code that the Respondent used.)

41 We have therefore adjusted the reconciliation that the Respondents have provided to take into account the correct net holiday leave figure otherwise the figures in that reconciliation are correct. Once we have inserted the correct figure for annual leave the gross wages become £1846.15 and doing our best to net that figure down, using an online tax calculator, we have assessed the net figure the final column to be £1537. It follows that figures for the Claimant's employment in total the net figure that he was due in total becomes £10,171.43 (instead of it being £10,253 on the schedule). We then deduct what he already been paid, and the outstanding figure that he is due and owing is £1,819.27. That figure includes outstanding holiday and outstanding net wages. Thus the figure for outstanding wages (less holiday) is £995.94.

42 We have considered interest and while the Claimant did not put his claim for wages as a breach of contract we have to consider that it also would be a breach of contract not to pay the full amount of wages so strictly we do have the power to award interest it is in our discretion to do so. We went on to consider whether this was an appropriate case to exercise our discretion to award interest and we have decided not to do so. The delay in payment was explicable by the difficulties in establishing the correct tax status of the Claimant caused by his own request to go self-employed and his refusal to provide his UTR and the long delay that Mr Baulackey had in waiting for HMRC Compliance input. In those circumstances it would not, in our discretion, be in the interests of justice to award interest.

43 Thus we will give judgment that the Respondent pays to the Claimant £1,819.27 in respect of accrued holiday leave and outstanding wages.

Religious discrimination

44 It follows from our findings of fact that the religious discrimination claim fails.

45 First it fails because the Claimant had not established that he was subject to any detriment, any disadvantage at work. In respect of his complaint about Ms Gokol-Hoota's conduct we find that her response to the concerns raised with her was entirely appropriate. It was the right thing to do to raise the matter informally with the Claimant to nip the issue in the bud. It was entirely proper for her to raise a concern with the Claimant, even if there had been no complaint by Ms P. Kissing colleagues at work, even on the cheek, might cause them to feel uncomfortable especially given that the Claimant was in a position of power as a manager. It was this that Ms Gokol-Hoota sought to explain to him. We find that she did nothing wrong in hearing the concerns and passing them on. Indeed, we are concerned that, even now, the Claimant does not appear to have understood the potential impact of such behaviour at work. While there is no issue here that there was any sexual intent, by being intimate at work, by moving into a co-worker's personal space this may make them feel uncomfortable. This was something that

it was entirely appropriate for Ms Gokol-Hoota to raise with the Claimant. We find that she was not being gossipy but that she received general concerns and was passing them on and seeking to give the Claimant appropriate advice. That is where the matter would have ended but for the Claimant escalating the matter with his own complaint. We find that Ms Gokol-Hoota did not subject the Claimant to a detriment in doing so. This is therefore an end to the first part of his claim.

46 We gone on to look at the handling of his formal complaint and, again, we find that the Respondent's conduct was entirely unsurprising and appropriate. Choosing an outside person to investigate was a really a very good idea. Many employers do not do it and they are not required to do it, many do internal investigations. But this was a small company and it was appropriate for Mr Baulackey to decide that somebody external who was more independent should do the investigation. Mr Smith had some experience of the sector - he had been in training within it. He was not Mr Baulackey's friend and there is no evidence that anybody influenced Mr Smith improperly in his investigation. He did an adequate investigation because he interviewed the key individuals. We do not find it would have appropriate for him to interview everybody in the room thus expanding the investigation so that everybody heard about the issue. This is especially so because the Claimant admitted he had kissed Ms P on the cheek -- the facts of the matter were not really in question. Therefore, again, the Claimant was not subject to a detriment by the approach the Respondent took to his complaint.

47 Even if we are wrong about detriment, we would have found that the conduct of Ms Gokol-Hoota and the approach to the complaint were nothing to do with religion or a difference in religion. We consider the Claimant would have been treated by the Respondent in exactly the same way had he been a Muslim: we repeat the analysis we have set out above about how unremarkable Ms Gokol-Hoota's approach to the informal concerns as and how sensible the approach to the Claimant's formal complaint was. We take into account also that we have made findings that Ms Gokol-Hoota did not ask the Claimant to remove his faith necklace; that there was a mix of religions amongst staff who appeared to work well together; and that Mr Baulackey was not that religious and did not make remarks about his faith or jihad at work. Therefore, there is no background evidence here to suggest that there was any religious reason in the conduct of either Ms Gokol-Hoota or the choice of investigator or the actions of the investigator himself. Thus, in any event, the religious discrimination claim would have failed.

Employment Judge S Moor

Dated: 11 April 2019