Case Number: 2206571/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms I C Jianu		**(1) Ms P Junco** **(2) Mr P de la Infiesta**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central — **ON: 18-19 September; 20 September 2019 (in chambers)**

BEFORE: Employment Judge A M Snelson — **MEMBERS: Mr D Ross, Mr J Shah**

On hearing the Claimant and the Second Respondent in person, the Tribunal adjudges that:

(1) The Claimant's claims are not well-founded.
(2) Accordingly, the proceedings are dismissed.

REASONS

Introduction

1 The Respondents, who are Spanish, are husband and wife. At all relevant times they lived in London with their three children. The Claimant, who is Romanian, was employed by them in the capacity of resident housekeeper/nanny between 27 February 2017 and 1 July 2018, when the Respondents terminated her employment on the stated ground of redundancy.

2 By her claim form presented on 2 November 2018, the Claimant brought complaints under the Equality Act 2010 ('the 2010 Act') of disability discrimination, claims under the Working Time Regulations 1998 ('the 1998 Regulations') for denial of weekly and daily rest breaks, and a money claim. The Respondents resisted her entire case.

3 At a preliminary hearing for case management on 9 May this year, Employment Judge ('EJ') Khan heard from the Claimant and the Second Respondent and set out the scope of the dispute. Dealing first with the disability discrimination claim, he noted that the single complaint was one of direct discrimination based on the dismissal and that the parties disagreed on three matters: first, whether the Claimant was at any material time disabled within the meaning of the 2010 Act; second, whether, if she was disabled, the Respondents were aware of her disability; third, whether in any event the dismissal was 'because of' the (alleged) disability.

4 The judge then carefully noted the two elements of the money claim but since one (relating to pension contributions) was abandoned soon afterwards and the other (to do with holiday pay) was abandoned before us, we will say no more about either.

5 Turning to the claims under the 1998 Regulations EJ Khan placed on record that the Claimant was seeking compensation for 19 unspecified breaches of the right to weekly rest breaks. The judge gave directions for details of each breach to be supplied. As for daily rest breaks, he noted the Claimant's straightforward case, disputed in its entirety, that she had been denied a daily break on every weekday worked between mid-March 2017 and 5 April 2018.

6 The weekly rest breaks claim was duly clarified. The Claimant claimed to have worked on 19 Sundays and to have been denied weekly rest breaks as a result (it being common ground that her regular working week involved Monday to Saturday working). The Respondents maintained that she had worked on only one of those Sundays and had been paid for doing so.

7 Although not expressly so recorded by EJ Khan, the parties were agreed that the Tribunal should treat the Sunday working dispute as also giving rise to a complaint of unauthorised deductions from wages.

8 The matter came before us for final hearing, with three sitting days allocated. The Claimant attended in person and had the benefit of the services of an interpreter, Ms C Munteanu. Mr de la Infiesta spoke for both Respondents.

9 We heard evidence from the Claimant, Mr de la Infiesta and a supporting witness for the Respondents, Ms Joanne O'Regan, who had worked for the Respondents in and administrative, payroll and record-keeping capacity during the time to which the Claimant's claims relate. All gave evidence by means of witness statements, Ms O'Regan's having been prepared in manuscript overnight between days one and two. We also read written statements in the names of Ms Junco (the First Respondent) and Ms Alina Gnewuch, who had worked for the Respondents as a live-out nanny at the time of the Claimant's employment.

10 In addition to witness evidence, we read the documents to which we were referred in the substantial bundle produced by the Respondents.

The applicable law

11 In view of our findings on the facts, a very brief summary of the relevant law is all that is required.

12 By the Equality Act 2010 ('the 2010 Act'), s 6(1) the protected characteristic of disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. An impairment is 'long-term' if it has lasted for at least 12 months or is likely to last for at least 12 months or for the rest of the life of the person affected (schedule 1, para 2).

13 Under the 2010 Act, s13(1) direct discrimination occurs where, because of a protected characteristic, a person treats another less favourably than he or she would treat others. In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572, which featured a direct discrimination claim based on the personal characteristic of race, Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', etc in the pre-2010 legislation) effected no material change to the law.

14 Under the Working Time Regulations 1998 ('the 1998 Regulations'), reg 11, a worker is entitled to a weekly rest break of not less than 24 hours in any 7-day period or two such breaks in any 14-day reference period. The working periods may be arranged 'back to back', so that a requirement to work without interruption in excess of the standard six-day week is lawful. By reg 12 a worker must be afforded a daily rest break of at least 20 minutes if his or her working time exceeds six hours.

The facts

15 The Claimant claimed to have been disabled by an injury to her chest sustained in a fall which, on her case, happened in the Respondents' house in early April 2018. Her evidence was that the fall had been witnessed by Ms Gnewuch, but she stated emphatically in an email of 4 July 2019 to Mr de la Infiesta that she had not seen the incident, although she had spoken to the Claimant not long afterwards, who had said that she had taken painkillers and was 'fine'. We prefer not to resolve the difference over whether there was a witness to the fall, but we accept that a fall happened in the first week of April. The Claimant carried on working as normal. By the middle of the month Ms O'Regan had learned from the Claimant that she was continuing to experience pain in her chest and had developed a cough, which she thought was associated with the injury. She was not otherwise forthcoming and Ms O'Regan did not think it right to inquire further. By an email of 19 April Ms O'Regan passed on to Ms Junco the limited information communicated to her by the Claimant.

16 In the meantime, on 18 April 2018, Mr de la Infiesta, Ms Junco and the Claimant met for a planned review of her work. This was the second such meeting, the first having taken place in January 2018. Mr de la Infiesta and Ms Junco passed certain comments critical of the Claimant, relating to her manner with the two older children. More generally, they observed that they had seen little improvement since the January meeting. The Claimant then left the room and returned with a sick certificate dated 18 April 2018 declaring her to be unfit to work. A second certificate followed, covering the period from 1 to 15 May, stating that she was fit to work but should avoid heavy lifting, bending and strenuous work. On 18 May a third certificate was produced, stating that she was unfit to work on account of "malaise weakness".

17 Mr de la Infiesta told the Claimant on 22 May 2018 that her employment was to terminate on the ground of redundancy. At the time of the decision to dismiss the Respondents' knowledge about her chest injury and its consequences did not extend materially beyond what they had gleaned from the sick notes and Ms O'Regan's email of 19 April. We find that they did not believe, and had no reason to believe, that the Claimant was suffering from a serious or long-lasting condition.

18 The reason for the dismissal was a matter of dispute. Mr de la Infiesta told us that, as a consequence of Ms Junco suffering from a rare and serious condition over a period of months culminating in surgery on 18 May 2018 with the prospect of a long period of recuperation to follow, the decision was taken that the family would cease to employ a live-in housekeeper/nanny and Ms Junco would spend much more time at home with the children. The Claimant's somewhat contradictory case appeared to be that the decision was motivated by desires to (a) save money and (b) get rid of an employee who was, or was believed to be, disabled. We find as a fact that the reason given by Mr de la Infiesta was true and neither of the reasons asserted by the Claimant figured in any way in the Respondents' thinking. (Reason (b) was, of course, impossible given our finding in the last paragraph that they did not believe that she was subject to a condition capable of constituting a disability.) The Claimant was not replaced and the Respondents (who have now returned to live in Spain) have not employed a live-in housekeeper/nanny since.

19 Turning to weekly rest breaks, we find that the Claimant worked one Sunday by agreement, and was duly paid for doing so. That was one of the 19 cited by the Claimant. She was not asked or expected to work on any of the other 18 Sundays. If she did on any occasion[1], it was without the knowledge of the Respondents (they spent many weekends away leaving her alone in the house) and in circumstances where, had she used her six Saturday working hours to good effect, there would have been no need to do so.

20 The Claimant's written contract made express provision for her right to an unpaid one-hour rest break on weekdays. She was not supervised in her duties and it was for her to decide when to take her breaks. She was never told not to take her daily break or when she must take it. She was not given so much work

[1]It is noteworthy that the complaint about rest breaks was first made after the Claimant's employment ended, and that she did not claim payment for any of the 18 disputed Sundays, despite being aware of her right to claim for any hours in excess of the standard working week.

that she could not complete it in the working day if she took the break to which she was entitled. During her employment she did not say or suggest at any time that she was being denied her right to a break.

Rationale for our findings of fact

21 It can be seen that we have accepted the Respondents' case on the events in dispute in its entirety. We were impressed by the detail and clarity of Mr de la Infiesta's evidence. More important for us, however, was the quality of the documentary evidence, which corroborated it. By contrast, the Claimant struck us as a notably poor witness. She had no command of detail and contented herself with making general allegations which she was quite unable to substantiate. We were unable to place any confidence in her evidence.

Conclusions

22 Our primary findings are fatal to the Claimant's claims.

23 The discrimination claim fails for two reasons. First, the Claimant was not disabled and was not perceived to be disabled. Her impairment did not have a 'long-term' adverse effect on her ability to undertake normal day-to-day activities, because it had lasted for only a few weeks at the date of the decision to dismiss. Nor was it 'likely' that the condition would last for a year or more. On the contrary, common sense and ordinary experience tells us that it was deeply improbable that it would do so. No medical evidence is advanced to the contrary. Second, we have found as a fact that the Claimant's chest injury played no part at all in the decision to dismiss. We see no good ground for doubting the reason for dismissal offered by the Respondents, but whether or not we are right about that, we are entirely satisfied that the injury played no part whatever in their decision to dispense with her services.

24 The weekly rest breaks claim is defeated by the fact, as we have found, that the Claimant was required to work only one of the 19 disputed Sundays. Accordingly, her rights under the 1998 Regulations, reg 11 were not infringed. It also follows inevitably that no claim for wages for Sunday working can be maintained.

25 The daily rest break claim fares no better. The Claimant was not denied her right to weekday breaks.

Outcome and postscript

26 For the reasons stated, all claims fail and the proceedings are dismissed.

27 We can well understand why Mr de la Infiesta referred more than once to the hurt which he and Ms Junco have experienced in facing the Claimant's repeated charges of exploitation and cruelty. We pointed out to both parties that we were not called upon to pass moral judgments: our function was simply to decide the claims before us. That said, we think it right to observe that it was not at all easy to reconcile the Claimant's intemperate allegations with the contemporary

documents and the liberality with which she distributed them only served to undermine our confidence in her as a witness of truth.

EMPLOYMENT JUDGE – Snelson
07th Oct 2019

Judgment sent to the parties on 08/10/2019

For Office of the Tribunals