Case Number: 2303064/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE ELLIOTT**

MEMBERS: **MS N CHRISTOFI**

MR S GOODDEN

BETWEEN:

Ms J Chikale

Claimant

AND

Ms I Okedina

Respondent

ON: **17, 18 and 19 October 2016**

IN CHAMBERS ON: **20 and 21 October 2016**

Appearances:

For the Claimant: **Mr D Reade QC, counsel**

For the Respondent: **Mr O Onibokun, solicitor**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims succeed, with the exception of those set out at points 2 and 3 below.
2. The claim for direct race discrimination fails and is dismissed.
3. The claim for indirect race discrimination is dismissed upon withdrawal.

CORRECTED REASONS

Note: there is a correction below in paragraph 141 as to the date referred to which is changed from 29 November 2015 to 29 November 2013.

1. By a claim form presented on 10 November 2015 the claimant Ms Judith Chikale brings the following claims: unfair dismissal, breach of contract for wrongful dismissal and failure to pay wages, unlawful deductions from wages, holiday pay, breach of rest break obligations, race discrimination, failure to provide written particulars of employment and failure to provide an itemised payslip.

2. The claimant was employed by the respondent, Mrs Ivy Okedina, in Malawi as a domestic worker working for the respondent's parents from September 2010 to July 2013. The respondent arranged for the claimant to travel to the UK in July 2013 to work for the respondent as a domestic worker in the UK.

3. The respondent is from Malawian and is a self-employed business woman.

The issues

4. At a Preliminary Hearing before Employment Judge Freer on 22 March 2016 the parties were ordered to provide to the tribunal at the outset of the hearing an agreed list if issues, legal and factual, for determination. The parties had not been able to agree a list of issues so we spent a large part of the morning on day 1 identifying the issues for determination which are as follows:

5. Unfair dismissal: The claimant complains that she was unfairly dismissed by the respondent telling her on 18 June 2015 to leave the house for good and that there was no potentially fair reason for dismissal.

6. For the purpose of unfair dismissal it is an issue as to whether the claimant can count her service with the respondent's parents in Malawi from September 2010 to July 2013 as continuous service over which the tribunal has territorial jurisdiction. The claimant's arrival date in the UK was 6 July 2013 and the date relied upon by the claimant as the effective date of termination is 18 June 2015.

7. It is also an issue as to whether section 215 of the Employment Rights Act 1996 applies on the question of continuity of employment.

8. Dismissal is not admitted. The respondent's case is that the claimant's employment ended on 28 November 2013 with the expiry of her domestic worker permit. On 29 November 2013 the respondent says it applied for the claimant to be registered as a dependent. It is an issue for the tribunal as to whether the claimant remained an employee after 28 November 2013 and if so whether her employment was terminated by the respondent on 18 June 2015.

9. The respondent's case is that because of section 21(1B)(b)(ii) of the Immigration Asylum and Nationality Act 2006 the claimant cannot have been employed after 28 November 2013 and as such the claim for unfair dismissal is just under two years out of time.

10. It is acknowledged that on the termination of her employment, the claimant was not permitted to work in the UK until her application for asylum was granted. The claim for unfair dismissal is therefore for notice and loss of statutory rights and the basic award.

11. Wrongful dismissal: The claimant claims her statutory minimum notice pay. The same issue as above in relation to length of service applies.

12. Contractual claim for unpaid wages: The claim is for £400 per month for the entire period of her employment in the UK from July 2013 to June 2015 less sums actually paid as set out in the schedule of loss.

13. Unlawful deductions from wages: The claim for unpaid wages is also brought as a claim for unlawful deductions under section 13 of the Employment Rights Act 1996. The claim is for £400 per month for the entire period of her employment in the UK from July 2013 to June 2015 less sums actually paid as set out in the schedule of loss. This is calculated in two parts as to the contractual claim and the national minimum wage claims and holiday pay.

14. Failure to pay the national minimum wage: It is an issue for the tribunal as to whether any of the exemptions to the requirement to pay the national minimum wage apply. Was the claimant a member of the respondent's family?

    a. It is not in dispute that the claimant resided at the family home of the respondent.
    b. Was she, although not a member of the family, treated as such as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities.
    c. Was she liable to any deduction or to make a payment to the respondent or any other person as respects living accommodation and meals?
    d. Whether if the work had been done by a member of the respondent's family, would it be treated as work or as performed under the claimant's contract because the requirements of section

57(2) would not be met? This requires us to consider, if the claimant had been a member of the family, whether the other conditions in section 57(2) were met, namely that she resided in the family home (which is not in dispute) and shared in the tasks and activities of the family.

15. It is also an issue in relation to the national minimum wage, as set out above, as to whether the claimant was a worker or employee after 28 November 2013.

16. Holiday pay: Did the claimant receive any annual leave during her employment with the respondent and what holiday pay was due to her on termination of employment? The claimant's case is that she received no annual leave. The claimant claims her entitlement under the Working Time Regulations. It is an issue as to whether the claimant asked for paid annual leave in 2015.

17. There is a factual issue as to where the leave year runs from. The claimant's case is that it runs from September in each year from September 2010 she commenced work for the respondent's parents in Malawi. The respondent's case is that the leave year runs from July as the claimant started work for the respondent in the UK in July 2013.

18. The claimant accepted in submissions that on the law as it stands, she could not claim for holiday pay other than in the leave year during which the employment terminated.

19. Rest breaks:

    a. It is an issue as to the hours worked by the claimant.
    b. Did the claimant seek to enforce her rights to take daily and weekly rest breaks by asking for those rights (Regulations 10 and 11 Working Time Regulations 1998)?
    c. Did the respondent refuse to allow the claimant to exercise those rights?
    d. The claimant seeks a declaration but accepts that there will be no additional financial loss under this head of claim on the law as it stands.

20. The claimant accepted in submissions that no financial remedy would flow from this head of claim but that there could be a declaration.

21. Direct race discrimination: The claimant puts her nationality, ethnicity and ethnic origin as Malawian. Following the recent decision of the Supreme Court in ***Taiwo v Olaigbe 2016 IRLR 719*** the claimant says that the tribunal can infer and find that the claimant was treated in this way because of her nationality and national origin. The claimant does not rely on vulnerability because of immigration status. The acts of direct discrimination are put as:

a. Withholding her passport
b. Failing to pay her the national minimum wage
c. Making unlawful deductions from wages
d. Requiring the claimant to work extremely onerous hours
e. Denying her privacy by requiring her to share a bedroom with the respondent's young daughter and covertly monitoring her by CCTV
f. Breaching the Working Time Regulations
g. Failing to provide a contract of employment and /or written particulars of employment
h. Failing to provide payslips

22. The respondent said that the claimant had changed her case as she had not previously relied upon nationality and ethnic origin. The claimant took us to the ET1 paragraph 69 page 96 which clearly stated that the claimant relied on her Malawian nationality and ethnic and/or national origin. There was no change of case in this respect.

23. Indirect race discrimination: The claimant withdrew at the start of this hearing her claim for indirect race discrimination.

24. Failure to provide written particulars of employment: The claimant accepts (ET1 Grounds of Complaint paragraphs 6 and 7) that she was given a one page employment contract. The issue is whether the particulars contained all that is required by section 1 of the Employment Rights Act 1996. Were there particulars as to the commencement date of employment, continuous service, holidays and holiday pay? The issue as to whether the claimant's employment ended on 28 November 2013 goes to the issue of time limits on this jurisdiction.

25. Failure to provide an itemised payslip: The respondent accepts that no payslips were provided. The respondent's case is that because of the exemptions under the National Minimum Wage Regulations there was no entitlement in any event. Were any unnotified deductions made in the thirteen week period prior to 10 November 2015?

26. Did the respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures? This is in two parts, firstly the dismissal because the claimant's case is that there was no process and the other part is that a grievance was raised in respect of holiday pay and non-payment of wages.

27. Time limit: The respondent's case is that the employment ended on 28 November 2013 and therefore all claims are substantially out of time, whether under the Employment Rights Act 1996 or section 123 of the Equality Act 2010.

The respondent's application

28. The respondent had made an application on 26 September 2016 to strike out the claim and/or for payment of a deposit because of the respondent's case that the claimant was in Botswana during periods when she claimed to be working for the respondent's parents in Malawi.

29. At a telephone preliminary hearing on 12 October 2016 Employment Judge Baron declined to consider the application and said that it could be renewed at the outset of this hearing.

30. The respondent accepted that this could only relate to aspects of the claim predating July 2013 when the claimant came to the UK. It does not therefore impinge on many of the jurisdictions which do not depend upon length of service, such as unlawful deductions from wages or national minimum wage. The respondent also accepted that there was insufficient time for a deposit to be paid under Rule 39 without a lengthy adjournment so confined the application to strike out under Rule 37.

31. The application was set out in writing at pages 552 to 565 of the bundle. It involved detailed factual issues such as where the claimant was said to be at relevant dates, whether there was permission for this, what the documents showed and whether, as the respondent contended, this meant that her claim was scandalous.

32. We are unanimous in our view that firstly, it is necessary to make findings of fact on these issues and secondly even if we find in the respondent's favour on this issue, the hearing will continue in any event to hear the claims on those aspects which are not contingent on length of service. We are not in a position to find without the hearing of the evidence that the claim has no reasonable prospect of success and we decline the application to strike out.

Witnesses and documents

33. The tribunal heard from the claimant. For the respondent we heard from the respondent herself, her husband Mikhail Okedina, the respondent's son Jubril Okedina who was almost 16 years old at the date of this hearing and Jane Phiri a cousin of the respondent.

34. There was a bundle of documents running to 2 lever arch files. We had a chronology prepared by the claimant and marked in tracked changes by the respondent. The items which were not shaded or in red were agreed. We also had a separate claimant's chronology.

35. We had an opening note from the claimant and a written submission from the respondent. Both parties spoke orally to these submissions

which are not replicated here. All submissions and authorities referred to were fully considered even if not expressly referred to below.

Findings of fact

36. The claimant is a Malawian national. She is currently 28 years old and has a 14 year old son who lives with her parents in Malawi. The claimant entered the UK on 6 July 2013.

37. The respondent is also of Malawian origin and lives in the UK in Woolwich, London SE18 with her husband, son and daughter and with others from time to time as set out below. The respondent and her husband also own a flat in Welling in Kent which is currently occupied by the respondent's cousin Jane Phiri.

38. Both the respondent and her husband run their own businesses. The respondent has a school outfitters business and her husband has a computer repair business. Both the respondent and her husband employ staff in their respective businesses.

Employment in Malawi

39. The claimant's case is that she had previously worked for the respondent's sister Lydia Chapasuka in Malawi having been employed since 2003 when she was about 14. The claimant's case is that she was employed by the respondent to work for the respondent's parents as a domestic worker or house-helper as it is termed in Malawi. The respondent's case is that she employed a person named Judy to work for her parents and subsequently for her own family in the UK, but that the claimant in these proceedings was not the same person.

40. The respondent went to Malawi in September 2010 when her father was unwell and this is when the person named Judy was hired. While the respondent was visiting Malawi, the claimant looked after the respondent's children at the sister's suggestion. The claimant's case is that the respondent thought that the claimant did such a good job, she wanted to retain her to look after her parents.

41. We saw a contract of employment at page 114 of the bundle which was made between the claimant and the respondent and both parties agreed in evidence that it bore their respective signatures. The date on the document and next to each signature was 9 September 2010. It was for the role of house helper / carer and hours of work were simply put as "live in". The duties were said to be cleaning the house, caring for the mother, cooking and washing laundry.

42. The respondent said that this document was not contemporaneous

and that she created it in 2013 and it was backdated by her sister and that this was done to obtain the domestic worker's visa. The claimant's evidence was that she had this contract in 2010. We find that the contract was a contemporaneous document signed by the parties on the date given by each of them on the face of the document, namely 9 September 2010.

43. Our reasons are as follows. Both parties agree that they signed the document. It accurately reflected the contractual agreement between the claimant and the respondent at the time, in September 2010. The respondent was present in Malawi in September 2010. She was equivocal in cross examination when being asked about whether it was contemporaneous, she said: "*Yes. No. Not 2010, but 2012 I had to backdate 'cos I wanted Judy to come to the UK, so I had to put it back, in 2010 I didn't have a contract, so I didn't go with a contract or anything, so when I wanted her to apply for the visa I had to get a document done so I sent it to my sister, I filled it in, sent it to my sister…*".

44. We also saw a letter at page 121.1 from the respondent's mother Mrs Ketty Mlundira, saying "*This letter is written to confirm that Judith Chikale is employed by my daughter, Ivy Okedina. She was initially employed to take care of her children when she visited Malawi in September 2010*." This supports our finding that the respondent entered into the contract with the claimant in September 2010 and we find that they met face to face at that time.

Employment in the UK

45. In early 2013 the respondent made enquiries of her sister as to whether the claimant would be amenable to coming to the UK to work for her and her family. The respondent said that this was only going to be for a limited period, about 2 months, while she, the respondent, was in Malawi.

46. The claimant agreed to go to the UK. She was told she would be paid £400 per month, she would have bed and board and that she could go to college in the UK. She understood that the respondent would pay for her education in the UK. She did not understand it to be a temporary arrangement.

47. Until 2011 the claimant did not have a birth certificate or a passport. In 2011 the respondent's sister Lydia Chapasuka assisted in obtaining both of these official documents. Ms Chapasuka swore an affidavit on 13 July 2011 saying that the claimant was her cousin, the daughter of her aunt. Ms Chapasuka gave completely incorrect names for the claimant's parents in that affidavit. The names of the parents were given as David Chikale and Joyce Mlundira. The respondent and Ms Chapasuka's parents' last name is Mlundira and this surname provided the family link. The affidavit said that the

person (claimed to be the aunt) named Joyce Mlundira was deceased. The claimant's parents' names are Ezara Chikale and Esnat Shema-Lembani who are still alive. This affidavit enabled a passport to be obtained for the claimant so that the claimant could travel to Botswana to look after other members of Ms Chapasuka's family. This passport was also used in obtaining the domestic worker's visa for the UK.

48. The affidavit also said that Lydia Chapasuka took care of the claimant since 7 October 1996 when her mother passed away. The claimant was 8 years old in 1996. The claimant's mother is still alive.

49. As part of the visa application a one-page contract of employment was drawn up by the respondent for the claimant (page 112). It was signed by the respondent in the UK and countersigned by the claimant in Malawi. Both parties accepted the authenticity of their signatures on that document. Hours of work were again expressed to be "live in". The salary was typed in as £500 per month and handwritten over at £400 per month. The duties were stated as dropping and collecting the children to and from school, cleaning the house, washing and ironing the laundry, preparing meals and looking after the children at home.

50. The contract referred to above was sent to the British High Commission in Lilongwe, Malawi as part of the visa application. It was with the respondent's letter dated 10 March 2013 stating that she had employed the claimant since September 2010 at her parent's residence. She said she was responsible for the wages and wished the claimant to continue in the employment in the UK.

51. Also on 10 March 2013 the respondent, as the employer, filled out a form for the UK Border Agency setting out the terms and conditions of employment of an overseas domestic worker. It said "*By signing this document, the employer is declaring that the employee will be paid in accordance with the UK National Minimum Wage (NMW) Act 1998 and any Regulations made under it for the duration of the employment in the United Kingdom"* (page 120).

52. The UKBA document gave the claimant's duties as "*Cleaning, laundry, child care, cooking; cleaning and tidying the house; washing laundry, minding the children after school and during holidays".* The free periods per day were stated as 3 hours, and the free periods per week were stated as 15 hours. It said the claimant would have her own double room in the house. In the section as to ending the employment it was not stated to be a fixed term contract, but "until further notice". We find that it was not therefore intended as a temporary two month arrangement. It was an indefinite contract.

53. The visa was granted until 29 November 2013 (page 419).

Arrival in the UK

54. The respondent's case is that when the claimant arrived in the UK on 6 July 2013 this was not the person she was expecting. The respondent said that she had never met the claimant before. In her witness statement at paragraph 19, the respondent said that she took this up with her sister who told her that the person who had arrived in the UK was "*a family member who had been benefitting from the monies that [the respondent] sent back to Malawi".*

55. We have found above that the respondent and the claimant had met in September 2010 when the contract between them was entered into. We find on a balance of probabilities that the person who arrived at the airport on 6 July 2013 was the claimant, who was known to the respondent. She was not some remote and previously unknown family member as subsequently claimed. We also accept the claimant's evidence that when she arrived at the airport the respondent did not do or say anything to give the impression that the respondent was expecting a different person.

56. The respondent's home in Woolwich has five bedrooms and two bathrooms. When the claimant first arrived she had her own bedroom. The claimant's evidence was that from August 2013 the respondent required her to sleep in the same room as the respondent's daughter who was having nightmares. The claimant's evidence was that she felt she could not refuse and this situation continued until she left the home in June 2015. The respondent denied this and said (witness statement 78) that the claimant had her own room throughout her stay with them. It is not in dispute that the respondent's mother-in-law came to live at the house in August 2014. Not mentioned in the respondent's witness statement but mentioned orally in evidence was that a niece named Susan Mlundira also lived with them from 2011 but was at university and was only there during academic holidays.

57. Mr Okedina's oral evidence was that he had other members of family living with them from time to time such as his sister, niece and sister-in-law and that "*people come and stay in the house and move on after that*". We find on a balance of probabilities, due to the number of people staying at the house, that the claimant did not have her own room throughout her time with the respondent.

Ireland

58. On 31 July 2013 the claimant was taken by the respondent on a trip to the Republic of Ireland. The claimant did not know the reason for the trip. The respondent's brother lived in Ireland. It is not in dispute that the claimant was taken to a college in Dublin to pick up an application form, to a bank to open an account and to an immigration office. We saw a Confirmation of Enrolment dated 1 November 2013

at page 126 from International College of Technology in Dublin. We saw a credit card in the claimant's name issued by the Allied Irish Bank with a receipt for visa fees in Ireland of €300, dated 25 November 2013 (page 128).

59. A second trip to Ireland took place on 4 August 2013. This time the respondent travelled with the claimant and the respondent's husband and daughter and they visited the respondent's brother.

60. On 31 October 2013 the respondent paid college fees of €1,000 for the college in Ireland.

61. Further trips to Ireland took place on 4 August 2013 and 13 and 25 November 2013. We saw copies of the relevant passport endorsements at pages 411 and 419 and find that these trips took place. The respondent's case is that the claimant took up residence in Ireland as a full time student on 4 August 2013 (chronology).

62. We find that the claimant did not take up residence in Ireland as a full time student or otherwise. After 4 August 2013 she made two further trips to Ireland on 13 and 25 November 2013 as shown in her passport. We saw a Facebook message from the claimant dated 13 November 2013 (page 127) saying "*!!!!Ireland again!!! I hate travelin by myself to the place that a'm not used to plz GOD proctect me".* This supports our finding that the claimant did not take up residence in Ireland on 4 August 2013 as a full time student.

63. The respondent was asked, if it were the case that the claimant was living in Ireland from August 2013, where she lived? The respondent initially could not say where the claimant was living other than that it was in Tyrellstown and she did not know the address. She then changed her evidence to say that the claimant was living at her (the respondent's) brother's address in Tyrellstown.

64. The course onto which the claimant had been enrolled in Ireland ran from 29 October 2013 to 28 October 2014. We saw a letter from the college dated 2 February 2016 which showed the claimant's level of attendance as "0%" (page 266). We find that the claimant never resided in Ireland and she did not attend college there.

65. An application was made for the claimant to obtain an Irish PPS number which, although not identical, is similar to a UK national insurance number. It was granted on 14 November 2013 (page 109.71) using the respondent's brother's address.

<u>The Surinder Singh application</u>

66. Using the free movement provisions between EU Member States the respondent decided to apply for an EEA family permit for the claimant as a family member of herself as a British citizen who has

worked in another EEA country, namely Ireland. This is known as the 'Surinder Singh' route based on the CJEU case of that name, case reference C370/90. To be eligible, the claimant had to be a family member and had to be residing with the respondent in Ireland when the respondent was exercising Treaty rights as an employed or self-employed person.

67. In the application which we saw at page 283 it was stated that the respondent commenced employment or self-employment in the Republic of Ireland from 22 May 2013 to 27 November 2013 and that she and the claimant lived together in Ireland from 31 July 2013 to 27 November 2013 (page 284). The respondent's oral evidence was that she had lived at the Woolwich address for 15 years. She said she had also lived in Ireland for three to four months in 2012. We find she was not living with the claimant in Ireland in 2013. The application form also said that the claimant had lived in the UK for "*24 days (in total)"* (page 176) as at 28 November 2013 – when she had actually been in the UK for just over four months. The information contained in this application was false and its purpose was to regularise the claimant's position in the UK.

68. The application was signed by the respondent on 28 November 2013, the day before the claimant's original domestic worker visa expired. Even if we were to accept that at the time the application was made, the respondent thought the claimant was a family member, the residency and employment conditions were not fulfilled and the information to that effect was false.

69. There was a dispute of fact as to whether the respondent held on to the claimant's passport. The claimant said the respondent asked for the passport shortly after she arrived in July 2013 and the only time she had the passport back was for a few days to make the trips to Ireland in 2013. The respondent's evidence was that she did not hold on to the claimant's passport. The claimant knew that her initial visa expired on 29 November 2013 and she said she thought the respondent was dealing with the renewal of her visa status.

70. We prefer the claimant's evidence that she did not have her passport other than when she was required to make the trips to Ireland and that the respondent otherwise retained the passport. We find this for reasons of credibility. We have found against the respondent, our finding being that she had previously met the claimant when she arrived on 6 July 2013 and we have found that she made a false application to the Home Office. The respondent also had to have access to the claimant's passport to make the application (and quote the passport number) and we find it probable that she needed the claimant's passport to book travel arrangements for her.

71. Neither party said that arrangements for the claimant changed after 29 November 2013. The claimant said she asked about her visa and

the respondent told her that she had sent the documents to the Home Office to be renewed. The claimant said that after this conversation she was no longer worried about it. She continued working at the house as before. We find that there was no change in her working arrangements after 29 November 2013. We find that the claimant relied on the respondent to take care of her visa situation.

72. It is not in dispute (chronology) that in January 2014 the claimant first raised with the respondent that she was not receiving her contractual entitlement of £400 per month.

The immigration appeal

73. On 7 February 2014 the application for leave to remain for the claimant as a family member was refused (page 136). On 12 February 2014 the respondent completed an appeal form for the First Tier Immigration Tribunal (page 147). It was submitted on 21 May 2014 (page 229 point 4).

74. In the application, the respondent was named as the claimant's representative and it also stated (page 141) that the claimant would not be attending an oral hearing. The ground of appeal was stated as "*The requested missed birth certificate is hereby attached plus marriage certificate that links us as relation".* The respondent obtained and submitted with the appeal a birth certificate for the claimant obtained on 20 February 2014, giving the false names for the claimant's parents of David Chikale and Joyce Mlundira. This inaccurate birth certificate provided the family link which the respondent needed in order to satisfy the Immigration Tribunal that she was related to the claimant.

75. The notice of hearing was sent to the claimant and respondent on 11 June 2014 at the Welling Road address (page 161), an address where neither of them lived. The claimant often opened the post at the house in Woolwich to help the respondent's husband with his business. The claimant would take photographs of correspondence on her phone and email or WhatsApp the photograph to Mr Okedina at work at his request. This letter was in any event addressed to the claimant personally.

76. In July 2014 the respondent's mother-in-law came to live with them in Woolwich. It is not in dispute (chronology) that the claimant's duties increased to include caring for the respondent's mother-in-law who is diabetic. The claimant began receiving £200 per month in cash. This continued up to and including March 2015. The parties also agree (chronology) that in August 2014 the respondent's niece Susan Mlundira came to live at the Woolwich address. Given the number of occupants in the house at this time (the respondent and her husband, their son, their daughter, the mother-in-law, Susan

Mlundira and the claimant) we have no difficulty in accepting the claimant's evidence and find that she had to share a bedroom with the daughter.

77. On 5 January 2015 the respondent purchased an airline ticket for the claimant to return to Malawi on 25 January 2015. The claimant had not requested this ticket and did not use it.

78. On 19 January 2015 the immigration appeal hearing took place. The respondent's husband attended, the claimant did not. The respondent's evidence was that the claimant did not want to go. The claimant's husband told the judge (as recorded in the decision) that the claimant was "too unwell to attend" but she was happy for the hearing to go ahead with Mr Okedina giving evidence. It had already been envisaged when the application was first made by the respondent in February 2014, that the claimant would not be attending the oral hearing (page 141 referred to above). There was therefore inconsistency as to the reasons why the claimant did not attend, as to whether she did not want to go, she was scared to go (as stated in oral evidence by Mr Okedina), she was too unwell to go, or another reason put forward by Mr Okedina - that that claimant was "having her period".

79. We find that it entirely suited the respondent and her husband for the claimant to be absent from that hearing because they were relying on false information. The claimant denied signing the appeal form (page 147). The signature that purported to be hers was in capital letters and did not match other signatures she acknowledged in evidence were hers. We find on a balance of probabilities that it was not her signature and she was unaware of the appeal hearing.

80. Mr Okedina told the appeal hearing that the claimant had lived with himself and his wife since November 2013. This was not correct. It is undisputed that the claimant began living with them on 6 July 2013. He said that respondent and the claimant were first cousins. He relied on the false birth certificate. He said that respondent was with the claimant in Dublin from June to November 2013. This was untrue. He said that the claimant had been a student in Ireland from 23 November 2013 to 28 October 2014. This was untrue. Mr Okedina sought to explain this in evidence, by saying that because the claimant was enrolled on a course in Ireland and had a student visa this was sufficient. He said that the respondent had supported the claimant in Malawi since her mother had died. The claimant's mother is still alive. He said that the respondent was responsible for the claimant from 2009 but there was no documentary evidence of this. All of this evidence was untrue.

81. On 27 January 2015 the First Tier Tribunal gave its decision that the appeal for leave for the claimant to remain in the UK as a family dependent was not upheld. Judge S Taylor of the First-tier Tribunal

was not satisfied that the respondent as the sponsor satisfied the self-employment and residence criteria and failed to meet the requirements of the Regulations in respect of a family member.

Facts leading to the claimant's departure from the family home

82. The claimant received £300 per month for both April and May 2015. In May 2015 the respondent installed CCTV in the kitchen to observe the claimant. The respondent said she was suspicious that money went missing and the food started "tasting funny".

83. In June 2015 the claimant spoke to her mother on the phone who said that she was unwell and that a transfer of money was needed. This prompted the claimant on 18 June 2015 to ask the respondent for more money. She asked for an increase in pay and holiday pay.

84. The claimant's case is that this led to an argument and the respondent told the claimant to leave the house for good. The respondent's husband told the claimant that she had 10 minutes to leave or he would call the police who would "kill her". The respondent's case was that the claimant had started drinking alcohol and behaving badly and her conduct was no longer tolerable. The respondent said that they "advised" the claimant to leave and go to the flat in Welling.

85. We saw a contemporaneous WhatsApp message sent on the evening of 18 June (translated from Malawian) between the claimant and Ms Judy Juma the girlfriend of the respondent's uncle, in which the claimant told Ms Juma that the respondent's husband had said he would call the police to "*come and get [her] out of here*" and we find that the respondent's husband did tell the claimant that he would call the police.

86. In oral evidence the respondent asserted that she drove the claimant to the flat in Welling. She stated four times in her witness statement that she and her husband told the claimant to "*go and stay at Jane's*" (ie the Welling flat in which Jane Phiri lived). The respondent did not say in her witness statement that she drove the claimant to Welling and we find that she did not. The claimant was left to make her way there by herself, late at night.

87. The respondent's husband asserted that on 17 June 2015 the claimant lay down half naked on the kitchen floor behind his chair and was "exposing herself" and that this was the "last straw" (statement paragraph 6). The respondent said that her husband woke her, she saw the claimant in a poor state on the kitchen floor wearing "an African cloth" with nothing underneath. The claimant

very strenuously denied that she ever drank alcohol as a born again Christian. Given our findings above as to the making of false statements by the respondent and her husband, we prefer the claimant's evidence and find that it was an argument about money that caused them to ask her to leave the house on the evening of 18 June 2015 at around 9.45pm. This was the termination of the claimant's employment.

88. The claimant went to the flat in Welling. She contacted the Salvation Army for assistance.

89. On 15 July 2015 solicitors instructed by the claimant wrote to the respondent seeking payment of arrears of salary (page 221). The respondent replied on 17 July 2015. Her husband also had given his input into this letter and they were in agreement on its contents. The letter said that the respondent had agreed that the claimant would work for 130 hours per month, although the respondent asserted that she did not carry out the full 130 hours of tasks and duties she agreed to but was nevertheless being paid for them.

90. The respondent said that they agreed that the claimant was to work 5 hours a day for 26 days per calendar month, from 7am to 10am and from 4pm to 6pm. It said that she was "off every Sunday". It also said that she took 2 to 3 days off per month for "monthly menstruation" and an average of 2 days off per month which started in the last 18 months of her stay. It was asserted that the household duties were shared amongst members of the family. The letter referred to a breakdown of the claimant's "wages" paid over the "*23½ months with me*". The letter then went on to set out the "*extra amount of money dissipated on Miss Chikale on top of her regular £200 per month".* This included the College fee, cost of trips to Ireland and Malawi, UKBA fees, the cost of a new bed and even £850 accountant's fee although the respondent could not explain why she had spent £850 on an accountant in respect of the claimant.

91. The respondent said that she was fully accustomed to her legal duties as an employer as she runs her own business (page 239). The respondent told the tribunal that she employs three people in her business. She again referred to the claimant's "monthly wages" page 240.

92. There was no denial in this letter that the claimant had continued to work for the respondent after 29 November 2013 and reference was made to her working (although not, on the respondent's case, for the full amount of hours agreed, over the full 23.5 months). We find that that the claimant was working for the respondent over the entire 23.5 month period in the UK.

The claimant's duties and involvement in the family

93. The respondent's case is that the claimant was treated as a member of the family, in particular as regards the provision of living accommodation and meals and the sharing of tasks and leisure activities. In terms of the claimant's involvement with the family activities, Mr Okedina said that for the claimant's birthday the family went out to Nando's and he paid. He said that she went out shopping by herself in Central London with his credit card. As this was said to be by herself we find that this was not taking part in family leisure activities. Jane Phiri who is of a similar age to the claimant said that they once went out to a nightclub in Central London but this was only an example of one occasion. Jane Phiri lives in the respondent's flat in Welling and not in the respondent's family household so to the extent that the claimant ever went out with Ms Phiri we find that this was not taking part in family leisure activities. Similarly Ms Phiri said they went a couple of times to the Westfield Shopping Centre in Shepherd's Bush and again we find this was not taking part in family leisure activities.

94. The claimant was asked about attending family events. She remembered going out for dinner once with the family in July 2013 shortly after she arrived. She also remembered attending a wedding with the family but said she was there to look after the respondent's young daughter and was not there as a wedding guest. This accords with the written duties set out in her contract of employment and we find that childcare was part of her duties and that on a balance of probabilities she was working when she attended this wedding. She was not participating in family activities. The respondent's husband also told the claimant not to make friends and not to find a boyfriend as they would give her "false information".

95. Ms Phiri said that when she and the claimant went out to a night club, the claimant had her passport with her as a form of identification as well as a credit card. This information was not led in her witness statement but given orally at the end of her evidence as something Ms Phiri "just wanted to add". Ms Phiri told the tribunal that she does not have the right to work in the UK and she accepted that she was entirely dependent upon the respondent and her husband for her living accommodation and upkeep. As this was not led in the witness statement, there was no opportunity for this allegation to be put to the claimant who had completed her evidence. We therefore attach limited weight to this assertion for three reasons, (i) it was not led in evidence-in-chief (ii) the claimant did not have an opportunity to answer it and (iii) Ms Phiri's dependence on the respondent leads us to the view that she would be inclined to support the respondent's case.

96. We find that the respondent maintained control of the respondent's

passport and that it was given to her when she needed it for travel to Ireland and at the behest of the respondent. It was returned to her when she left the respondent's house in June 2015. Otherwise the respondent retained control and possession of the claimant's passport.

The claimant's working hours

97. There was a dispute of fact as to the claimant's working hours. We find based on the respondent's letter of 17 July 2015 to the claimant's solicitors that the claimant worked for the respondent throughout the 23.5 months that she lived in the house in Woolwich. We do not accept the assertion that she did not work after 19 November 2013. There was no evidence to suggest that the arrangements changed after that date.

98. There is also an acknowledgement by the respondent that the claimant's duties increased from August 2014 when the mother in law came to live with the family. The claimant was given more pay at this point.

99. The claimant's evidence was that before the mother in law came to live with them she worked 11-12 hours per day and once the mother in law arrived, she worked 14 hours per day on weekdays. She said she also worked around 14 hours on a Saturday and 8 hours on a Sunday. The claimant said that she finished work at 2:30pm on Sundays so that she was able to spend time at church and on church activities on Sunday afternoons. She took the respondent's daughter to church on Sunday mornings before returning to make lunch for the family.

100. The respondent accepted in the letter of 17 July that the claimant worked 5 hours per day for 26 days per calendar month. It was put to the claimant that because the respondent's home had a dishwasher and a washing machine there could not possibly be enough work to occupy her for the hours she claimed. It was also asserted that the claimant did not cook for the family and the respondent said that she did the cooking when she came home from work.

101. It is not in dispute that the family ate proper cooked meals rather than ready meals. The respondent's husband preferred Nigerian food cooked from scratch.

102. When the claimant was first employed by the respondent one of her duties (contract page 112) was that of preparing meals. In the letter of 10 March 2013 seeking the domestic worker's visa the respondent said that both she and her husband ran and managed their own businesses and due to their very busy schedules it was difficult to

consolidate other commitments such as school runs, domestic work and child minding. We find that this was the case and this is the reason they required the claimant's services. When the domestic worker's visa expired, their domestic and work situations did not change and they had the same need for the claimant to cook, take the children to school (or drop them at a brother's house to be taken with his children to school) and do the domestic work. The respondent and her husband were both busy running their own businesses. They were not doing the domestic work themselves while the claimant was with them.

103. We find that the claimant was up early in the morning starting work around 6.30am to get the son and daughter up for school and make their breakfast and prepared their lunches to take with them. On Saturdays the claimant made breakfast for the entire family. She had a full range of cooking, cleaning and childcare duties and looked after the mother in law from August 2014. The respondent's son was an under-12 player with Tottenham Football Academy, playing 4 times per week (respondent's letter page 111 dated 10 March 2013) which involved further duties and laundry for the claimant. On Sundays the claimant got up to make breakfast for the family and make sandwiches for the parents and the son as they went to football matches and took the daughter to church returning to make the lunch. This was another busy working day, although it finished on a Sunday at 2.30pm.

104. We accept the claimant's evidence and find that she was working 12 hours per day from Mondays to Saturday and 8 hours on a Sunday. The working hours increased in August 2014 to 14 hours a day from Monday to Saturday with the arrival of the mother in law. The claimant accepted that when the niece Susan Mlundira came to live at the house she would help with a particular task if asked, for example if the claimant was unwell, but we find that this did not make any significant impact on the claimant's workload or hours of work.

105. There was no evidence that the claimant asserted her right to take rest breaks.

The law

Unfair dismissal

106. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be

determined in accordance with equity and the substantial merits of the case.

Continuity of employment

107. Under section 215(1) of the Employment Rights Act 1996 the continuity of employment provisions apply to a period of employment (subject to exceptions, principally for redundancy) even where during the period the employee was engaged in work wholly or mainly outside Great Britain, and even where the employee was excluded from any right conferred by the ERA.

Illegality

108. Contracts of employment may either be or become illegal. The contract of employment may be prohibited by statute, the contract may be illegal at common law as being for a criminal or immoral purpose and thus be contrary to public policy or the contract may be legal at its inception but become illegal in its performance. The three categories were set out by Lord Justice Peter Gibson in ***Hall v Woolston Hall Leisure Ltd 2000 IRLR 578*** as follows (judgment paragraphs 30 and 31):

> *30. In two types of case it is well established that illegality renders a contract unenforceable from the outset. One is where the contract is entered into with the intention of committing an illegal act; the other is where the contract is expressly or implicitly prohibited by statute (St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267 at p.283 per Devlin J)*
>
> *31. In a third category of cases, a party may be prevented from enforcing it. That is where a contract, lawful when made, is illegally performed and the party knowingly participated in that illegal performance. In Ashmore, Benson Ltd v Dawson Ltd [1973] 1 WLR 828 Lord Denning MR (at p.833) said:*
>
> *'Not only did [the plaintiff's transport manager] know of the illegality. He participated in it by sanctioning the loading of the vehicle with a load in excess of the regulations. That participation in the illegal performance of the contract debars [the plaintiff] from suing [the defendant] on it or suing [the defendant] for negligence.'*
>
> *So too Scarman LJ (at p.836) 'But knowledge by itself is not enough. There must be knowledge plus participation ... For those reasons I think the performance was illegal.'*

109. The respondent relies on section 21(1B)(b)(ii) of the Immigration Asylum and Nationality Act 2006 which, in its context, provides as follows:

> *(1) A person commits an offence if he employs another ("the employee") knowing that the employee is disqualified from employment by reason of the employee's immigration status.*
>
> *(1A) A person commits an offence if the person—*

(a) employs another person ("the employee") who is disqualified from employment by reason of the employee's immigration status, and

(b) has reasonable cause to believe that the employee is disqualified from employment by reason of the employee's immigration status.

(1B) For the purposes of subsections (1) and (1A) a person is disqualified from employment by reason of the person's immigration status if the person is an adult subject to immigration control and— ……..

(b) the person's leave to enter or remain in the United Kingdom—

(i) is invalid,

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise)……..

110. The Supreme Court considered the illegality argument in ***Hounga v Allen 2014 IRLR 811***. In this case Ms Allen was of joint Nigerian and British nationality and lived in England. The claimant Ms Hounga, worked as home help for Ms Allen's brother in Nigeria. Ms Allen's mother and brother put a proposal to Ms Hounga that she would go to live in England with Ms Allen, where she would work as home help. They told her that she would go to school and offered her £50 per month plus bed and board. She willingly accepted the proposal. An illegal plan was made to secure her entry into the UK involving falsely obtaining a passport. The main issue in the case was the effect that Ms Hounga's illegal activity had on her claims.

111. The SC held that the defence of illegality rests upon the foundation of public policy. Lord Wilson as part of the majority judgment, at paragraph 44, said as follows:

Concern to preserve the integrity of the legal system is a helpful rationale of the aspect of policy which founds the defence even if the instance given by McLachlin J of where that concern is in issue may best be taken as an example of it rather than as the only conceivable instance of it. I therefore pose and answer the following questions:

(a) Did the tribunal's award of compensation to Miss Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent upon her dismissal, in particular the abusive nature of it.

(b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Miss Hounga has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed upon her, it would not represent evasion of it.

(c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Miss Hounga to enter into illegal contracts of employment? No, the idea is fanciful.

(d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to

> *encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity.*

112. The SC held that the illegality did not defeat Ms Hounga's claims.

Unlawful deductions from wages

113. Section 13(1) of the ERA provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

114. Section 23(2) of the ERA provides that subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Subsection (4) provides that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

115. The National Minimum Wage Regulations 2015 came into force on 6 April 2015. Prior to this the position was governed by the National Minimum Wage Regulations 1999 as amended. The parties accept that the relevant wording is the same.

116. Regulation 57 of the 2015 Regulations sets out exemptions. The relevant exemption for our consideration is in Regulation 57(3) as the respondent confirmed that she did not rely on Regulation 57(2). Regulation 57 provides that work for the purposes of the Regulations does not include work relating to family household. Regulation 57(1) states that "work" does not include any work done by a worker in relation to an employer's family household if the requirements in paragraphs (2) or (3) are met. Regulation 57(3) provides:

> *(3) The requirements are all of the following—*
>
> *(a) the worker resides in the family home of the worker's employer;*
>
> *(b) the worker is not a member of that family, but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities;*
>
> *(c) the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;*

(d) if the work had been done by a member of the employer's family, it would not be treated as work or as performed under a worker's contract because the requirements in paragraph (2) would be met.

117. In ***Nambalat v Taher 2012 IRLR 1004*** the Court of Appeal considered this exemption and held that it is for the tribunal to decide whether, on the evidence, it is established that the worker is being treated as a member of the family and not as a domestic servant. In each case, it is for the employment tribunal to assess, having regard in particular to the factors stated in [Regulation 57(3)], whether the worker is treated as a member of the family. The tribunal must keep in mind that it is for the employer to establish that the conditions in [Reg 57(3)] are satisfied and that onerous duties may be inconsistent with treatment as a member of the family. Tribunals will need to be astute when assessing whether an exemption designed for the mutual benefit of employer and worker is, or is not, being used as a device for obtaining cheap domestic labour.

118. Under section 28 of the National Minimum Wage Act 1998 (NMWA) there is a reversal of the burden of proof. It is presumed that the individual qualifies unless the contrary is established. For the purposes of unlawful deductions from wages and for breach of contract it is presumed for the purposes of the complaint that the worker was remunerated at a rate less than the national minimum wage unless the contrary is established.

119. Section 17 of the NMWA creates a contractual entitlement to the full amount of the national minimum wage where a worker is paid at a rate which is less than that.

Holiday pay

120. Under Regulation 13A of the Working Time Regulations 1998 (WTR) the aggregate amount of annual leave entitlement is subject to a maximum of 28 days.

121. Under Regulation 13(3)(b)(ii) a worker's leave year begins on the date on which the employment began and each subsequent anniversary of that date.

Rest breaks

122. Under Regulation 10 WTR a worker is entitled to a daily rest period of not less than 11 consecutive hours in each 24 hour period during which he works for his employer.

123. Under Regulation 11 a worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.

Direct discrimination

124. Section 13 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

125. Section 23 of the Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

126. Section 136 of the Equality Act provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

127. The leading authority on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

128. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

129. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden doers not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

130. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

131. In ***Taiwo v Olaigbe 2016 IRLR 719*** the Supreme Court (SC) held that while immigration status is a function of nationality, it is not so closely associated with nationality to be indissociable from it.

Therefore mistreatment of a migrant domestic worker on the grounds of her vulnerability due to precarious immigration status did not amount to discrimination on the ground of nationality. In that case the claimants were Nigerian migrant domestic workers who, while employed in London, were mistreated and exploited by their Nigerian employers. The SC upholding the decision of the Court of Appeal, held that the precarious immigration status is not the same as discrimination on the ground of race.

Written particulars and itemised pay statement

132. Section 1 of the Employment Rights Act 1996 (ERA) provides that an employer shall give to an employee a written statement of particulars of employment not later than 2 months after the beginning of the employment. It must include (section 1(3)(b) and (c)) particulars of when the employment began and the date on which any period of continuous service began and (section 1(4)(d)) any terms and conditions relating to entitlement to holidays, including public holidays and holiday pay, sufficient to enable the employee's entitlement, including any entitlement to accrued holiday on termination of employment, to be precisely calculated.

133. Section 8 provides that an employee has the right to be given at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement. It shall contain particulars of the gross pay, any variable amounts and any fixed deductions and the net amount.

ACAS Code

134. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 awards of compensation cam be adjusted if there is an unreasonable failure to comply with the ACAS Code. The award is an amount considered by the tribunal to be just and equitable and not exceeding an increase or decrease of 25%.

Conclusions

Illegality

135. The respondent's case is that the contract of employment was void for illegality after 29 November 2013 when the domestic worker's visa expired and the claimant no longer had the right to work in the UK. The respondent relies on section 21(1B)(b)(ii) of the Asylum and Nationality Act 2006 set out above.

136. The respondent submitted that this was a situation falling within the second category outlined by Lord Justice Peter Gibson in ***Woolston Hall*** (above), paragraph 30, namely where the contract is expressly or impliedly prohibited by statute.

137. The claimant submits that it is the third category, paragraph 31, where a contract, lawful when made, is illegally performed and the party knowingly participated in that illegal performance.

138. We find that it is the third category and not the second category. There is no question that the contract was lawful at its inception. It was not a contract expressly or impliedly prohibited by statute. It was lawful at the point when made and lawful until 29 November 2013.

139. We have found above that the claimant relied on the respondent to take care of her visa situation. We have also found that it entirely suited the respondent and her husband to keep the claimant away from the immigration appeal hearing because they were relying on false information. We also found above that she did not sign the application form. We therefore find that the claimant did not knowingly participate in any illegal performance of her contract and that following ***Woolston Hall*** which was itself followed in ***Wheeler v Quality Deep Ltd (trading as Thai Royale Restaurant) 2005 ICR 265 (CA),*** the illegality does not render the contract unenforceable.

140. The claimant relied on an alternative argument in the event that we found that this was not a third category case – which we do. For the avoidance of doubt we find that even if we were wrong about this, following ***Hounga v Allen*** (above) there are public policy reasons which would have led us to find that the contract could be enforced. As this is not our primary finding we have not found it necessary to set out this reasoning in any detail.

141. We find that the contract is enforceable despite the fact that it was illegal after 29 November 2013.

Unfair dismissal

142. We find that under section 215(1) ERA 1996 the claimant's period of service in Malawi counts as continuous service for the purposes of her claim for unfair dismissal. We find that her period of service commenced on 9 September 2010 based on the Malawian contract of employment and that it was continuous to 18 June 2015.

143. This means that the claimant has sufficient continuous employment to found her claim for unfair dismissal. The claimant was dismissed on 18 June 2015 when she was told to leave the house where she was employed as a domestic worker.

144. There is no doubt in our minds that this was an unfair dismissal. There was no process followed of any description. The respondent did not suggest that there was. The claim for unfair dismissal

succeeds.

ACAS Code

145. We have considered whether there should be any uplift in compensation awarded because of any unreasonable failure to comply with the ACAS Code on Disciplinary and Grievance Procedures. We have taken into account that this was a family home situation which makes the application of disciplinary proceedings more difficult. However, there was no process followed at all and on the respondent's case, the claimant's behaviour and therefore her conduct, led them to terminate the working arrangement. The claimant did not have any opportunity to answer the assertions and we find that this was an unreasonable failure to follow the ACAS Code. The respondent and her husband both run their own businesses and in the letter to the claimant's solicitors dated 17 July 2015 they say at point 21 that they are fully accustomed to their legal duties as an employer. We find that as it is a family home situation, the uplift should be low and we award an uplift of 5% on those jurisdictions to which it applies.

Wrongful dismissal

146. The claimant was dismissed without notice. Her claim for wrongful dismissal succeeds for the statutory minimum period of notice based on a start date of 9 September 2010, a total of four weeks.

National Minimum Wage claim

147. The respondent relies on the exemption in Regulation 57(3) of the National Minimum Wage Regulations 2015. It is accepted by the parties that the wording of this exemption did not differ from that set out in the 1999 Regulations in force at the relevant time.

148. It is not in dispute that the claimant lived in the family home. She was not a member of the family. We have considered whether she was treated as such in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities.

149. We have found above that as regards the provision of living accommodation that other than when she first arrived, the claimant did not have her own bedroom but shared with the daughter. The burden of proof is on the respondent to satisfy the tribunal that the exemption applies. The only evidence we had as to sharing of leisure activities was a meal out when the claimant first arrived and a birthday meal to Nando's. This is over a period of nearly 2 years.

150. We found that when the claimant attended a wedding she was working on child care duties and not as a family member or wedding

guest. Any social time we heard about with Jane Phiri was not with the family nor were shopping trips taken alone. We have found that the claimant continued to perform domestic work after 29 November 2013 with no change other than an increase in duties from August 2014. We find that the respondent has not satisfied the burden of proving that the exemption in Regulation 57(3) applies. The claimant is therefore entitled to be paid at the rate of the national minimum wage. Credit must be given for sums paid to the claimant.

Unlawful deductions from wages

151. We have made findings above as to the claimant's hours of work and a finding that she is entitled to the national minimum wage. The claimant acknowledges having been paid only £3,300 (page 109M). Her claim for unlawful deductions succeeds as she has not been paid for the full amount of her hours worked. The quantum is to be determined at remedy stage. The parties are encouraged to seek to agree the figures.

152. The claim for unpaid wages also succeeds as a breach of contract claim.

Holiday pay

153. The claimant accepted in submissions that as the law stands, she can only claim for the holiday year in which the employment terminated. Our finding above is that her employment commenced on 9 September 2010. The leave year therefore begins in each year on 9 September and the claim for holiday pay is therefore to be calculated from 9 September 2014. There was no evidence of any annual leave having been taken in that leave year and we find that the full amount of the accrual from 9 September 2014 is due to the claimant on termination of her employment.

Rest breaks

154. The claimant accepted that as the law currently stands, she could not recover a financial remedy under this head of claim. The claimant did not seek to exercise her right to rest periods or rest breaks. Based on our finding that the claimant finished work on Sundays at 2.30pm and commenced work again at 06.30am she did not receive her weekly rest break. She also did not receive 11 hours daily rest by finishing at 8.30pm and starting work again at 06.30am.

Written particulars and itemised pay statements

155. The respondent accepted that they did not provide the claimant with pay slips or itemised pay statements. We therefore find that they failed to provide the claimant with itemised pay statements.

156. It was accepted for the claimant that because of the method of calculation of remedy under section 12 ERA that no financial remedy flows from this findings.

157. There were written particulars of employment which were at page 112 of the bundle. They do not provide particulars of the date of commencement of the employment, the date upon which continuous service began or any terms as to holidays or holiday pay and to this extent there is a failure to comply with the requirement to provide written particulars of employment. The claimant is entitled to a remedy, to be determined, under section 38 of the Employment Act 2002.

Direct discrimination

158. The claimant made reference to ***Taiwo*** in the opening note stating that the claimant would point to primary facts and invite the tribunal to find that the respondent would not have acted in the way that she did towards the claimant had the claimant been of a different nationality or national origin. No further submission was made on the direct race discrimination claim in closing submissions.

159. The respondent submitted that even if the claimant had been a national of the respondent's husband's country of origin, Nigeria, she would have been treated the same.

160. We accept the respondent's submission and find that the reason for the treatment of the claimant was her precarious immigration status and not because of her race as defined under section 9 of the Equality Act 2010. The claim for direct discrimination fails and is dismissed.

Time limits

161. For the time point to be decided in the respondent's favour, the respondent had to succeed on the illegality issue. The respondent fails on this issue and we find that the employment terminated not on 29 November 2013 but on 18 June 2015 and a series of unlawful deductions were made up to that date. The claims are within time.

Remedy hearing

162. At the conclusion of submissions we listed a date for a provisional remedies hearing, the parties having had an opportunity to check their availability. The hearing is listed to take place on **23 January 2017** for one day, commencing at 10am at Croydon. No further notice of hearing will be given.

163. We also ordered that on or before **19 December 2016** the respondent shall serve on the claimant a counter schedule of loss.

164. Although not ordered in front of the parties we direct that the claimant has leave if so advised to serve an updated schedule of loss on or before **5 December 2016** to reflect the findings made by this tribunal. Even if the claimant chooses not to serve an updated schedule of loss, the respondent shall comply with the order made above for a counter schedule based on the existing schedule of loss.

165. The parties are encouraged to seek to agree remedy and shall notify the tribunal forthwith if the remedies hearing is no longer required.

_____

Employment Judge Elliott

Date: 21 October 2016