Case No: 3331325/2018

EMPLOYMENT TRIBUNALS

Claimant: **Miss A Neascu**

Respondent: **Magic Nursery Group Ltd**

Heard at: London Central **On:** 20 November 2019

Before: Employment Judge D Henderson (sitting alone)

Representation

Claimant: Mr G Virtopeanu (Counsel)

Respondent: Ms N Gyane (Counsel)

RESERVED JUDGMENT

1. **The claimant's claims for breach of contract (wrongful dismissal) and for unlawful deduction of wages do not succeed and are dismissed.**

2. **The remedies hearing date provisionally agreed with the parties, for 9 January 2020 is no longer needed and is duly vacated.**

REASONS

1. This was a claim for breach of contract (wrongful dismissal) and for unlawful deduction of wages, brought by an ET1 issued on 11 July 2018.

2. There had been a Preliminary Hearing dealing with case management on 7 October 2019 before EJ A James, which had identified the issues for determination in these proceedings.

The Issues

3. At the commencement of the hearing the Employment Judge clarified those issues with the parties' Counsel, who agreed that the issues as set out in the Case Management Summary were the relevant issues for determination in this case. It was agreed that the hearing would be for liability only. The agreed Issues were as follows;

   a.wrongful dismissal (under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 (the Extension of Jurisdiction Order)
   - did the respondent dismiss the claimant on 6 April 2018? If not, then the claimant had resigned (as alleged by the respondent. If yes,
   - was the respondent entitled to dismiss the claimant due to any repudiatory breach of contract on her part or otherwise? If not,
   - what notice was the claimant entitled to under her contract of employment? It was agreed by both parties that the notice period was 4 weeks;
   - the claimant had originally claimed an uplift of up to 25% on any award made by the Tribunal in respect of her claim under section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992. However, at the hearing, Mr Virtopeanu accepted that he was unable to identify any Code of Practice relevant to the claimant's circumstances in this case. Accordingly, the claimant withdrew the issue of an uplift.

   b.unlawful deduction of wages (under section 13 of the Employment Rights Act 1996 (ERA))
   - has the respondent made an unauthorised deduction from the claimant's wages and if so when? The claimant said that the respondent had unlawfully deducted the amount of £273 from her final wages;
   - the claimant also claimed £112 which had not been paid in respect of pension at £8 per month for a period of 14 months (the length of her employment with the respondent).

4. As had been noted at the Case Management hearing the claimant sought to bring other claims for compensation for alleged failures by the respondent in relation to the mentoring process, the probation review process and alleged breaches of the implied term of trust and confidence. These claims were expressed in terms similar to those for personal injury or injury to feelings and accordingly did not fall within the jurisdiction of the Employment Tribunal under the Extension of Jurisdiction Order. That Order gave jurisdiction under Article 3 (c) for an Employment Tribunal to deal with a breach of contract claim which arises or is outstanding on the termination of the relevant employment.

5. The Employment Judge in this case reiterated to Mr Virtopeanu that the Tribunal only had such jurisdiction to hear contractual claims as had been granted to it under the Extension of Jurisdiction Order. Any contractual claims outside that jurisdiction must be made in other courts.

6. It was also accepted that the claimant did not have the requisite continuity of employment to bring an unfair dismissal claim.

Preliminary Applications by the Claimant for Postponement

7. Mr Virtopeanu requested a postponement of the hearing on the basis that the respondent had produced a witness statement from Ms Bernadette Mealy (the Group Manager of the respondent nursery), but she was unable to attend to give evidence in person. He said that the fact that he would be unable to cross-examine Ms Mealy and to highlight the inconsistencies in her statement which would be unduly prejudicial to the claimant and he also noted that the respondent had not served a Notice of Hearsay.

8. Ms Gyane explained that Ms Mealy had left the respondent organisation. She accepted that the Tribunal could only give limited weight to Ms Mealy's evidence. However, she observed that there was adequate documentation in the Agreed Bundle of documents before the Tribunal to support the general content of Ms Mealy's witness statement, which was on predominantly on the issue of whether the claimant resigned or had been dismissed.

9. I explained to Mr Virtopeanu that the process in the Employment Tribunal was less formal than in the High Court or County Court and a Notice Of Hearsay was not required. I considered the provisions of the Overriding Objective (paragraph 2 of the Employment Tribunal Rules of Procedure 2013) and concluded that it would be possible to have a fair and just hearing without Ms Mealy attending in person. There was extensive documentation in the Agreed Bundle covering the relevant events surrounding the termination of the claimant's employment. I would be giving limited weight to Ms Mealy's witness statement. The claimant was giving evidence in person and, therefore, her evidence would be given greater weight by the Tribunal. It was also in both parties' interest to continue with the case without further delay, especially as the Full Merits Hearing of this case had already been postponed in October 2019.

10. This application for postponement of the hearing was refused.

11. Mr Virtopeanu then made a further application for postponement of the hearing, when it transpired that the claimant had not appreciated that she was required (under the Case Management Order of October 2019) to produce a copy of the Agreed Bundle for use by the witness at the hearing. This application for postponement was also refused. When the claimant was unable to obtain copies of the Agreed Bundle from a local copying centre, Ms Gyane arranged for a copy to be made at her Chambers. This resulted in an adjournment of 1.5 hours but meant that the hearing could proceed.

The Conduct of the Hearing

12. The Tribunal heard evidence from the claimant who adopted her written witness statement as her evidence in chief. A witness statement of Valentina Bosa (the claimant's mother) was also presented to the Tribunal. However, it was agreed that there was nothing contained in Ms Bosa's statement which was relevant to the issues identified above. Ms Gyane also confirmed that she had no cross-examination questions for Ms Bosa. As mentioned above, there was also a signed witness statement presented on behalf the respondent from Ms Bernadette Mealy, the respondent's Group Manager.

13. The Tribunal was also presented with the Agreed Bundle of documents (of 379 pages). Page references in this Judgement and Reasons are to that bundle. The Tribunal was assisted by written submissions from Ms Gyane and by oral submissions only from Mr Virtopeanu.

14. Given the delays with regard to applications for postponement and the claimant's failure to produce the Agreed Bundle for the witness table, the substantive hearing did not commence until 1:30pm. The hearing concluded at 4:40 pm and judgement was reserved. A provisional date for a remedies hearing was agreed with the parties for **9 January 2020** (allocated for 3 hours).

Findings of Fact

15. The Tribunal will only make such findings of fact as are necessary for it to determine the identified Issues as set out above.

Background

16. The claimant was employed by the respondent on 27 February 2017 under a contract of employment (at pages 80-85). The respondent accepted that the disciplinary, grievance and other procedures set out in the Employee Handbook (page 88-142) had been incorporated into the claimant's contract of employment.

17. The contract of employment gave the claimant's job title as Nursery Practitioner. The claimant was at pains to establish that this was incorrect and that her correct job title was as set out in the job description (at page 76) which had been given to her in November 2017 (six months after her employment commenced). This job description referred to her as Nursery Assistant (Level 1/unqualified). The claimant appeared to be attempting to show that as she had not yet obtained her Level 3 qualification she could not be described as a Nursery Practitioner. She also sought to show that the respondent had given her duties and responsibilities over and above her abilities, which had caused her to suffer from stress-related illness. She had experience several absences from work on this basis during the course of her employment: 16-30 November 2017; 20-28 February and 201815-29 March 2018.

18. However, the Tribunal concludes that the claimant's job title and the appropriateness of the responsibilities and duties she was asked to undertake, are not relevant to the strict contractual issues as set out above. The claimant's evidence does demonstrate, as supported by several of the emails which she wrote to Ms Mealy in April 2018, that she had numerous complaints about the way she had been treated by the respondent and had intended to bring a grievance in respect of those complaints. There was no evidence presented to show that these complaints were repudiatory breaches of the contract of employment. The claimant's evidence was that she had not resigned from her employment.

19. As part of her employment, the claimant also received training from the respondent and an external organisation, GP Strategies. She commenced this

training in April 2017. On 9 November 2017, the claimant signed a Training Agreement in relation to this training with the respondent (page 144). Under that agreement, the claimant agreed to remain employed for a minimum period of one year after completion of the training, which was scheduled for completion in April 2018. She further agreed that if she left employment at any time for any reason (including dismissal) prior to the end of April 2019 she would refund the sum of £1500 to her employer on a proportionate scale based on the amount of time she remained in employment after the completion of the training.

20. The agreement went on to say that in the event of the claimant's failure to pay such sums, she agreed that the respondent *"has the right as an express term of my Contract of Employment to deduct any outstanding amount due under this agreement from my salary or any other payments due to me on the termination of my employment, in accordance with legislation currently in force*".

21. The claimant accepted that she had understood the terms of the agreement. Mr Virtopeanu sought to argue that the agreement should not be regarded as enforceable because the respondent had not set out in that agreement how the sum of £1500 had been calculated or how it was compiled. I note that the claimant did not seek to establish such a breakdown of that sum when she signed the agreement. I find that there has been no evidence presented to suggest that this agreement is not valid and that the claimant had not agreed to the deductions clause set out in that agreement.

Events of April 2018

22. The claimant was due to return from sick leave on 29 March 2018. She was scheduled to have a return to work meeting with Ms Mealy but had to cancel it due to a panic attack. The claimant met with Ms Mealy on 3 April 2018. Following that meeting, the claimant sent an email to Ms Mealy on 4 April 2018 (at pages 182-188). The email noted that Ms Mealy had questioned the reason for the claimant's sickness absence and the claimant offered to allow her to speak directly to the claimant's doctor. Ms Mealy had also told the claimant that she would not allow her to meet with her course assessor for the training, given that her sickness absences may be an indication that the training together with the claimant's work duties were proving too much for her.

23. The claimant believed that she was being unfairly and unreasonably treated and stated in her email "*on reflection it feels like constructive dismissal*". The claimant also said "*it seems clear that you no longer want me to work at the nursery, I've asked you what will happen if I leave. You said that you will not ask for the £1500 that is in the signed contract but you will take £250-£350 fee for enrolling me onto the course. This is unacceptable to me as I feel my health problem has been the result of my time at the nursery*". From the claimant's own email, it appears that she raised the question of what would happen if she left.

24. The claimant also referred in her email to a situation which had previously arisen in November 2017 when disciplinary issues had been raised with her. She had indicated her intention to resign at that stage, when the manager had

backed down and withdrawn the disciplinary charges. The claimant set out at length in the email of 4 April 2018, various organisational issues with which she was unhappy, including a refusal to reduce her hours to enable her to complete her training and to recover her health. The claimant accepted in cross examination that the respondent was under no contractual obligation to reduce the hours agreed in the contract of employment.

25. The claimant said in her oral evidence that she regarded this email as a grievance being made under the respondent's procedure, although she accepted that she had made no specific reference to the grievance procedure. The email concluded with the claimant saying "*if you want me to leave, I do not agree to pay any money. Unfortunately if we can't come to an agreement, I'm afraid that I will have no alternative than to take further legal advise (sic)"*

26. The claimant sent a further email at 10:15 PM on 4 April 2018 (page 190) to Ms Mealy in which she said that she spoken to her lawyer who advised that she could claim wrongful and unfair dismissal and also possibly have a claim in relation to the stress she had suffered and discrimination on grounds of nationality. The letter concluded with the sentence, "*I would like my wages to date without any deductions for training expenses and an agreed reference*".

27. It was put to the claimant in cross-examination that this email indicated her intention to terminate the contract of employment, for example her request for her wages to date. The claimant said that she did not regard that email as a resignation. She had been asking for her wages to date as she had not been paid for March 2018. The claimant's evidence on this point was unclear and confused. She said that she had not realised that she was paid in arrears. She said that her wages would normally be paid into her bank account on the last day of every month but she did not explain why this would not have been done for March 2018. She said that her request for an agreed reference was not an indication that she was planning to leave, but that she just wanted to have it there "in case". I did not find the claimant's evidence on this point to be credible. Given the claimant's reference to taking legal advice and setting out the various claims which she might have against the respondent, I find that the context of that email suggests that she was considering terminating her employment.

28. On 5 April 2018 Ms Mealy replied to the claimant (page 192) asking for clarification. She interpreted the last email from the claimant as an indication of the claimant's intention to resign. The Tribunal finds that this would be a reasonable interpretation.

29. Ms Mealy expressed concern that such a decision may be being made in haste, especially bearing in mind the claimant's feelings of stress and anxiety relating to work. Ms Mealy suggested that the claimant may wish to reconsider her decision to resign; that the respondent could obtain further information about her health from either her GP or an occupational health assessor and that the concerns identified by the claimant in her lengthy email 4 April 2018 should be investigated through the respondent's formal grievance procedure. Ms Mealy also indicated a wish to investigate the claimant's allegations of discrimination on grounds of nationality. The Tribunal notes that Ms Mealy was

accepting several of the points made by the claimant in her previous correspondence, relating to her ill-health and her grievances.

30. Ms Mealy concluded by saying that she would appreciate the claimant's response as soon as possible. If the claimant decided not to withdraw her resignation then the respondent would take steps to process the termination of her employment and deal with any monies which may be outstanding.

31. The claimant responded by email later on the evening of 5 April 2018 (page 194). The email stated *"I would like to start off by stating that I have not resigned but I have been constructively dismissed".* The claimant also reserved her rights to bring an employment tribunal claim against the respondent. She asked for her pay to date; her outstanding holiday pay; an agreed reference and for the return of various documents which she had left at the nursery. She said that she would attend the nursery to collect these various items the following day. If this was agreed, she would not take any further action, by which it would appear she meant legal/tribunal claims.

32. The claimant accepted in her oral evidence that she had been due to return to work on 29 March 2018, but had not attended for work on 4 or 5 April 2018. She had not provided any medical certificates for those days. She also accepted that although she had gone to the nursery on 6 April 2018, this had not been for work but simply to meet with Ms Mealy. The claimant said that she would normally arrive at work at around 8 AM but she arrived on 6 April at around 9:30 AM. The Tribunal finds that on the basis of the claimant's own evidence, she had failed to attend work, without any explanation, since 3 April 2018. This could be interpreted as an indication from the claimant that she regarded her employment as terminated.

33. When the claimant arrived at the nursery on 6 April 2018, her fingerprint access had been withdrawn and her online working account on the respondent's "Tapestry" system had been deleted. The claimant was admitted to the nursery by the reception staff and met with Ms Mealy who refused to return the claimant's paperwork stating that they were the nursery's property and she asked the claimant to leave. The claimant regarded these actions as dismissal. However, she accepted in cross-examination that she had never received any documentation which confirmed an actual dismissal by the respondent.

34. On 6 April 2018, Ms Mealy wrote to the claimant (page 196) stating that the claimant had refused to meet and discuss the concerns and options available to her. She had sent repeated requests to receive her outstanding pay, holiday pay and documents. Therefore, the respondent had to conclude that the claimant no longer wished to work at the nursery and had terminated her employment by her own volition. Ms Mealy said that a P45 would be arranged together with any monies owing and the claimant was requested to return all company property and her uniform and locker key by 13 April 2018. The letter did conclude by saying "*if you feel that I have been incorrect in reaching this conclusion, then it is important that you contact me immediately upon receipt of this letter in order that we may arrange a meeting to discuss the situation*."

35. The claimant responded on 9 April 2018 (pages 198-199) stating again that she had been “constructively dismissed”. She repeated her request for pay without deductions and for the return of various documents and a reference. The claimant referred to the fact that she had contacted her course assessor who had told the claimant that Ms Mealy claimed that she still worked for the respondent and that she was regarded as being on unauthorised absence. This would appear to support Ms Mealy’s interpretation of events. The claimant restated the fact that she had not resigned but considered herself as constructively dismissed.

36. The claimant was asked what she understood by the words, “constructive dismissal”. She said that she thought it meant that Ms Mealy was trying to get her out of the organisation. When it was put to the claimant that in order for there to be a constructive dismissal there needed to be a resignation by the employee relying on the employer’s breaches of contract, she said that she had not realised this and had not been told this by her legal advisers. She accepted that now that she understood this, her communications with the respondent would have been confusing, but she maintained in her oral evidence that she had never resigned but had been dismissed.

37. Ms Mealy responded to the claimant in a letter dated 6 April 2018 (page 201-202) but which the claimant accepted must have been written on 10 April as it referred to the claimant’s email of 9 April. This letter stated that the claimant had not been dismissed constructively or otherwise. Ms Mealy repeated what she had said in her previous letter. She explained that bearing in mind the tenor of the emails written by the claimant with regard to legal action, the respondent had felt that in order to protect their business, the claimant should be removed from the fingerprint access and from access to the Tapestry system. The respondent had not regarded this as a dismissal.

38. Ms Mealy repeated that the respondent regarded the claimant has having resigned but if this was not correct, then the claimant should let her know by 13 April 2018. However, on 12 April 2018 (page 204) before the 13 April deadline, Ms Mealy wrote to the claimant noting her resignation which would take effect from the 6 April 2018. The letter confirmed that her final salary payment due on 30 April would be £273.71. However bearing in mind the agreement of 9 November 2017 and the fact that an outstanding sum of £1500 would be due from the claimant to the respondent the final salary payment would be deducted from the money owed. This left a sum of £1226.29 outstanding from the claimant. The respondent did not lodge a counterclaim for this sum in the Employment Tribunal proceedings.

39. On the basis of the evidence set out above, the Tribunal finds that the respondent did not dismiss the claimant on 6 April or at all. The claimant’s misunderstanding of the nature of constructive dismissal meant that she did not formally resign. However, the substance of her emails; her repeated reference to being constructively dismissed; her conduct in not attending for work on 4, 5 and 6 April 2018 and her repeated requests for outstanding wages due and an agreed reference, made it reasonable for the respondent to conclude that she had resigned.

Pension

40. The claimant accepted in her oral evidence, the reference in her contract of employment (at page 87) to the fact that the respondent would operate a contributory pension scheme to which she would be auto-enrolled, subject to the conditions of the scheme. The claimant accepted that during her employment she had never been enrolled in such a scheme.

41. Ms Gyane stated in her submissions that the relevant legislation only provided for auto-enrolment after the age of 22. The claimant accepted that she had been aged 21 as at 6 April 2018 when her employment terminated. The relevant legislation cited by Ms Gyane, section 4 of the Pensions Act 2008 to be read in conjunction with the Occupational and Personal Pension Scheme (Automatic Enrolment) Regulations 2010, regulation 24 and Schedule 2. Mr Virtopeanu did not challenge these submissions. Further, Ms Gyane's submissions are confirmed by information given at https://www.pensionsadvisoryservice.org.uk/about-pensions/pensions-basics/automatic-enrolment.

42. The claimant was not entitled, due to her age, to be auto-enrolled in the respondent's pension scheme. If she had wished to join the scheme prior to her 22nd birthday she should have specifically opted-in, which she had not done.

Conclusions

Wrongful dismissal

43. Based on the findings of fact set out above, the Tribunal concludes that the respondent did not dismiss the claimant on 6 April 2018. The claimant's communications with the respondent were confused and ambiguous. However, her repeated reference to "constructive dismissal", which would require a resignation by her as the employee; her failure to attend for work on 4,5 and 6 April 2018, without explanation and her request for outstanding wages to date, holiday pay and an agreed reference indicate resignation by conduct even if there was no express resignation given by the claimant.

44. The claimant's claim for wrongful dismissal fails and is dismissed.

45. The claimant did not plead constructive dismissal (as it is usually understood) and it was not one of the issues raised at the hearing, as the claimant (and her counsel) maintained that she had never resigned. In any event, there was no evidence presented to the Tribunal to show that the respondent had committed any repudiatory breaches of contract.

Unlawful Deductions

46. The written agreement of November 2017, which was signed by the claimant, gave her consent to the making of deductions from any final payment to her as regards training costs. This was prior consent within the meaning of section 13 (1) (b) ERA. Therefore, the respondent's deduction of £273 from the final salary due to the claimant was not unlawful.

47. The claimant had no entitlement to be auto enrolled into the respondent's pension scheme until she reached the age of 22. Her employment terminated before she reached that age. There was no unlawful deduction with regard to outstanding pension contributions.

48. The claimant's claims for unlawful deduction of wages fail and are dismissed.

Employment Judge

Date 3 December 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

04/12/2019

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FOR THE TRIBUNAL OFFICE