RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms AM Tremain**

Respondent: **Forrest Nurseries Limited T/a Clever Cloggs Day Nursery**

Heard at: **East London Hearing Centre**

On: **28, 29, 30 & 31 January and 4 February 2020**

Before: **Employment Judge Burgher**

Members: **Ms L Conwell-Tillotson**
Ms J Owen

Representation

Claimant: In person, assisted by lip speakers Ms l Gilford and Mr P Rees

Respondent: Mr P Maratos (Consultant)

JUDGMENT having been sent to the parties on 19 February 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 At the outset of the hearing the following issues were clarified for determination.

2 The Claimant commenced employment with Forrest Nurseries Ltd trading as Clever Tots Nursery (Clever Tots) on 29 January 2014. The Claimant worked as a cover staff and after School Club assistant. The Claimant had a NVQ Level 3 qualification as a Nursery Nurse and was expected to cover the role and responsibilities of a nursery nurse when a designated nursery nurse was not available. The Claimant continued working at Clever Tots until 21 April 2016 when she was signed off sick following incidents relating to three children under her care. The 21 April 2016 was her last day working with colleagues at Clever Tots.

3 The Claimant returned to work following her period of sickness absence on 20 June 2016 and was transferred to work at the Clever Cloggs Day nursery (Clever Cloggs) with different working colleagues from that date.

4 The Claimant makes the following claims

Constructive dismissal – section 95 of the employment rights act

5 Whether the Respondent has acted in repudiating the breach of contract. The Claimant alleges that the Respondent acted in breach of the implied term of trust and confidence in the following respects:

5.1 On 16 July 2014 she was scolded by Zoe Minihane and told she was responsible for cleaning up any mess from children's snacks

5.2 She received unfriendly looks from her colleagues on a variety of dates and on many occasions at Clever Cloggs

5.3 On 20 June 2016 the Claimant was transferred from Clever Tots to Clever Cloggs

5.4 She was excluded from conversations. Her colleagues had taken to cover their mouths during conversations with one another in order to alienate the Claimant. 7 July 2016, Marinka Coppin, covered her mouth with her hands while talking to another member of staff;

5.5 The Respondent unfairly allocated the cleaning duties amongst its staff resulting in a disproportionate cleaning workload for the Claimant

5.6 Transferring the Claimant to Clever Cloggs.

5.7 Requiring the Claimant to work on journals for 11 children instead of 5 children. The Claimant alleges that the Respondent's staff knew that she was dyslexic.

5.8 Not being allowed to know what was discussed at the evening meeting on 5 October 2016.

5.9 Do all or any of the above allegations, if proven, constitute a fundamental breach of the Claimant's contract.

5.10 If so did the Claimant resigned in response to the fundamental breach of her contract. The Respondent contends that the Claimant had resigned from her employment to care for her terminally ill mother.

5.11 Did the Claimant delay her resignation therefore by affirming the breach?

Disability claims

6 The Claimant's claim was initially based on disabilities of being dyslexic and having mobility issues regarding her knees. However, during clarification of the issues and the Claimant's evidence it was apparent that the Claimant was seeking to add further allegations for failure to make reasonable adjustments based on her dyslexia rely and to on being deaf as a disability as the basis for some of her claims.

7 The Tribunal assessed the pleadings, the case management orders of Employment Judge Jones dated 23 April 2018 and 7 November 2018, alongside the representations that the Claimant was making before us.

8 The Tribunal did not permit the Claimant to amend her claim to add a claim for failure to make reasonable adjustments in respect of staff covering their mouths on the basis of her dyslexia. This was not part of the Claimant's ET1 and formed no part of the two preliminary hearings that had taken place. It was clear that the reasonable adjustments claim that the Claimant was advancing was specifically related to her mobility issue that arose from her transfer to Clever Cloggs from Clever Tots. Dyslexia was not previously discussed as a relevant issue to be considered as a failure to make reasonable adjustments, and this condition was unconnected with the Claimant's allegation about having to walk up a hill to Clever Cloggs. Further, whilst the issue of dyslexia amounting to disability was seemingly conceded by the Respondent, the knowledge of dyslexia being a disability was not.

9 The hearing had been postponed on two occasions previously and the availability of lip speakers to assist the Tribunal in proceedings was very limited. To have allowed this amendment at this late stage would have required a further adjournment of the hearing in order to permit the Respondent to call additional witnesses in this regard. The Tribunal did not conclude that it was in accordance with the overriding objective of dealing with matters fairly and justly to allow the Claimant to amend her claim to include it.

10 The Claimant also sought to add a similar claim in respect of staff covering their mouths relating to her being deaf. The Tribunal concluded that it was proportionate to allow this amendment. The Claimant had mentioned being 90% deaf in her ET1, but curiously this disability did not form the basis of any issues raised in the preliminary hearings. The Claimant was maintaining before us that her deafness was an issue. The issue of disability and knowledge of the Claimant's disability being 90% deaf was not in dispute and in so far as the specific allegations being levelled against Marinka Coppin, was concerned as she was a witness the Respondent was calling. We concluded that the Respondent would have sufficient opportunity to deal with the allegations in the time allotted.

11 Having considered these matters the Claimant's disability claims are as follows:

11.1 was there PCP of transferring staff from one site to another 9 (mobility)

11.2 was there a PCP of holding spoken meetings (deafness)

11.3 If so did the PCP place the Claimant at a substantial disadvantage compared to non-disabled persons

11.4 The Claimant alleges that the PCP of transferring staff to Clever Cloggs meant that she had to walk up a hill and was at a disadvantage due to her limited mobility because of her knee problem.

11.5 In respect of the spoken meetings, the Claimant alleges that she was not able to understand what happened during meetings because she could not hear in them.

11.5.1 The Claimant alleges that a reasonable adjustment would have been to leave her at Clever Tots at the lower site near the train station where she would not be required to walk up the hill which caused her knee pain.

11.6 The Claimant also alleges that providing her with a designated person to explain what was happening in meetings would have been reasonable adjustment to ensure she understood what was going on.

11.7 If it is concluded that the PCP placed the Claimant at a substantial disadvantage would the proposed adjustments have been reasonable

11.8 Did the Respondent know or be reasonably expected to have known that the PCP would put the Claimant at a substantial disadvantage.

Age discrimination

12 The Claimant claims that a younger group of people would treat people over 50 less favourably. The Claimant states that in effect she was not on the same wavelength as those under 50 and was not made to feel welcome by them.

13 The Claimant relies on the following matters:

13.1 Being constantly disrespected and talked down to by her younger colleagues whilst employed by the Respondent

13.2 Her younger colleagues alienating her from conversations (by putting their hands over their mouth). The Claimant alleges that Marinka Coppin was the main person who did this and this was done as well by Scarlett Taylor and Dawn Aukett were also in the room

13.3 Being assigned cleaning work by her younger colleagues and other work that they did not want to do. The Claimant alleges that this happened on most days especially when she was at the after-school club at Clever Tots.

13.4 Whilst, there was no cleaning rota at Clever Cloggs the Claimant was doing a lot of cleaning in the preschool class after 3pm as the usual staff always avoided doing it.

13.5 The Claimant was not invited to Scarlett Taylor's Halloween party held in October 2016. The Claimant alleges that Scarlett Taylor had invited everyone to her party apart from the Claimant and this hurt her feelings.

14 During her evidence the Claimant seemingly refocused her age discrimination complaint to be a failure to be given training and/or promotion opportunities whilst at Clever Tots. This was in her witness statement but was not in her ET1 or list of issues at the preliminary hearings. As Nicola Marshal, the Operations Manager was in attendance at Tribunal we concluded that it was proportionate to consider with these as additional allegations of age discrimination.

15 In respect of any act of discrimination are any of those acts out of time?

16 Are the acts officially linked to consider due to an act extending over a period or are they a series of discrete events.

17 Insofar as the above acts are admitted or proven has the Respondent advanced the non-discriminatory explanation that is capable of defeating an inference of age discrimination.

Holiday Pay

18 Is the Claimant owed monies in respect of holiday pay?

Other payments and overtime payments

19 Is the Claimant owed sums in respect of overtime or other days worked?

20 The Claimant submitted a schedule of loss with no reference to these claims. The Claimant was asked to clarify the amounts that she was seeking to claim. She referred to an additional 'non payment list' at document 7 bundle B2 setting out her claims for non payment. This specified a number of dates with unspecified hours claimed. She was able to clearly state that there were two separate Saturdays where she had mandatory training on health and safety on 24 October 2015 and 7 November 2015. However, in respect of evenings the Claimant frankly stated that she was unable specify the additional hours she worked on the evenings to calculate her claims. The Claimant was therefore informed that it would be difficult for the Tribunal to assess and quantify the Claimant's claims for payments for overtime in respect of the evenings claimed, if she was able to establish any entitlement in this regard.

Evidence

21 The Claimant gave evidence on her own behalf. The Tribunal referred to her written witness statement, her ET1, pages 56 to 69 of the bundle setting out key dates and document 10 of additional Bundle B2 and a handwritten statement staff cleaning rota C2 as her sworn evidence. The Tribunal was greatly assisted by Ms L Gilford and Mr P Rees who attended as Lip Speakers throughout the duration of the hearing.

22 Prior to the commencement of the hearing the Respondent had applied for a postponement of the hearing on the basis that two of its key witnesses were Ms Nichola Marshal, Operations Director and Ms Jacky Rollinson, Nursery Nurse, were unable to attend due to serious health conditions. The Tribunal refused the postponement application and concluded that in view of the two previous postponements of the hearing and the restricted availability of Lip Speakers, it was appropriate to commence the hearing which could then be adjourned if necessary to accommodate the availability of the Respondent's two witnesses. It was anticipated that the Tribunal could hear the Claimant's evidence and the Respondent's four other witnesses prior to any such adjournment.

23 When the hearing commenced, Mr Maratos on behalf the Respondent, stated that none of the Respondent's witnesses felt able to attend the hearing in the absence of Ms Marshal, and that they would sign themselves off sick with anxiety and would not be attending the Tribunal. Mr Maratos applied for the Tribunal only to hear the Claimant's evidence in the current listing and to adjourn the case to consider all of the Respondent's evidence in one sitting. The Tribunal expressed its disquiet at the Respondent's witness's

indication that they would choose not to attend due to the non-availability of Ms Marshal. Mr Maratos did not make an application for witness orders for the Respondent's witnesses to be compelled to attend. However, Mr Maratos stated that he would take instructions and the position could be considered I once the Claimant had completed her evidence.

24 On the second day of the hearing Mr Maratos indicated that Ms Marshal would now be able to attend and as such some of the other witnesses were also now confident to attend the hearing as well.

25 The Respondent subsequently called Ms Marinka Coppin, nursery nurse, Ms Scarlett Taylor, Senior Deputy Manager and Ms Nicola Marshal, Operations Manager to give evidence on behalf of its behalf. Statements from nursery nurses Jacky Rollinson, Maryanne Waddingham, Laura Porter were prepared and read by the Tribunal but given very limited weight given the absence of any signature on the statements and the fact that they were unable to attend Tribunal to be cross-examined on the contents of such statements

26 The Tribunal was also referred to a hearing bundle consisting of 424 pages and an additional bundle of 15 separate documents provided by the Claimant.

Facts

27 The Tribunal has found the following facts from the evidence.

28 The Respondent is in the business of providing childcare and employs 150 employees across seven separate sites.

29 The Claimant commenced employment with the Respondent in its Clever Tots Nursery on 29 January 2014. The Claimant worked as a Cover Staff and after School Club assistant.

30 The Claimant was not given a written contract of employment. Whilst the Respondent sought to rely on a contract which was unsigned it referred to a wrong start date and to a pension scheme that could not have been in operation until a year after the Claimant commenced employment. Whilst the written contract may have represented the Respondent's subsequent standard contract terms we find that it was not given to the Claimant. It is evident that that much of the disagreement and confusion that occurred in this case relating to the Claimant's work could have been avoided had there been a written contract and job description provided to the Claimant.

31 We note that despite the large number of employees the Respondent employs it does not have a defined equality policy dealing with discrimination whether age or disability discrimination and its relevant the managers had not had specific training on this.

32 In respect of pay, the Respondent operates an overtime system where staff are required to complete overtime payment claims and submit them for processing. The Claimant complied with this system in respect of claims for early shifts. She stated that she did not complete it for evening meetings because she was told that there was no overtime for evening meetings. Ms Marshal maintained that if staff has on appointment the Claimant notified the Respondent that she was 90% deaf and this was relayed to staff that she worked with to ensure that they spoke her to in front of her so that she could

understand what they were saying. The Respondent also employed another deaf worker and appropriate arrangements were taken to ensure that she was able to work. In the early period of her employment the Claimant was instructed to ensure that her hearing aids were switched on as it was a health risk if she could not hear the fire alarm. The Claimant accepted this that this was done and ensured that her hearing aids were switched on future occasions. There were no complaints made by the Claimant about not been able to hear or understand other staff whether at whilst at work or in meetings at the relevant time. We find that the Respondent's management had reasonable belief that the Claimant could understand and participate in working at the nursery with her hearing aids and with staff speaking at in front of her. On the evidence presented we find that the Respondent did not reasonably believe that any further adjustments were necessary for the Claimant's hearing and the Claimant did not ask for any.

33 The Claimant has maintained that she is disabled by reason of dyslexia and the Respondent has conceded that at a preliminary hearing before Employment Judge Jones. There was no dyslexia assessment before the Tribunal. In the hearing before us the Claimant referred to copious handwritten notes that she had written recording her version of events, some taken daily, setting out her work at the Respondent until her resignation. Some of the notes were seemingly contemporaneous and others were obviously taken well after matters in question were alleged to have occurred and formed part of a summary of the Claimant's perception of events. However, the detail, consistently good spelling and content of the Claimant's extensive handwritten notes combined with her ability to read them, and other documents unaided in the Tribunal, would have led the Tribunal to find that the Respondent did not have reasonable knowledge that the Claimant was being disabled by reason of dyslexia had it been necessary to do so.

34 The Claimant had a NVQ Level 3 qualification as a Nursery Nurse and was expected to cover the role and responsibilities of a Nursery Nurse when a designated Nursery Nurse was not available. The Claimant was 55 years old on her appointment and worked with numerous other nursery nurses, the majority of whom were in their twenties. The Tribunal finds that the Claimant believed that she was more experienced, competent and qualified than the younger people she worked with and this affected her interaction with them especially when she conveyed that her views were right, even when they ran contrary to the Respondent nursery practices. This formed the basis of a number of disagreements that occurred throughout her employment with the Respondent.

35 On 16 July 2014 Zoe Minihane told the Claimant that she was responsible for cleaning up any mess from children's snacks. The Claimant was unhappy with this and noted this in her notes. However, the Claimant stated in evidence that this incident played no part in her consequent decision to resign on 11 October 2016. It is apparent that the Claimant believed that she was only required to clean up her in respect of the children she was supervising. However, the Respondent expected a common sense team based approached for staff in the same room to assist one another if for example the class was having meal time, singing or reading time. If one member of staff was doing a class activity the other member of staff could be expected to clean tidy up.

36 The Claimant had numerous other disagreements and arguments with other Nursery Nurse staff whilst working at Clever Tots over trivial work-related matters. Her arguments extended to a number of individuals with different age ranges between 20s and early 60's. The Claimant was set her ways and reticent in following the guidelines set

down by the Respondent as outlined by the Operations Director Ms Nicola Marshal. The Claimant believed her way was best.

37 On 20 March 2015 the Claimant suffered an accident whilst at work and damaged her teeth, ribs and knees. The Claimant took four weeks off and was supported by Ms Marshal during this period and received full pay and assistance. One of the recommendations for her return from this accident was for her to be given duties that did not involve sweeping or mopping. These duties were therefore not assigned to the Claimant for a limited period.

38 The Claimant stated that whilst employed at Clever Tots she was not given training whereas her younger colleagues were. The evidence we have heard is that the Claimant was NVQ level 3 qualified and as such did not require any higher level training to undertake her role. We accept Ms Marshal's evidence that in the Respondent that any training above NVQ Level 3 was elective and self-funding. We accept the Respondent's evidence that younger workers who were NVQ level 3 or above were not provided any additional training to the Claimant.

39 The Claimant was required to attend two days mandatory health and first-aid training on Saturday 24 October 2015 and 7 November 2015 which formed the part of the Claimant's outstanding payments claim.

40 The Claimant also asserted that she felt undervalued by not been given a "promotion" in running the after-school club whilst at Clever Tots. The Claimant stated that she felt undervalued and that younger, less experienced individuals were being constantly promoted to room leader and she was not. The Respondent's evidence was that there was no role of room leader to be promoted to within the Respondent. However staff, who were not employed as cover staff, were assigned to particular rooms and the rooms could have been referred to after the staff member concerned. The Claimant was employed as cover staff and as such could be required to work in any given room as required and there was no difference in pay scale or formal promotion as contended by the Claimant.

41 On 20 April 2016 the Claimant was involved in incidents upsetting 3 children who were all under 5 years old.

42 The Claimant told Child A not to be greedy when he came up for second helping of a meal before other children had been served. This upset Child A. The Claimant wrongly accused Child B of throwing away a tangerine and Child B was upset. The Claimant upset Child C by telling her she was not able to sit and eat with her friends. The Claimant wrongly decided separate vegetarians from eating with meat eaters. This was not the Respondent's policy.

43 On 21 April 2016 the Claimant was questioned about her care of the three children the previous day. The Claimant felt pressured and was signed off sick from work.

44 In May 2016 the Respondent received two separate complaints about the way that the Claimant had treated their children on 20 April 2016 from parents concerned. One set of parents complained that their daughter was being picked upon and was been split from her friends at mealtimes. The other set of parents complained that the Claimant referred to their child as being greedy because they had requested extra food and that their children were being unnecessarily separated from their friends because they were vegetarian.

They specified that they did not want the Claimant to care for their children and if this continued they would remove their children from the nursery.

45 On 6 May 2016 the Claimant wrote letters of apology to the parents concerned and gave her explanation, stating that it was out of character for her to behave in that way.

46 The Claimant had a knee operation arranged for 9 May 2016 and did not return to work until 20 June 2016. The Respondent accepted that the Claimant is disabled by reason of her knee and that it had knowledge of this. This disability impacted on the Claimant's mobility.

47 On 26 May 2016 the Claimant saw an Employment Coordinator Counsellor, Clive McIntyre. His notes of contact with the Claimant throughout this period were included in the bundle. Mr McIntyre noted that the Claimant is off sick from work and has been working as a nursery nurse for considerable time but would now like to consider leaving this and moving into a new career possibly working with animals. We find that by this time Claimant was upset by the parental complaints and feared that she would be subject to disciplinary action by the Respondent arising from her conduct on 20 April 2016 and was seeking to reviewing her option.

48 On 2 June 2016 Mr McIntrye notes that the Claimant is working on a grievance document and has been considering her options in terms of future plans. It was noted that the they looked at the grievance document and discussed how it could be amended.

49 On 17 June 2016 Mr McIntyre's notes record "*we reviewed the grievance document and [the Claimant] know [sic] feels able to submit to her employer but it is going to contact her solicitor to discuss as well.*"

50 On 17 June 2019 Ms Marshal sent a text message to the Claimant and asked when she was able to return to work as a meeting would need to take place before her return.

51 The Claimant responded stating that she was due to come back to work on the 20 June but was seeing a doctor 8.30 in the morning first. The Claimant asked who she would be having the meeting with and whether she needed to bring somebody along with her. Ms Marshal responded that the Claimant should call her on Monday and the meeting will be with her and she did not need to bring anybody.

52 Further, on the morning of 20 June, prior to the meeting that day the Claimant texted Ms Marshal and asked again whether she needed to bring somebody with her to the meeting or not. Ms Marshal said no.

53 We find by asking whether she need to bring anybody with her to the meeting the Claimant was concerned about whether she would be disciplined for the behaviours she demonstrated on 20 April towards the children. There was not any other reason for her to ask whether she needed to bring someone with her in the meeting.

54 The Claimant attended a meeting with Ms Marshal on 20 June 2016. Curiously, despite her copious notes on seemingly irrelevant matters that the Tribunal was referred to during her evidence, the Claimant did not make any notes of this meeting. This was a

key meeting for the Tribunal to determine. Ms Marshal did not take any notes of this meeting either.

55 The positions of the parties as to what happened at this meeting were diametrically opposed. The Claimant maintained that the meeting was attended by Ms Marshal and Ms Taylor where she handed Ms Marshal a grievance letter, a sicknote, and her notes of key events of consisted 6 pages all contained in an envelope. The Claimant maintained that Ms Marshal stated that the Claimant's grievance was *"too upsetting to read"* and she would have to pass it to Sam Forrest the owner. The Claimant maintained that Ms Marshal told that her that she was being removed to work at Clever Cloggs so that Miss Marshal could keep an eye on her. The Claimant stated the Ms Marshal told her that she could use the car parking at Clever Cloggs until 21 July 2016, the end of the summer term.

56 Ms Marshal and Miss Taylor deny that there was a meeting with the Claimant on 20 June 2016 with both of them present. Ms Marshal accepts there was a meeting but denies that any grievance letter that was handed to her by the Claimant. Ms Marshal stated that the reason for the Claimant moving to Clever Cloggs was to avoid disciplinary action against and put her in an experienced and supportive team in order that she could have a fresh start away from disapproving parents. Ms Marshal stated that the Claimant agreed to this course of action and that the Claimant was content to move. Ms Marshal stated that the Claimant was informed that she could use the car parking at Clever Cloggs and no end date was given. The transfer to Clever Cloggs work meant that the Claimant was no longer doing after school club work.

57 Having considered the competing versions we find that Ms Marshal's version of the meeting of 20 June 2016 to be far more reliable. When looking at the grievance the Claimant alleges that she gave to Ms Marshal it could hardly reasonably be said to be *"too upsetting"* to consider. The contents of the alleged grievance were simply complaints that the Claimant was making against other members of staff. The grievance the Claimant relied on at the Tribunal was dated 6 June 2016 but the Claimant maintained that her son changed the date on the one that she submitted to Ms Marshal to 20 June 2016. We do not accept this as there is no explanation why the correctly dated version was not presented to the Tribunal. Further, Mr McIntyre's contemporaneous notes do not support the Claimant's version of events. Mr McIntyre recorded on 20 June 2016 *"she has seen her GP this morning and he has reluctantly signed her off but on reduced duties. [The Claimant] has contacted employer and told them this and they are hoping to meet with her today. [The Claimant] is hoping to speak with her solicitor prior to discuss. We discussed submitting the grievance document today. [The Claimant] will keep me updated on progress."*

58 On 21 June Mr McIntyre's notes state *"[the Claimant] left me a message: the meeting yesterday went OK. [The Claimant] has been transferred to another branch of the nursery still in Brentwood and feels this may resolve some of the outstanding issues. Still intending to submit grievance feels more confident."*

59 This indicates to the Tribunal that the Claimant had not by this stage submitted the grievance. The Claimant stated that Mr McIntyre's notes were wrong in this respect.

60 Mr McIntyre's notes of 22 June 2016 state *"we spoke yesterday but I contacted her today via email to see how things were going re: transfer etc. Asked [the Claimant] if*

she has been in contact with her solicitor? Has she submitted the grievance letter. Asked her to get back to me to let me know how things are going. Asked [the Claimant] if she would like me to write to the employer. I offered this idea yesterday"

61 The next note is 29 June 2016 where Mr McIntyre notes that he emailed the Claimant to asked how things are going. A similar contact is made on 6 July 2016.

62 Mr McIntyre's notes are conspicuous in not recording that the grievance was submitted or the Claimant's unhappiness in it not being considered by Ms Marshal as she alleges.

63 On the Claimant's case she was informed by Ms Marshal that the grievance was too difficult to deal with and that it would have to be referred to Sam Forrest. However, the Claimant stated that she spoke to Sam Forrest on 28 June 2016 about a locker key but did not enquire about whether her grievance handed to Ms Marshal was being considered. No other enquiry about the status of her alleged grievance was made by the Claimant.

64 Given the above we did not accept the Claimant's evidence regarding what happened at the 20 June 2016 meeting. Specifically, we find that the Claimant was content to move to work at Clever Cloggs and she did so working from 20 June 2016 at that location. Clever Cloggs, unlike Clever Tots, was located up a steep hill from the Train station. The Claimant was told that she could have access to parking at Clever Cloggs without limitation.

65 The Claimant had access to a solicitor and advice from Mr McIntryre at that stage and had she sought to bring a claim she would have been able to have done so. The Claimant did not give evidence as to why she did not bring a claim at the relevant time relating to any allegations of disability discrimination or age discrimination whilst at Clever Tots. She stated that she was advised by her Citizens Advice Bureau that she should focus on her claims whilst at Clever Cloggs as her claims before that were out of time.

66 Whilst at Clever Cloggs the Claimant worked with a wholly separate group of individuals to those at Clever Tots save for Ms Marshal, who she knew as the overall Operational Manager and Marinka Copping, who she had worked briefly with at Clever Tots.

67 The Claimant's work did change when she was at Clever Cloggs and she was now working in one room and was assigned 11 key children instead of five. The Claimant stated that this was difficult because the Respondent knew that she was dyslexic. We do not accept that the Respondent knew that the Claimant was dyslexic she had not told Miss Marshal this and Ms Copping denies that the Claimant told her this. The Claimant did not complain at the time that she was unable to cope with the workload and Ms Marshal expressed surprise that this was not done as she would have made accommodations address this.

68 On 30 June 2016 Ms Marshal agreed the Claimant's request to change of hours of work to give her more time to prepare for art activities. The Claimant requested an hour lunch break to allow more time to rest her leg. The Claimant was then allowed to work four days Monday to Thursday between 9am – 6pm.

69 The Claimant was quickly integrated within the team of Clever Cloggs and attended Ms Marshal's 40th birthday party.

70 The Claimant alleges that whilst at Clever Cloggs she was excluded from conversations. She stated that her colleagues had taken to cover their mouth during conversations with one another in order to alienate her. Three examples were given,

71 On 7 July 2016 the Claimant alleged that Marinka Copping covered her mouth with her hands while talking to another Scarlett Taylor. This is recorded in the Claimant's handwritten notes. Both Ms Copping and Ms Taylor denied this. The Claimant did not make any complaint to anyone about this at the time to management and the Claimant's notes were not given to Ms Copping or Ms Taylor to consider at the time. However, we find that the content of the Claimant's notes is such that any conversation was gossip and not work related and was a private conversation between them. It was a private conversation they would have had an entitlement to engage in.

72 The Claimant refers to a note of 29 September 2016 where Ms Taylor is alleged to have covered her face with sided hands. This was not raised as a complaint to management at the time. Mr Taylor denies this and we find that had it happened it would have been a private conversation that given that the Claimant had criticised them about discussing non work related matters in the workplace instead of working.

73 The Claimant notes that on the" 10th 11th 12th or 13th of October? Dawn Aukett and Markina Coppin *"were talking often Marinka would wisper [sic] and have her head down while doing so. Dawn would respond the same. I was always excluded from any conversations they had this was a fairly small room so I was sitting quite…"*

74 We do not accept that the Claimant's note in this regard is an accurate reflection of events. It must have been transcribed well after the event, it was incomplete and did not form the basis of any complaint to management. We accept Ms Coppin's evidence that she would not talk down to the floor she was accustomed to using with deaf people and her mother is deaf and she would not have treated the Claimant in that way.

75 We do not find that the Claimant was assigned cleaning duties in a disproportionate manner. On the evidence we have assessed we find that cleaning duties were unfairly assigned. It is clear that eagerness in which staff undertook their cleaning duties varied and it seemed that the Claimant was more military about her approach to cleaning duties and was upset that other staff were not as proactive as she was.

76 The Claimant alleged that she received unfriendly looks from her colleagues at Clever Cloggs following disagreements with staff. The Claimant gave scant evidence in the regard and the Tribunal were unable to identify any such matter that could have been said to have resulted in the Claimant's subsequent resignation in October 2016.

77 The Claimant stated asserted that she was deliberately excluded from a party that Ms Taylor organised. We accept that Ms Taylor had arranged a birthday party and was a private party for her close friends. Ms Taylor did invite some colleagues from work but not everyone was invited. Ms Copping, for example was not invited. Ms Taylor did not know the Claimant particularly well and did not invite her. The Claimant's evidence that everyone was invited, was based on an inaccurate comment that may have been related to her at Brentwood train station by a newly recruited "younger member of staff".

78 The Claimant did not attend a staff meeting in the evening of on 5 October 2016 as she had to visit her mother who was in poor health in care home. The Claimant complains that Jacky Rollinson told her that she was not able to relay what was discussed during this meeting as she was told by Ms Marshal not to do this. The Claimant stated that she did not feel this is right as a member of staff should be informed of any changes in the nursery. Ms Marshal denies giving this instruction to Jacky. There would be no reason to do so as all staff should be informed of operational changes.

79 Mr McIntyre's notes of 11 October 2016 state that "*the Client was very anxious about going back to work after the weekend as she is claiming that she is being harassed even though the nursery has moved her to another location due to problems she was having the staff there. I have signposted her to contact ACAS and the Mary Ward legal centre for further advice and support."*

80 The Claimant wrote a letter dated 11 October 2016 stating to whom it may concern:

> *"This is a formal notification of my resignation from Clever Cloggs day nursery effective from 1/10/16 "I appreciate all I have learnt here and I wish the nursery to continue in its fruitful endeavors [sic]"."*

81 This letter made its way to the desk of Ms Marshal who arranged a meeting with the Claimant on 12 October 2016. During this meeting Ms Marshal observed that the Claimant looked tired. The Claimant stated that the reasons for leaving were due to caring with for her mother who was terminally ill. Whilst the Claimant denied this we accept Ms Marshal's evidence in this regard and do not conclude that the meeting would have taken place without a reason being given, as alleged by the Claimant. Sadly, the Claimant's mother passed a few weeks later.

82 During this time the Claimant then sought advice from the citizens advice bureau and subsequently submitted a grievance dated 14 November 2016. The Respondent denied receiving this grievance. The grievance refers to the Claimant submitting a grievance 'in June 2016' that was not dealt with. We have found that no grievance was submitted then. The Claimant also alleges that Ms Marshal failed to progress the Claimant's grievances about Lauren that were said to have been raised with Ms Marshal on 22 and 28 September 2016. The Claimant texted Ms Marshal in the evenings after work on both these dates and Ms Marshal responded that she was dealing with personal family matters and could not speak then. She would have expected matters to be followed up by the Claimant in working hours but this was not done.

83 Following her resignation the Claimant worked a zero hours contract at a bowling club in Romford and secured temporary work at a nursery through an agency. The Claimant was offered a permanent role at the nursery she was working at but declined this as she preferred the flexible hours available through the agency.

Law

84 The relevant time limits for unlawful discrimination complaints are provided by section 123 of the Equality Act 2010 which states:

Time limits
123

(1)Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a)the period of 6 months starting with the date of the act to which the proceedings relate, or
(b)such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

85 In respect of the Claimant's unlawful discrimination claims, I had regard to the summary of the law regarding time limits and extension of time at paragraphs 30-41 provided by Jackson LJ in the case of Aziz v FDA which sets out a helpful summary. I also considered the guidance of Robertson v Bexley Community Centre (t/a Leisure Link) that the extension of time is the exception rather than the rule.

86 I also considered the balance of prejudice between the parties when considering whether it is just and equitable to extend time and the factors in the case of British Coal Corp v Keeble where Mrs Justice Smith held:

"*The EAT also advised that the Industrial Tribunal should adopt as a check list the factors mentioned in Section 33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. The decision of the EAT*

was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in Section 33 was erroneous."

87 The time limits for unlawful deduction of wages complaints are set out in section 23 of the Employment Rights Act 1996 which states:

Complaints to employment tribunals.

(1) A worker may present a complaint to an employment tribunal—
(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),
(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or
(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) 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—
(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received
.
(3) Where a complaint is brought under this section in respect of—
(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
[(3A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [F3and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2).

(4)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.

(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the

date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

88 For breach of contract complaints to the Tribunal following termination of employment Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides:

Article 7 ET Extension of Time

"Subject to articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented –

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has been terminated, or

(ba) where the period within which a complaint must be presented in accordance with paragraph (a) r (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).

(c) Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

Constructive dismissal

89 A termination of the contract by the employee will constitute a dismissal under section 95(1)(c) of the Employment Rights Act 1996 if she is entitled to so terminate it because of the employer's conduct. The Court of Appeal has made clear in Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, [1978] ICR 221 that it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.

90 In order for the employee to be able to claim constructive dismissal, four conditions must be met:

90.1 There must be a breach of contract by the employer.

90.2 That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. A genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

90.3 She must leave in response to the breach and not for some other, unconnected reason.

90.4 She must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

91 The Claimant relies on the breach of the implied term of trust and confidence to base her claim in this regard.

Failure to make reasonable adjustments

92 Section 20(3) of the Equality Act 2010 (EqA) places a duty on an employer:

> *… where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

Direct age discrimination

93 Section 13 EqA defines direct discrimination.

> *'13 (1)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.*
> *(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
> *(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
> *(4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
> *(5)If the protected characteristic is race, less favourable treatment includes segregating B from others.*
> *(6)If the protected characteristic is sex—*
> *(a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
> *(b)in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*
> *(7)Subsection (6)(a) does not apply for the purposes of Part 5 (work)'.*

94 Section 5 EqA defines age as a protected characteristic. The Claimant asserts that she is treated less favourably because she is over 50 years old.

Burden of proof for unlawful discrimination complaints

95 The burden of proof provisions are found at section 136 of the Equality Act 2010. This states

> *136 Burden of proof*
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) 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.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

96 The burden is on the Claimant to prove, on a balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, at paragraph 56. The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination), confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

97 Even if the Tribunal believes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that he treatment was due to the Claimant's age

Conclusions

Time limits

98 The Claimant presented her complaint to the Tribunal on 1 February 2017 but due to issues of fees and administrative difficulties within the Employment Tribunal this was not subsequently acknowledged until 7 February 2018 over a year later. No detail of the date of the ACAS certificate and relevant extension was available for the Tribunal to consider.

99 The ACAS certificate number was recorded as R205789/16/26. Without certification extension the Claimant ought to have presented her complaints by 12 January 2017. However, in the absence of the certificate we accept that the ACAS certificate extended the time limit to the 1 February 2017 or later. The Claimant was being advised by the CAB at the time and we assume that she contacted ACAS within the primary time limit and informed of the time limits by them. We accept that her work at Clever Cloggs from 20 June 2016 up until 13 October 2016 was an act extending over a period given the location she was working in that the people she worked with. However, we conclude that the Claimant's time working at Clever Tots is separate and does not amount to acts extending over a period. Her discrimination claims in respect of work at Clever Tots are therefore out of time. They were different allegations relating to different people. The Tribunal did not consider it just and equitable to extend time given the advice the Claimant had access to at the time and the failure to provide any basis for presenting claims in this regard before she did. In any event, in view of our findings above we would not have concluded that the Claimant had established any of her unlawful discrimination allegations in respect of work at Clever Tots.

Constructive unfair dismissal

100 The Tribunal considered whether the Respondent acted in repudiatory breach of contract.

101 The Claimant did not maintain that the 16 July 2014 incident with Zoe Minihane contributed to her decision to resign. We conclude that this amounted to one of a number of disagreements the Claimant had with others at Clever Tots arising from the Claimant's perception that she was more experienced, competent and qualified than the younger people she worked with. This affected her interaction with them especially when she conveyed that her views were right. The Claimant did not present a grievance in respect of the disagreements for the Respondent to resolve and we do not conclude that there was a breach of the implied term of trust and confidence in this regard.

102 The Claimant has not established that she received unfriendly looks from her colleagues on a variety of dates and on many occasions at Clever Cloggs. We have found that the Claimant was integrated within the Clever Cloggs team. The Claimant did not present a grievance in respect of these allegations for the Respondent to resolve. We accept that Ms Marshal would have professionally addressed such allegations had they been raised. Therefore we do not conclude that there was a breach of the implied term of trust and confidence in this regard.

103 On 20 June 2016 the Claimant was transferred from Clever Tots to Clever Cloggs. This was accepted by the Claimant. The Claimant relayed to Mr McIntrye on 21 June that the transfer to another branch may resolve some of her issues. If the Claimant had stayed at Clever Tots the Respondent would have been required to take formal action to address the Claimant's conduct towards children on 20 June 2020. We therefore do not conclude that the transfer to Clever Cloggs amounted to a breach of the implied term of trust and confidence.

104 We find that there may have two occasions involving Ms Coppin and Ms Taylor relating to private conversations that the Claimant was excluded from. They both may have covered their mouth during such conversations. We find that the members of staff were gossiping amongst themselves and not talking about work matters, these were matters that the Claimant had criticised them from doing instead of working. The Claimant did not present a grievance in respect of these allegations for the Respondent to consider. We accept the Ms Marshal would have professionally addressed such allegations had they been raised. Therefore, we do not conclude that there was a breach of the implied term of trust and confidence in this regard.

105 The Claimant has not established that she was unfairly allocated the cleaning duties amongst its staff resulting in a disproportionate cleaning workload for her. Therefore we do not conclude that there was a breach of the implied term of trust and confidence in this regard.

106 We have not concluded that the Respondent knew, or could reasonably be expected to know that the Claimant was dyslexic. The requirement for the Claimant to work on journals for 11 children instead of 5 children caused additional stress for the her. However, we accept Ms Marshal's evidence that had the Claimant raised this accommodations would have been made for her. The Claimant did not raise this or give Ms Marshal an opportunity to address the Claimant's concerns in this regard. We do not conclude that the was a breach of the implied term of trust and confidence in this regard.

107 The Claimant has not established that Ms Marshal informed staff not tell the Claimant what was being discussed at the meeting on 5 October 2016. Had the Claimant

asked Ms Marshal what was discussed she would have found out. There was therefore no breach of the implied term of trust and confidence in this regard.

108 The Claimant has failed to establish that any of the above matters constitute a breach of the implied term of trust and confidence to amount to a fundamental breach of her contract. Her claim for unfair constructive dismissal therefore fails and is dismissed.

Reasonable adjustment claims

109 The Respondent transferred the Claimant from Clever Tots to Clever Cloggs following her agreement to move as a consequence of the incidents on 20 April 2016 regarding the children. We do not conclude that there was no underlying policy of moving between sites to amount to a Provision Criterion or Practice.

110 If there was a policy then the Claimant's move to work at Clever Cloggs may have placed the Claimant at a substantial disadvantage as this was located up a steep hill from the Train station and she would have difficulty walking up this. However, the Claimant was allowed to park in the Clever Cloggs car park and could use it without restriction. She was not required to walk up the hill if she did not wish to do so.

111 The Claimant's alleged reasonable adjustment of leaving her to work at Clever Tots ignores the fact that she agreed to move as a fresh start away from disapproving parents. This would not have been reasonable in the circumstances.

112 The Respondent operated a Provision Criterion or Practice of holding spoken meetings. The Claimant alleges that she was not able to understand what happened during meetings because she could not hear in them. On the evidence before us we do not conclude that the way these meetings were held placed the Claimant at a substantial disadvantage. The Claimant was required to ensure her hearing aids were on, discussions took place in front of her and there was no complaint from the Claimant or any reason for the Respondent to believe that the Claimant was not aware of what was being discussed. There would therefore not have been a reasonable adjustment to providing the Claimant with a designated person to explain what was happening in meetings.

113 Our conclusions on the Claimant's failure to make reasonable adjustments claims mean that that her claims fail and are dismissed.

Age discrimination

114 The Claimant claims that a younger group of people would treat people over 50 less favourably. The Claimant states that in effect she was not on the same wavelength as those under 50 and was not made to feel welcome by them.

115 The Claimant relies on the following matters:

115.1 Being constantly disrespected and talked down to by her younger colleagues whilst employed by the Respondent. We do not conclude that the Claimant has established this. We accept that there where arguments between the Claimant and other members of staff but do not conclude that such arguments were not age related.

115.2 Her younger colleagues alienating her from conversations (by putting their hands over their mouth). The Claimant alleges that Marinka Coppin was the main person who did this and this was done as well by Scarlett Taylor and Dawn Aukett were also in the room. We accept that there were some conversations between staff that they did not wish the Claimant to be part of and that the Claimant was excluded from. Such conversations were either not work related or of a personal and gossipy nature between other members of staff. We do not conclude that such conversations were related to the Claimant's age, or her deafness for that matter. They depended on the closeness of the working relationships between staff.

115.3 Being assigned cleaning work by her younger colleagues and other work that they did not want to do. The Claimant alleges that this happened on most days especially when she was at the after-school club at Clever Tots. The Claimant's claims in respect of Clever Tots are out of time. In any event we accept that there was a publicised rota that fairly distributed the cleaning duties between staff.

115.4 Whilst, there was no cleaning rota at Clever Cloggs the Claimant was doing a lot of cleaning in the preschool class after 3pm as the usual staff always avoided doing it. We accept that the Claimant may have had a more assiduous and exacting approach to cleaning duties at Clever Cloggs and this created tension. However, there is no basis to conclude that the Claimant's age featured in how much cleaning was done and by whom.

115.5 The Claimant was not invited to Scarlett Taylor's Halloween party held in October 2016.

115.6 The Claimant alleges that Scarlett Taylor had invited everyone to her party apart from the Claimant and this hurt her feelings. Scarlett Taylor did not invite everyone to her party and she hardly knew the Claimant. Party invitation was not due to age but Ms Taylor's friendship group, many of which did not even work for the Respondent.

116 Given our conclusions above, the Claimant has not established that her age played any part in the matters she experienced. If anything, on the evidence we conclude that the Claimant believed that her age should have been a basis for her to be given more respect and acknowledgment regarding her experience of childcare and she was disappointed when this was not forthcoming from her younger colleagues.

Holiday Pay

117 There was no evidence advanced in respect of the Claimant's holiday pay claim and as such she has not established her claim for accrued holiday pay. This claim therefore fails and is dismissed.

Other payments and overtime payments

118 Is the Claimant owed sums in respect of overtime or other days worked?

119 The Claimant was asked to clarify the amounts for evening overtime hours that she was seeking to claim. She referred to an additional 'non payment list' at document 7 bundle B2 setting out her claims for non payment.

120 This specified a number of dates with unspecified hours claimed. However, in respect of evenings the Claimant frankly stated that she was unable specify the additional hours she worked on the evenings to calculate her claims. We conclude that the Claimant was aware of the overtime claim process. Somewhat contradictorily the Claimant stated that she was told that other members of staff would not attend evening meetings as they know that they could not claim for them. Despite this the Claimant still attended. The Respondent stated that staff could claim for compulsory evening meetings and were required to fill out an overtime claim form. The Claimant did not fill out a claim for these hours but she was accustomed to claiming and being paid overtime. Some of the Claimant's payslips were referred to in this regard. Therefore the Claimant was unable to establish her the Claimant's claims for payments for overtime in respect of the evenings claimed, if she was able to establish any entitlement in this regard.

121 The Claimant also clearly stated that there were two separate Saturdays where she had mandatory training on health and safety on 24 October 2015 and 7 November 2015. The Respondent accepts that the Claimant was sent on these courses which was compulsory. The Claimant maintains that she did not get paid for either these days. The Respondent did not provide any evidence that the Claimant was in fact paid for these days however it maintained that the Claimant ought to have put in a claim for overtime on the days and other claims in respect of unpaid hours for evening staff meetings.

122 We conclude that in respect of the full days pay, on Saturdays, the Respondent ought to have paid the Claimant regardless of an overtime claim form. The hours were defined by the date and duration of the course. We conclude that the Claimant has established her contractual claim for payment for attendance on the course on these two Saturdays. The Claimant's claim is in time pursuant to Article 7 and * of the Employment Tribunal (Extension of Jurisdiction) Order 1994.

123 The Claimant is entitled to be paid a total sum of **£80.70** in respect of these days (12 hours x £6.70 (minimum wage)).

124 The Tribunal went onto consider the provisions of section 38 of the Employment Act 2002 which states:

> *Failure to give statement of employment particulars etc.*
>
> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.*
>
> *(2) If in the case of proceedings to which this section applies—*
> *(a)the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and*
> *(b)when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change [F1or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday]),the tribunal must, subject to subsection*

(5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—
(a)the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
(b)when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 or under section 41B or 41C of that Act,the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—
(a)references to the minimum amount are to an amount equal to two weeks' pay, and
(b)references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of an employee shall—
(a)be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and
(b)not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

125 The Claimant was not provided with a statement of particulars of employment. We conclude that 4 weeks pay is appropriate given the number of employees the Respondent employs and duration of the default. The Respondent is therefore ordered to pay the Claimant the sum of **£857.60,** which is 4 weeks pay, pursuant to section 38 of the Employment Act 2002.

126 Therefore the Respondent is ordered to pay the Claimant the total sum of **£938.00** in respect of her successful claims.

Dated: 25 February 2020

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Employment Judge Burgher