



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs M N Ssebeggala  
**Respondent:** Collingham Gardens Nursery  
**Heard at:** East London Hearing Centre (by Cloud Video Platform)  
**On:** 11 March & 14 May 2021  
**Before:** Employment Judge Barrowclough

## Representation

**Claimant:** Ms Samantha Davies (Counsel)  
**Respondent:** Ms Sybille Raphael (member of the Respondent's management committee)

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.*

## RESERVED JUDGMENT

The Claimant's complaints of unfair constructive dismissal, for holiday pay and for unpaid expenses all fail and are themselves dismissed. The Claimant's claim for three days' pay in lieu of notice in the sum of £284.90 succeeds, but that is set off against the sums still owed by the Claimant to the Respondent under the judgment on the employer's counterclaim for £1647.65, leaving an overall balance due and owing to the Respondent of £1,332.75.

## REASONS

1. By her claim, presented to the Tribunal on 24 July 2020, the Claimant Mrs Nisha Ssebeggala raised complaints of unfair constructive dismissal, unlawful discrimination based upon her race and her age, holiday pay, pay in lieu of notice and an unpaid expenses claim against Collingham Gardens Nursery, the Respondent and her former employer. The Respondent, which is a non-profit community nursery, resisted and

disputed all the Claimant's complaints, and brought a counterclaim against the Claimant in respect of overpaid wages. At a preliminary hearing on 16 November 2020, the Claimant's discrimination complaints were dismissed on withdrawal, and judgment was entered on the Respondent's counterclaim in the sum of £1647.65. The Tribunal went on to make case management directions and orders, including for further particulars of the Claimant's holiday pay and unpaid expenses complaints, and identified the issues to be determined at the full merits hearing.

2. I heard this case remotely by Cloud Video Platform over the course of a two day hearing, at the conclusion of which and due to a lack of available time I reserved my judgment. The Claimant was represented by Ms Samantha Davies of counsel and gave evidence in support of her claim. The Respondent was represented by Ms Sybille Raphael, a member of the Respondent's management committee and herself a trainee employment lawyer. She called as witnesses (a) Ms Katherine Browne, the manager of the Respondent nursery school from January 2009 until her retirement at the end of August 2019, and (b) Ms Laura Murdoch, the chair of the Respondent's management committee at the material time. In addition to statements from all three witnesses, I was provided with a substantial trial bundle.

3. The Respondent, Collingham Gardens Nursery, is a charitable co-operative nursery for 24 children. It was rated "excellent" by OFSTED from 2013 until December 2019, when it was downgraded to "good". The nursery is owned by the parents of the children currently attending the school, and is run by an annually elected management committee of parents. The manager (Ms Browne from 2009 to 2019) reports directly to the management committee, who appoint a chair on an annual basis. The Claimant became a full-time permanent member of staff at the school in 2009, and from about April that year she became the Special Educational Needs & Disabilities Co-ordinator ('SENDCo'). She was also until 2016 the full time room leader in the 'Big Room', for children aged 3-5 years (the 'Little Room' being for younger children attending the nursery).

4. The Claimant was supervised by Ms Browne. From 2016 onwards, they discussed the Claimant's future professional plans over the course of several staff supervisory meetings, when she expressed the wish to progress to a more managerial position. Ms Browne was keen to encourage this, as the Respondent valued the Claimant's work and experience, and did not want her to leave the nursery. The Claimant had completed her "Early Years Professional" (EYP) degree whilst at the nursery with time off for study, and had become the most qualified person at the nursery. The management committee and Ms Browne decided to create a new role of curriculum leader to which the Claimant was promoted. This meant that on top of her responsibilities as SENDCo, the Claimant became the lead professional researching new play practices and provision, which she then introduced at the nursery, including training staff on the new curriculum and '*forest school*' (a loose and informal association of schools keen to encourage their children's interest in and experience of nature and the natural world) provision. The Claimant also went on a four day '*leadership*' course provided by the nursery's local authority in 2016, accompanied by the then deputy manager (Joy), and continued to attend SENDCo, EYP and curriculum related courses/meetings regularly, being given time off for these meetings and training days. From 2017 onwards Ms Browne also worked with the Claimant on building her managerial skills and introducing her to the administrative side of the nursery, usually over one half day a week. In the same year, the Claimant and Joy attended the annual conference of early years' providers run by Camden, the local authority, instead of Ms

Browne, since it was thought that would be useful managerial exercise for her; and in the summer of 2018, Joy worked one day a week with the Claimant and her colleague Gemma Springett to review the nursery's 220 policies and procedures and to begin to update them as necessary.

5. It is clear and was not disputed that Ms Browne was a very experienced and competent manager, that the Claimant was an experienced and highly regarded teacher or 'practitioner' at the nursery who was also popular and well-liked, and that they were and remained on good terms: even in January 2020, after the events which the Claimant alleges led to her resignation, the Claimant wrote to Ms Browne telling her that she looked up to, respected and indeed loved her, and that she would always be the Claimant's '*best manager*' (page 303 in the bundle). It is equally clear that Ms Browne and the school took steps, as set out above, to assist the Claimant in her expressed wish to progress her career and to acquire and develop managerial and administrative skills.

6. In the summer of 2018, Ms Browne told the Respondent's management committee that she intended to retire in August 2019. It was also then known that Joy, the deputy manager, would be retiring more or less simultaneously, although in fact she ceased work in October 2018 due to ill health, and the Claimant acted up as deputy manager thereafter: she and Ms Springett (a room leader at the nursery since 2013 who also wished to progress) attended weekly training sessions in administrative and managerial responsibilities arranged by the Respondent. In early 2019, the roles of manager and deputy manager were advertised by the Respondent, both internally and externally. The Claimant applied for the role of manager, and Ms Springett for that of deputy. Whilst it was apparently felt that the Claimant did not interview well, partly at least due to nerves, the Respondent's appointment sub-committee considered that she and Ms Springett would make a good team and were a better fit than the other candidates, and they were offered and accepted the roles for which they had applied.

7. From April until August 2019, the Claimant and Ms Springett were allocated one day per week together to plan for their joint roles. Ms Browne had already advised the management committee that the deputy manager should in future be office based, rather than working from a classroom as had formerly been the case, since that had resulted in all administrative responsibilities falling on the manager. The Respondent's bookkeeper's role was also increased in order to reduce the burdens on the managers, and other steps were taken to prepare the Claimant for the handover of responsibilities when Ms Browne retired and to assist her and Ms Springett, including their attending a three day course run by a local business support provider. Since a long awaited OFSTED inspection would take place during the autumn term, arrangements were made for an appropriate support and advice team from the local authority to provide then with training in February 2019, and a 'mock OFSTED inspection' was scheduled for early September. Finally, Ms Browne made clear that although she was retiring, she would be available to provide advice to, and to answer queries from, the new managers, since she had always made clear to them how demanding the manager's role was.

8. Ms Browne duly retired at the end of August 2019, when the Claimant became manager with Ms Springett as her deputy. Thereafter, Ms Browne's involvement with the nursery was limited. The process of substituting the Claimant for Ms Browne as a signatory on the Respondent's bank account, commenced during that summer, had taken a long time, and was not finalised until mid-October, and Ms Browne went to the

school to participate in that process. In addition, she was able to confirm when asked by the management committee that a report had been prepared some years earlier concerning the possible presence of asbestos in the school buildings. Ms Browne also attended as a helper at the Respondent's 'Gardening Day'. On such occasions, Ms Browne spoke to the Claimant to ask how she was getting on, when the Claimant would respond that she was finding the role to be very hard, although not requesting specific assistance.

9. From September 2019 onwards, the Claimant attended weekly or fortnightly meetings with Ms Murdoch, then chair of the management committee, and Ms Raphael, another committee member, at which progress and potential issues were discussed; and the Claimant also met regularly with the committee treasurer. From an early stage, Ms Springett raised with committee members what she reported as being a lack of supervision and delegation by the Claimant, and there were issues concerning the Claimant's organisation and communication skills. These included problems in the provision of school meals by the regular supplier, a lack of planning for staff meetings, delays in raising and chasing parents' outstanding fees, and infrequent or delayed updating of the photos and observations to the online 'Parentzone' platform. The Claimant also failed to recruit full and part time key workers, as instructed, instead of relying on more expensive agency staff. The Respondent had stressed the importance of the Claimant being present at the commencement of the school day, to meet and greet children and their parents on arrival, particularly given the number of agency staff, but this rarely happened. Finally, the mock OFSTED inspection in September 2019, conducted with the assistance of the local council, concluded that on its current performance the school would be judged as being 'inadequate', a dramatic decline from its previous 'excellent' rating. As a result, a parent on the management committee went through the policies and procedures with the Claimant which had been found to be inadequate, and also sought to address with her the communication and language skills issues which had also been highlighted. Whilst at the actual OFSTED inspection on 25 November an improvement in the policies and procedures had been achieved, the language and communication skills issues remained, and the nursery was downgraded from 'excellent' to 'good'.

10. The Claimant's appointment and performance as manager was specifically subject to a probation review, to be undertaken in December 2019, towards the end of her first term in charge. The Respondent's management committee decided to conduct a 360 review before that, seeking feedback from the Claimant's three most senior members of staff (Gemma Springett, Upaia Teja, and Justyna Stankiewicz), as well as inviting the Claimant to undertake a self-appraisal, which she did not do. The results of the 360 review are at pages 218 to 221 in the bundle, and gave rise to concerns about the Claimant's leadership, decision making and professionalism. In light of those, the Claimant's probation review meeting was postponed from December 4 for one week, to enable the management committee to meet and discuss how best to proceed. At its meeting, the management committee determined that the Claimant's performance had been unsatisfactory, that her probation period should be extended, and that a Performance Improvement Plan ('PIP') be put in place in respect of the main components in the Claimant's job description. Ms Murdoch drafted a summary of the committee's conclusions to be passed on to the Claimant, which is at page 227 in the bundle. Whilst that noted that the Claimant was a 'wonderful practitioner', it set out the Respondent's concerns about her as a manager, and that there were then considered to be two available options: either extending her probationary period as manager until

the end of April 2020 (which was the committee's preferred option) if the Claimant agreed, or alternatively dismissing her there and then.

11. The Claimant's probation review meeting took place on 11 December, when the committee's concerns about her performance and the areas where improvement was required, as set out at page 227, were made clear to the Claimant, who was also provided with a PIP, a copy of which is at pages 233 to 238. It was agreed that the Claimant's probationary period should be extended, and that there would be a further meeting with the Claimant on 17 January 2020, when her progress in relation to her PIP targets would be reviewed.

12. Ms Murdoch had been made aware shortly before the 11 December meeting of a parent's earlier complaint about the poor provision of SENDCo tuition and assistance to their child, which complaint the Claimant had apparently not reported to the management committee nor to herself as chair. That was reinforced later on 11 December when Upaia Teja, the 'Big Room' leader, expressed serious concerns about SENDCo at the nursery, which she summarised later that day in her email at pages 228 to 230. Five days later, Ms Browne sent Ms Murdoch the email at pages 240a to e, in which she reported the concerns of two members of staff about the Claimant's performance and attitude as manager which had been expressed to her following the staff's Christmas meal, to which Ms Browne had been invited, and in particular the apparently toxic atmosphere and general staff unhappiness. Finally, on 19 December Ms Springett wrote to Ms Murdoch (page 243) complaining about the Claimant's management of her as her deputy, and in relation to staff recruitment.

13. On 8 January 2020, Justyna Stankiewicz, the leader of the 'Small Room' at the nursery, resigned. Her resignation letter addressed to the Claimant, in which she said that she was returning home to Poland, is at page 248. However, at her meeting with Ms Murdoch two days later, Ms Stankiewicz apparently said that the Claimant had been rude to and unsupportive of her, that others might well leave the school, and that the Claimant did not communicate matters clearly (pages 249/250).

14. On 9 January, the deputy manager Gemma Springett resigned. She too submitted her resignation letter to the Claimant (page 252). Ms Murdoch and the Claimant met on the following day to discuss the staff resignations, when the Claimant put forward as one possible solution the appointment of a very experienced manager, and indicated that she would not object to stepping down to the deputy manager's role, as the Claimant subsequently confirmed in her ET1 at page 46.

15. The Respondent's management committee met on 16 January, when it reviewed the developments since 11 December 2019, including the PIP completed by the Claimant, albeit with visible assistance from Ms Browne as was clear from the document (pages 255/259). The committee decided that the Claimant's performance was still not at the level required of the manager, that Ms Murdoch and Ms Raphael should see her on the following day, and that unless the Claimant could then convince them that she should remain as manager, that they would suggest that the Claimant step down from that post and take up another role at the nursery, for which she would be invited to suggest ideas or an outline. Finally, the management committee apparently asked Ms Murdoch to contact Ms Browne, who had acted as the nursery's manager for ten years and had over thirty years managerial experience in early years, to seek her advice and to ask whether she would be willing and able to come in and help, as she had offered to do on 8 January (pages 246/7) .

16. The Claimant duly met Ms Murdoch and Ms Raphael as planned on 17 January. Notes of the meeting are at pages 263 to 267 in the bundle, which record inter alia the Claimant being told that the Respondent had come to the conclusion that the nursery required a much more experienced manager and *'needed rescuing'*; that there would be a formal review of the Claimant's probationary period on 21 January; and that that might result in the Claimant's demotion or dismissal. The possibility of the Claimant being dismissed at that meeting was repeated in the formal invitation to that meeting (page 277), sent to her by email on 18 January, when she was told that she could be accompanied, and where it was repeated that the management committee continued to believe that there were significant areas where the Claimant's performance was unsatisfactory. In her text report of the meeting to the management committee at pages 270 to 273, sent shortly after it had concluded, Ms Murdoch said that she believed that the Claimant knew what was coming, and would like it not to be the end of her time at the nursery; that the Claimant had been sad and disappointed and had said that she found *'all the office stuff'* very hard and didn't like it; and that the next step was the formal meeting with the Claimant on the following Tuesday (21 January) *'with the inevitable dismissal in her role as manager'*.

17. Following her meeting with the Claimant on the morning of 17 January, Ms Murdoch telephoned Ms Browne at about 2.30 pm that afternoon, as had been agreed at the management committee meeting the previous day. Ms Murdoch says that she then told Ms Browne in confidence that it was hoped that the Claimant would agree to a change in her role at the forthcoming meeting on 21 January, and asked her how the Respondent might go about finding an experienced manager at short notice, should the need arise; and that she recalls Ms Browne mentioning that the forest school association might be a good place to advertise. Ms Murdoch and Ms Browne both deny that the latter was then asked to advertise for the manager's role, or to post anything on Facebook or elsewhere, particularly since no final resolution had then taken place.

18. Ms Browne's account is that she then, on her own initiative and (as she says) very foolishly, put out a loosely worded *'feeler'*, not identifying the Respondent nursery, on the forest school website to which she belonged. She says that her reason for doing so was because if, as appeared likely, the Claimant was asked to step down from the manager's role, the Respondent would need to appoint a replacement very quickly; and that it was not, as the Claimant alleges, because she had been asked by the Respondent to do so. The relevant entry on the forest school website (repeated on Ms Browne's Facebook page under her maiden name) is at page 276, posted by her at 3.53pm on 17 January, which reads: *'I need to find an experienced nursery manager willing to work in Central London in a fabulous forest school inspired nursery for the under fives. Salary 30 to 35k full time. If you are in this field could you share as recruiting these days is so hard. The nursery is wonderful'*.

19. The Claimant says that on the following day, 18 January (a Saturday) she was alerted to Ms Browne's relevant Facebook page by her friend Shamsia, who sent her a screenshot of it. She did not see the original page or the version on the forest school website, and accepts that the suggestion at paragraph 10 of her witness statement that the text appeared on the Respondent nursery's official Facebook account is incorrect and mistaken. However, it was clear to the Claimant that it was her job and her role that was being canvassed by Ms Browne, and she was very upset. Luckily, she was at home at the time, and her husband and her brother supported and comforted her. On the next day, Sunday 19 January, the Claimant drafted and sent a letter of resignation to Ms Murdoch and Ms Raphael. A copy of that letter is at page 278, and whilst no

transmission details are included, it is accepted that it was sent to them by email that day. The Claimant's evidence to the Tribunal was that her reason for resigning was because the Respondent was advertising her role whilst she was still employed in it, thereby breaching the implied term of trust and confidence. The Claimant's letter in fact provides no reason or explanation for her resignation as manager, simply stating that her last day of employment would be 3 April 2020, that it had been a pleasure working with the Respondent's management committee over the preceding eleven years and that the Claimant was grateful for the opportunities and support provided, and that she would like to help in the transition consequent on her departure.

20. Ms Murdoch was, she says, first made aware of Ms Browne's post on 19 January, when it was brought to her attention by a previous parent; and there is a lengthy exchange of texts between them at pages 280 to 286, in which Ms Murdoch said '*I should clearly have not spoken to (Ms Browne) until after Tuesday.. MC wanted me to get her advice on demotion idea...My fault*'. Ms Murdoch says that she was dismayed on learning of the post, and immediately texted Ms Browne asking her to remove it, which duly happened, Ms Browne repeatedly apologising for what she had done.

21. Ms Murdoch also received and read the Claimant's resignation letter on that Sunday evening, and says that she then hoped that the Claimant had not yet seen or become aware of Ms Browne's post, and that the Claimant was resigning because she did not want to stay at the school following her likely demotion from the manager's role. Accordingly, she replied to the Claimant at 7.20am on 20 January, accepting her resignation as manager, but suggesting that it might be possible, if the Claimant wished, for her to remain at the school in another role, which could be discussed at the scheduled meeting on 21 January (page 279). However, the Claimant responded later that day saying that she wanted a fresh start away from the nursery.

22. Ms Murdoch says that she thinks that it was during the evening of 20 January that she first knew that the Claimant and other members of staff had seen or become aware of Ms Browne's post, and that she and Ms Raphael went to the nursery early on the morning of 21 January and spoke to the Claimant and other staff to tell them that the post had not been placed on their instructions or in accordance with their wishes, and that they were sorry that it had happened.

23. In the circumstances, the Claimant's probation review meeting did not go ahead. On 22 January, the Claimant approached Ms Browne and asked her whether she would be willing to provide her with a reference. Ms Browne agreed, and the reference is at page 317. Ms Browne had by then already apologised to the Claimant (and other staff members) concerning her Facebook post, and the Claimant's gracious response is at page 303. Neither there nor, Ms Browne says, at any other time did the Claimant tell her that she had resigned because of what Ms Browne had done.

24. On 27 January, there was a meeting at the nursery after school had finished when Ms Murdoch and other management committee members met staff, including the Claimant, to decide on the way ahead. At that meeting, the Claimant said that she could and would work out her notice as manager. However, in the light of concerns raised by other staff members about the Claimant's ongoing commitment, the Respondent decided that Ms Springett should assume the role of interim manager, and that the Claimant should step down from her managerial duties and instead concentrate on the SENDCo provision, which required a good deal of work, and on

forest school activities, whilst retaining her existing salary as manager. On 28 January, the Claimant's brother contacted the Respondent to tell them that the Claimant was unwell, suffering from panic attacks and stress. Ms Murdoch wrote to the Claimant on 30 January (page 327) telling her that she should take whatever time she needed to rest and recover, and putting forward a previous chair of the management committee to assist her in any sort of exit interview or review that she might wish. In fact, the Claimant did not return to the school thereafter.

25. From early February until 20 March 2020, when the nursery closed due to the first Covid-19 lockdown, and at the request of the Respondent's management committee, Ms Browne came to the nursery on two days a week to provide support to Ms Springett as acting manager and to help out with kitchen tasks. On 3 March, Ms Murdoch wrote to the Claimant to inform her that she had been placed on gardening leave, which would continue until her employment ended, and that she would be paid in full until the end of her notice period on 3 April 2020, when it is agreed the Claimant's employment terminated.

26. In fact, as Ms Murdoch accepts, the Claimant was not paid for the period from 1 to 3 April, the sum of £284.90 being due for those three days, a fact which Ms Murdoch says was not appreciated by the Respondent until after these proceedings were commenced. However, and as already noted, the Claimant (along with other staff) was mistakenly paid twice in respect of the month of March 2020. Whilst other staff paid back the overpayment, the Claimant has so far only remitted the sum of £440, resulting in the Tribunal judgment in favour of the Respondent, of which a balance of £1,617.65 remains outstanding; and the Respondent seeks to set off the wages owed to the Claimant of £284.90 against that sum.

27. In relation to the Claimant's complaint of unpaid holiday pay, Ms Murdoch's evidence was that at no point during the Claimant's notice period or during the months after her employment terminated did the Claimant suggest that she was owed holiday pay, or that her holiday entitlement had not been met. The complaint was only belatedly raised, and the Claimant had failed to provide details or particulars, despite being ordered to do so at the preliminary hearing in November 2020. In relation to unpaid expenses, I was told at the commencement of the hearing that these amounted to £50, although no details were provided, and despite the Claimant's clear indication in her email to the Respondent on 30 December 2020 that no expenses were being claimed by her (page 90). The Claimant did not give any evidence to the Tribunal in relation to either complaint, neither of which is mentioned in her witness statement, and neither claim was raised or addressed in Ms Davies' closing submissions on the Claimant's behalf.

28. Finally, there is a dispute between the parties about a Spotify account, through which music and videos can be accessed. The details are far from clear, but it seems that in about May 2016 the Claimant set up such an account, paid for by the Respondent, to enable such materials to be available for children at the nursery. At some point during 2019, and because the log on details and password were in the Claimant's name, a second Spotify account was opened by the Respondent. That duplication was discovered in September or October 2019, and the Claimant was instructed to rectify the situation, whereupon she cancelled the account in the Respondent's name, rather than that in her name. That was only appreciated by the Respondent following the termination of the Claimant's employment, and Ms Springett as interim manager then cancelled the Claimant's account, and re-instated the



Respondent's account. However it was not suggested and there was no evidence before the Tribunal that the Spotify music and video supply was not being used for the benefit of children at the school, or that such services were ever unavailable to them or interrupted, albeit that the Claimant might have been able to access them privately as well.

29. As noted, a list of issues to be determined at this full merits hearing was helpfully included in the case management orders made by Employment Judge McLaren at the preliminary hearing on 16 November 2020. Before focusing on them, it may be helpful to set out in general terms the applicable legal principles which govern a complaint of unfair constructive dismissal, which is the Claimant's main claim. The burden of proving such a claim on a balance of probabilities rests on a claimant. The Claimant in this case alleges a breach of the implied term of trust and confidence which, if established, amounts to a fundamental or repudiatory breach of contract, going to the root of the agreement between the parties, and thereby entitling the employee to resign because of that breach and claim unfair constructive dismissal. The implied term provides that neither party in the employment relationship shall without reasonable cause conduct itself in such a manner as is calculated or likely to destroy or seriously damage the relationship of trust and confidence that must exist between employer and employee.

30. The first issue is as follows: did the Respondent tell a former employee (Ms Browne) that the Claimant was to be dismissed before the outcome of the Claimant's probationary review was known by or communicated to her? In my judgment, the simple answer to that question is that it did not, first and foremost because no decision to dismiss the Claimant had been taken by the Respondent at the time of Ms Murdoch's telephone conversation with Ms Browne on the afternoon of 17 January 2020, or indeed thereafter. Whilst the possibility of the Claimant's being dismissed certainly existed, as the Claimant was, perfectly properly, told both at her meeting with Ms Murdoch and Ms Raphael on the morning of 17 January, and in the formal invitation the following day to a probation review meeting on 21 January, I find that no such decision had been taken by the Respondent, and that in fact the Respondent hoped to retain the Claimant at the nursery in some alternative role to that of manager, since on any view she had been such an asset to the school over many years prior to her appointment as manager in August 2019. All the evidence I saw and heard suggests that, whilst it was practically inevitable that the Claimant would be demoted from the manager's role, in which it is clear she had not been successful, at the review meeting scheduled for 21 January, it was hoped by the Respondent that the Claimant would then agree to stay in some other capacity, rather than leave. Accordingly, whether or not the Claimant's employment then terminated was ultimately her decision, rather than the Respondent's. It is clear that Ms Murdoch's first reaction to learning of the Claimant's resignation was to write to her early on the following morning asking her to stay at the school, and to identify a role or function that she would like to undertake. Even if it could perhaps be said that Ms Murdoch was then seeking to repair the damage arising from Ms Browne's post, that would not apply to what was said to the Claimant at the meeting on the morning of 17 January, before Ms Murdoch's conversation with Ms Browne. At the conclusion of that meeting was the following exchange: *'Think of whether you would be willing to stay at Collingham but in a different capacity. When were you happiest?' 'In my former role. I do not like the admin etc'. 'Think about it and come up with a proposal, if that is what you want, we'll consider it. Ball is now in your camp.'* (page 267). And in Ms Murdoch's text report to her colleagues on the management committee, sent shortly afterwards, she said *'I think (the Claimant)'d like it not to be the end for her at Collingham, we said there's definite*

*openness to discuss what a change in role could look like for her eg something that is essentially far more forest school and time with children* (page 269). A little later in that report, and in relation to the forthcoming probation review meeting, Ms Murdoch added *'She also knows it's her time to respond with potential options of what a change in role could be..'* (page 273). I conclude that at no stage did the Respondent decide to dismiss the Claimant, rather than demote her from the role of manager; and accordingly that Ms Murdoch did not tell Ms Browne that the Claimant was going to be dismissed.

31. Did Ms Murdoch instruct Ms Browne to post an advert for the Claimant's role as manager on her Facebook account and/or the forest school website during the phone conversation which it is accepted they had on the afternoon of 17 January 2020, or at any other time? If she did, then it seems plain to me that Ms Browne was acting as an agent for the Respondent in posting that advert. Ultimately, this issue turns and depends on the credibility of Ms Murdoch and Ms Browne as witnesses, since both deny that any such instruction was given or received. Overall, I found both of them to be careful and reliable witnesses, whose accounts were supported by and consistent with the contemporaneous documents. Additionally, the documentation to which I was taken which relates to Ms Browne's post on her Facebook page and the forest school website strongly suggests that those steps were taken by her on her own initiative alone, without the knowledge or approval of Ms Murdoch or any other member of the management committee, and in a misplaced attempt to help the nursery where Ms Browne had worked for so long. There are the immediate, repeated, and fulsome apologies by Ms Browne; and it is relevant that at the time the Claimant accepted that Ms Browne's post had been a mistake on her part (page 303), as the Claimant agreed in her evidence to the Tribunal. Perhaps more significantly, it is clear from Ms Murdoch's reaction when told of the post that that was the first time she was aware of what Ms Browne had done, as can be seen in the text exchange at pages 280 to 286, and in particular her initial response: *'I should clearly have not spoken to (Ms Browne) until after Tuesday.. MC wanted me to get her advice on demotion idea...My fault'*. That contradicts in terms any suggestion that Ms Murdoch and Ms Browne had planned to act in advance of the Claimant's probation review meeting on Tuesday 21 January. Ms Davies on the Claimant's behalf lays great emphasis on the fact that there is no written record of the apparently brief phone conversation that took place between Ms Murdoch and Ms Browne on the evening of 16 January, and invites me to draw adverse inferences from that omission. With respect, I do not agree, since that conversation took place before the critical meeting on the morning of 17 January between the Claimant and Ms Murdoch and Raphael, when the management committee's conclusions were made known to the Claimant, and she was told of the probationary review meeting four days later and of her likely demotion from the role of manager. In my judgment, it is highly unlikely that anything of substance was discussed on 16 January between Ms Murdoch and Ms Browne which would have added anything to their conversation on the afternoon of 17 January. Finally, had Ms Browne in fact been instructed to advertise on the Respondent's behalf for a new manager for the school as a matter of some urgency, then one might well have expected her to do so by identifying the Respondent nursery school, rather than using a shield of anonymity: but that was not the case. In summary, I accept the evidence given by Ms Murdoch and Ms Browne and I find that no such instruction was given.

32. Had Ms Murdoch on behalf of the Respondent told Ms Browne on 16 or 17 January that the Claimant was going to be dismissed and asked her to advertise for a replacement manager, or in the alternative simply asked Ms Browne to advertise for a

new manager, then it seems to me that in either case the Respondent would have breached the implied term of trust and confidence and have acted without reasonable and proper cause, and that such conduct would have amounted to a fundamental breach of contract. That is because, as Ms Murdoch then recognised, the Claimant was still at that time the duly appointed manager of the Respondent's nursery school, and but for her resignation would have remained so until the outcome of her extended probationary review meeting, due to take place on 21 January 2020, was known. Whilst as I have found it was highly likely if not inevitable that at that meeting the Claimant would have been demoted from that role, and either she would have chosen to leave the Respondent or, as the Respondent wished, an alternative and more suitable role at the nursery would have been found which was acceptable both to her and to the Respondent, it would in my view have substantially undermined the Claimant's trust and confidence if the Respondent were taking active steps to find a replacement manager even before any such meeting. Whilst I accept on the clear evidence before the Tribunal that there were significant and justified concerns about the Claimant's inadequate performance as manager of the nursery school, and that it might well have been appropriate for the Respondent to start to consider how best they might be able to obtain an experienced nursery manager at short notice, to advertise the Claimant's post whilst she was still in it and before her review meeting had taken place seems to me to be unacceptable. However, all these observations are ultimately hypothetical, since, for the reasons set out above, I have found that neither limb of the alleged breach has been established or took place.

33. In case I was wrong in coming to that conclusion, I go on to consider whether the Respondent's alleged breach of contract was a or the reason for the Claimant's resignation. I am not persuaded that it was. Whilst I acknowledge that it is not a rule of law that a claimant must specify his or her reason for resigning in order to mount a successful unfair constructive dismissal complaint, it does strike me as being significant that the Claimant in this case gave no reason at all for doing so in her resignation letter, which was sent to the Respondent a day after she became aware of Ms Browne's post; that she agreed at the time that Ms Browne's act had been a 'mistake'; and that the first time it was suggested that Ms Browne had been acting on the instructions of the Respondent was some months later, when the Claimant commenced these proceedings. In addition, it is clear that the Claimant was neither suited to nor enjoyed the role of manager, and that, as she said during the course of her evidence, following her meeting with Ms Murdoch and Ms Raphael on 17 January 2020 she knew that there was a good chance that she would be demoted from the role of manager at her extended probationary review meeting on 21 January. Finally, the Claimant having agreed to work out her notice, it seems to me to be no coincidence that she did not return to work after 27 January, when she had been told that her managerial duties would thereafter be undertaken by Ms Springett, her former deputy, for the remainder of the Claimant's notice period. I find that the reason for the Claimant's resignation was because of her likely demotion from her managerial role on 21 January 2020, rather than because she had been made aware of Ms Browne's post.

34. For the avoidance of doubt, there can be no question that the Claimant affirmed her contract of employment by delay or otherwise following her learning of the Respondent's alleged breach, since she tendered her resignation the next day. However, for the reasons set out above I find that the Claimant's unfair constructive dismissal claim fails and must itself be dismissed.

35. In relation to the Claimant's claims for expenses and for holiday pay due to her, and as already noted, no particulars or details of either complaint were provided by the Claimant, notwithstanding the Tribunal's orders at the preliminary hearing, and the amounts claimed by way of holiday pay varied considerably; no evidence in support of either claim was provided by the Claimant, nor was I taken to any evidence in the bundle to support those complaints; and no submissions were advanced in relation to those claims in Ms Davies' closing remarks. I have little hesitation in dismissing both complaints.

36. The dispute between the parties concerning the various Spotify accounts was not one of the issues listed for determination by the Tribunal, and in my judgment there was insufficient detail or certainty concerning it to enable the Tribunal to make any finding. Neither party has succeeded in establishing any liability on the other's part in respect of it.

37. Finally, it is acknowledged and accepted that the Respondent mistakenly failed to pay the Claimant the notice monies due to her in respect of the three days from 1 to 3 April 2020, amounting to £284.90. The Claimant is entitled to have that sum set off against the outstanding balance owing under the Respondent's counterclaim, which results in the debt due from the Claimant being reduced to a figure of £1,332.75.

**Employment Judge Barrowclough**  
**Date: 21 June 2021**