EMPLOYMENT TRIBUNALS

Claimant:	**Miss Merve Kalgidim**	
Respondent:	**Early Education Alliance Limited**	
Heard at:	**CVP**	**On: 3rd February and 7th April January 2022.**
Before:	**Employment Judge R F Powell**	

Representation:
Claimant: **In person, and Ms McDaid on 7th April 2022**
Respondent: **Ms J Ferguson, of counsel**

JUDGMENT

The judgment of the Employment Tribunal is:

1. **The claim of a failure to provide the written particulars of employment is well founded.**
2. **The claim for breach of contract, by a failure to pay one week's notice pay, is well founded.**
3. **The Respondent made unlawful deductions from the claimant's properly payable wages on the 5th October and 4th November 2020.**
4. **The claimant was unfairly dismissal contrary to section 104 of the Employment Rights Act 1996.**

REASONS

1. The Respondent operates a business trading under the name "The Garden Nursery and Pre School" in Hove East Sussex. Miss Kaldigim commenced working at the nursery in November 2019 and remained working with the Respondent until a disputed date in the autumn of 2020. Arising from her period of work with the respondent Miss Kaldigim asserts four claims:

a. That the respondent failed to provide her with a written statement of her terms and conditions of employment; contrary to sections 1, 2 and 4 of the Employment Rights Act 1996.
b. A claim of unlawful deductions from her properly payable wage for the months of September and October 2020.
c. That the Respondent failed to pay her notice pay.
d. That consequent to her assertion of a statutory right on the 12th and 17th October 2020, she was dismissed principally because of that assertion; contrary to section 104 of the Employment Rights Act 1996.

2. The precise date on which she started to work, her status as an employee or worker and her date of termination are all matters of dispute, as are the terms and conditions under which she worked. It is these issues which I address first as they frame the claims, and the further issues which I have to decide.

3. Before doing so I record that this case was heard over two days between January and April 2022. On the 7th April 2022, after hearing the parties' submissions, I began my deliberations however, before I commenced writing this judgment I was ill with Covid and then absent for another, unrelated, reason both of which have caused the delay in the promulgation of this judgment.

4. To determine this case, I have had the benefit of hearing from four witnesses, all of whom provided written witness statements and were cross examined.

5. I have also considered the majority of the agreed 322 page bundle of documents and two additional documents relating to the provision of local authority funding provided to the respondent.

6. Before addressing each of the four claims, I record the following findings of fact.

7. The claimant is a person who is experienced and qualified in teaching children with particular educational needs. Such needs are often associated with a physical or mental impairment and before me, in oral evidence and documents these particular needs have been referred to as "Additional Needs" or Special Educational Needs (SEN)".

8. The respondent's nursery provided additional needs support for children and employed a to undertake the responsibilities of a designated SEN Co-ordinator ("SENco"); a suitably competent person who supervised the provision of SEN teaching/support to children attending the respondent's nursery.

9. The people who provided the SEN teaching in the Nursey might be referred to as a Nursery Teacher or a Support Worker.

10. One of the children who attended the nursery, to whom I shall refer as "A", was a child with exceptional additional educational needs. She had been attending the nursery prior to the

respondent making an application, dated 5th September 2019[1], to the local authority for funding to pay the wage of a SEN support worker for A, for 51 weeks beginning in the Autumn of 2019.

11. That application to the local authority was made by the Respondent's SENco; Sian Scammell in September 2019. The application was made for the number of hours a week A's parents chose to place her in the respondent's nursery. At the start of the relevant period, A attended the nursery for seven hours a day on Wednesday and Friday of each week.

12. The application anticipated that on each day A was present at the nursery, she would attend for seven hours, during which, six of those hours A would require the assistance of a support worker. Accordingly, the respondent applied for funding to pay for 12 hours a week for 51 weeks.

13. I accept the evidence from the respondent that whether A attended the respondent's nursery was a decision for her parents. Similarly, it was her parent's decision as to which days, and which hours on each day, A attended.

14. I also accept that, by the date of the funding application, Ms Scammell had formed a good relationship with A but she was due to leave on a six month sabbatical in mid-December 2019 and would therefore not be available to provide support to A for a large part of the 51 weeks of funding.

15. After the local authority approved funding in principle, the respondent advertised a vacancy for a support worker for A. It was for that job which the claimant applied and was appointed.

16. In October 2020 the claimant with Ms Scully, the Nursery manager, and was interviewed.

17. The interview was based on the respondent's job discretion for the support worker's role; a copy of which had been sent to the claimant beforehand.

18. The interview concluded with an oral offer of the job; one which the claimant accepted.

19. Her only knowledge of the terms of that offer were those which the respondent had provided; the content of the job description.

20. Between the date on which the claimant accepted the offer of work and the first day on which she attended work the respondent did not provide the claimant with any information suggested that role was otherwise than that set out in the respondent's job description.

The date on which the claimant commenced working with the respondent

21. The claimant's ET 1 asserted that her employment commenced on 1st October 2019. The respondent's ET3 (at paragraph 9) asserted that the claimant commenced work on 6th November 2019.

[1] The tribunal considered this additional document produced in a PDF format and titled" ASF Contract pvi - ".

22. I have considered a series of emails [38-40] which commence on the afternoon of the 4th November 2019 (referring to receipt of satisfactory references and a discussion about the claimant's uniform) which concludes on the 5th November with the claimant stating to the respondent; "Look forward to seeing you tomorrow !". I have noted that there is contemporary documentary evidence which records a date on which the claimant's employment would begin, I note that there is a logical basis for the respondent's assertion that the claimant was expected to start her work with the nursery on the same day as A attended; one of which was Wednesday 6th November. The 6th November was the day to which the claimant referred in her email which I have quoted above. Further these points are consistent with the respondent's witness evidence. The above is further corroborated by an email from the respondent to its staff dated the 1st November 2019 which states; "…Merve will be starting as 1-1 on Wednesday 6th."

23. I have taken into account the rota of working hours [313] which shows the claimant's name for dates in October 2019 but the majority of these also have a question mark against them and there is no evidence of any payment being made for work done in October 2019 and no complaint by the claimant for a failure to pay wages due in that period

24. Having considered all of the above, I prefer the respondent's evidence and find that the claimant's working relationship with the respondent commenced on Wednesday 6th November 2019.

The contractual relationship between the parties

25. There are no unambiguous records of the claimant's terms and conditions of work/employment.

26. The respondent asserts that the claimant was a bank worker and I accept that the respondent employed a number of core staff on full time contracts and also contracted with other people, whom it described as "bank staff", of whom, according to an email of the 28th November 2019 [page 40 of the bundle] there appeared , at that date, to be two.

27. The respondent evidently held pro forma contractual documents and, in this case a copy of one of those contracts has been produced [32-36].

28. That contract refers to; "Employee Name" and "Date of commencement of probation/employment"[32]. It contains a series of clauses which state as follows:

"1. STATUS OF THIS AGREEMENT

This contract governs your engagement from time to time by The Garden Nursery as

a casual worker. This is not an employment contract and does not confer any

employment rights on you (other than those to which workers are entitled). In

particular, it does not create any obligation on the Company to provide work to you.

2. COMPANY'S DISCRETION AS TO WORK OFFERED

It is entirely at the Company's discretion whether to offer you work and it is under

no obligation to provide work to you at any time.

The Company reserves the right to give or not give work to any person at any time

and is under no obligation to give any reasons for such decisions.

3. NO PRESUMPTION OF CONTINUITY

Each offer of work by the Company which you accept shall be treated as an entirely

separate and severable engagement (an assignment). The terms of this contract shall

apply to each assignment but there shall be no relationship between the parties

after the end of one assignment and before the start of any subsequent assignment.

The fact that the Company has offered you work, or offers you work more than once,

shall not confer any legal rights on you and, in particular, should not be regarded as

establishing an entitlement to regular work or conferring continuity of employment."

29. There is a dispute between the parties as to whether the claimant received a copy of this contract, to which I will return.

30. However, I find that the terms set out in the copy of pro forma contract before me reflected the respondent's intention towards its "bank staff".

31. I also find that, as of the 11th October 2019, the respondent made some distinction between bank staff" and a "1:1"support worker" [312]; expressly referring to one new starter as "joining the bank staff team and to the other new starter; the claimant, as a "1-1 Support Worker".

32. The distinction, between the two is some corroboration of the claimant's case; that, on 11th October 2019, the respondent did not consider the claimant to be part of its bank work team.

33. I have also considered the respondent's job description for a 1:1 Support worker [311]:

    a. The role was subject to a six month probationary period.
    b. The role was clearly one which principally provided services to a child, rather than children generally.
    c. There were, in addition to "the child", responsibilities towards "children" at the nursery, including participation in outings with the children of the nursery.
    d. There is an express reference to the 1:1 Support worker being required to undertake the role of a Nursery Practitioner in the absence of "the child" for whom the 1:1 Support Worker was primarily responsible.

34. The main purpose of the role was stated as:

Follow the Code of Conduct at all times.
Take care of and supervise the child with regard to their physical, emotional and intellectual needs ensuring that the environment is stimulating and inviting at all times.
Plan and prepare activities, to meet the child's individual needs, liaise with parents and negotiate working targets ensuring effective communication within the nursery.
Ensure the nursery setting is of a continuous high quality including reflecting and evaluating the playrooms in regards to equipment, resources, equal opportunities and safeguarding.

35. I accept the claimant's evidence that a copy of the job description was emailed to her before her interview and before she agreed to accept the respondent's offer of work.

36. I accept that the claimant's understanding of the nature of the role was derived from the job description and that, during the interview, the claimant was told she would be engaged on fixed hours and for a period of 51 weeks; the duration of the funding.

37. There is no dispute between the parties that a copy of a contract for the claimant was not prepared until sometime in November 2019; after the claimant had started work, more importantly; it was prepared after the claimant and respondent had discussed the terms of her employment and reached an oral agreement.

38. I therefore find that the respondent's job description noted above was the basis of the discussion between the claimant and the respondent at her interview.

39. I also accept that for the claimant, as a single parent, dependant on universal credit and child care provided by her grandmother, any uncertainty as to the hours of work, the regularity of the working pattern and the expected duration of the work would have been unacceptable.

40. I therefore find that the rate of pay, the hours of work and the responsibilities of the claimant's role were clearly defined in the discussion between the respondent and the Claimant prior to the 6th November 2019.

41. The pattern of work agreed was 12 hours every week, worked on Wednesday and Friday for a period of (up to) 51 weeks.

42. However, I also find that both parties understood that the hours worked as a 1:1 support worker for a could vary for a number of reasons; A's health, A's holidays and the decision of A's parents as to the days (and hours) on which they wanted A to attend the nursery.

43. I make one further finding in respect of the claimant's duties. In paragraph 7 of her witness statement, she describes that on one occasion "as a favour to the nursery" she agreed to do overtime.

44. In my judgment the claimant, in accordance with the terms of the 1:1 Support Worker job description, was required to undertake other activities and work as a Nursery Practitioner when it was reasonable to ask her to do so. Her conduct on the occasion was not a favour; it was an instance of her compliance with a term of her job description.

45. I have been provided with a redacted copy of the relevant "ASF" set up form. That documents shows the respondent's receipt of funding of the 1:1 support workers post was dependent upon the appointment of the "1:1" and that the hours funded by the Local authority could not be used

for any activity other than the express purpose of additional support for children with substantial additional needs.

46. Lastly, I note that the local authority ASF document specified the number of hours each week, and the days on which those hours of assistance would be provided to Child A. That specification was replicated in the hours the claimant regularly worked.

47. In light of my finding that the above terms were offered by the respondent and accepted by the claimant, during the claimant's interview. I went on to consider the status of that agreement.

48. I find that the claimant was not offered a "bank worker" contract. I find it beyond credence that the respondent would offer a contract to a person which did not place a contractual obligation to provide continuity of support for a vulnerable and disadvantaged child when the respondent had agreed to provide twice weekly support for a continuous period of 51 weeks and had public funding for that specific task and a specific child.

49. Moreover, I do not accept the respondent's contention that the claimant was perceived as a bank worker; on the contrary; the respondent expected the claimant to attend work for 12 hours a week for the subsequent 51 weeks and her responsibilities during those twelve hours were unambiguously focused on the provision of additional education support for one child. Further still, the respondent's contemporary emails demonstrate that the respondent distinguished the claimant's role from those engaged as a bank worker.

A contract of service or a contract for services

The Legal Matrix

50. McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, stated as follows:

> ''A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …'.'

51. While this may initially sound relatively straightforward, many judgments stress the practical difficulties in applying it:

> ''It is almost impossible to give a precise definition … It is often easy to recognise a contract of [employment] when you see it, but difficult to say wherein the difference lies'
>
> (Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101 at 111, per Denning LJ).

52. The essential question is: was this a contract of employment within the meaning which an ordinary person would give to the words?; Cassidy v Ministry of Health [1951] 2 KB 343 at 352, per Somervell LJ. Fundamentally, there are three questions to be answered (Ready-Mixed Concrete, para [20):

    (1) Did the worker undertake to provide their own work and skill in return for remuneration?

    (2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?

    (3) Were there any other factors inconsistent with the existence of a contract of employment?

53. No single issue or test is necessarily sufficient to determine this issue; it is a multifaceted decision, albeit I have set out my reasoning on the elements separately.

The parties' submissions

54. Ms Ferguson noted the content of the Bank Worker contract expressly stated that there was no mutuality of obligation between the parties, that the contract was expressly not one of employment. Further, the claimant's role was a specialist one and she had a great deal of independence in how she managed her work, performed her work and assessed her work; she was essentially working in a shared environment but quite discretely from the employed nursery practitioners and bank staff.

55. The claimant's case urged me to make the findings of fact which I have, albeit that my approach was rather different to hers.

Findings and conclusion

56. The respondent's argument is in part dependent upon a finding that the claimant's contractual relationship with the respondent was framed by the terms of the bank worker contract. I have made a finding quite contrary to that assertion.

57. I do accept that the claimant had a degree of autonomy in the way in which she achieved the purpose set by the respondent. However, she was subject to the instructions of the Nursery Manager and, if the need arose, the decisions of the respondent's Senco.

58. I also accept that the respondent could require her to attend staff meetings, parents' evenings publicity activities and "outings".

59. The respondent could direct the claimant to undertake "any other" appropriate activities within the nursery and require her, in appropriate circumstances, to fulfil the role of a nursery practitioner.

60. The respondent required the claimant to wear the Nursery's uniform, to learn the basic sign language of Makaton and to prepare regular reports about A's activities, achievements and progress.

61. The only factor which lay contrary to the indication of a contract of employment was the pro forma bank worker contract; which I have found was not provided to the claimant and was not, in any sense, in the minds of the parties when the claimant accepted the offer of employment.

62. By reason of the above I find that the claimant was an employee of the respondent for the purposes of section 230 of the Employment Rights Act 1996.

Sections 1,2 and 4 of the Employment Rights Act 1996

Was the claimant provided with a copy of her contract ?

63. The respondent's case is that two copies of a pro forma "bank worker" contract, each annotated with the claimant's details and signed by the owner of the respondent; Mr Ben Theobald, were provided to the claimant. The claimant denies receipt.

64. To determine this dispute, I took into account the evidence of the claimant, Mr Theobald and Ms L Scully, who was employed as the nursery manager.

65. Mr Theobald's witness evidence stated that he had signed two copies of the pro forma contract for the claimant and he handed them to Ms Scully in November 2019. He could not give evidence on the issue in dispute; whether the copies he had signed were provided to the claimant.

66. Ms Scully, in cross examination accepted that the claimant may have requested her contract on occasion before the date November/December, 2019 when the two copies "would have" been given to the claimant.

67. I will record that I found Ms Scully to be a generally straight forward witness and when pressed, quite rightly, she accepted that she could not specifically remember if the contract had been handed over to the claimant at the same time as two other new members of staff were given theirs.

68. Ms Scully accepted that there was no copy of the contract on the respondent's file. She said that was because both copies would have been given to the claimant; one for her to retain and the other for her to sign and return to the respondent. She said the claimant had not returned the signed contract.

69. The Claimant's case is that she did not receive a contract at all. She relied on documentary evidence; two emails she sent to the respondent which expressly stated that she had not received a contract, the first was dated [132]; 23rd March 2020. On both occasions the respondent did not contradict the claimant's assertion.

70. The claimant's evidence is certain and corroborated by contemporary written complaints.

71. The respondent's evidence is less certain and is undermined by the absence of any contemporary evidence contradicting the claimant's complaints.

72. I therefore prefer the claimant's evidence to that of the respondent and consider that the claimant has proven, on the balance of probabilities, that the respondent did not provide a written statement of any of the particulars of her employment during the course of her twelve months of employment.

73. In light of my conclusion above, I went on to consider section 38 of the Employment Act 2002.

74. It is not disputed that the claimant has, in these proceedings presented a claim of unfair dismissal; a breach of contract and unlawful deductions of wages; relevant claims within Schedule 5 of the Employment Act and section 38.

75. I have upheld the claim for notice pay; a claim which falls within the jurisdictions listed in Schedule 5 of the Employment Act 2002 and I must, subject to subsection (5), increase the award by minimum amount, which is equal to two weeks' pay, or by the higher amount which is equal to four weeks' pay, unless there are exceptional circumstances which would make an award unjust or inequitable.

76. I find that there was no exceptional circumstance present in this case which would make an award unjust or inequitable. The respondent had the opportunity to prepare and deliver a written statement of the claimant's particulars of employment in the weeks before her first day of work, in the five months the claimant worked before the Furlough Scheme was introduced in April 2020 and after the claimant was expected to return to work. It did not do so and I have not accepted the respondent's evidence that a statement of the claimant's terms was provided to her at any point, nor their absence explained.

77. The duration of the respondent's failure, despite the claimant's requests for a written statement and the respondent's failure to provide an explanation for its failure to do so properly place the circumstances of this case in the higher band and the respondent is ordered to pay to the claimant the sum of four weeks wages; to be calculated in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996.

<u>Breach of contract; the failure to pay notice pay.</u>

78. The claimant's contract with the respondent did not define any period of notice. In the absence of an express provision section 86 of the Employment Rights act 1996 states as follows:

    (1)The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—
    (a)is not less than one week's notice if his period of continuous employment is less than two years,

79. The claimant's employment with the respondent exceeded one month on the 7th December 2019 and her dismissal occurred in 2020 I therefore find that the claimant was, at the date of termination, entitled to one week's notice.

80. The respondent's defence does not assert that the claimant received any payment for notice; rather it asserts that she had no entitlement to notice pay. I note that the respondent's records of the calculation of the claimant's final pay [229] do not include a sum for notice.

81. I find that the claimant was entitled to one week's notice pay and that the respondent failed to pay the said sum.

82. The claim for unpaid notice pay is well founded and the respondent is ordered to pay to the claimant damages in the sum of one week's pay.

Unlawful deductions From wages

83. The claimant's case on this issue relates to the non-payment of wages for the month of October 2020. This is referred to in her witness statement at paragraph 42 and encompasses:

    i. An alleged underpayment for the month of September 2020; for which payment was due on the 5th October and;

    ii. An alleged underpayment payment for the month of October 2020.

84. It is agreed, and documented, that the respondent did not pay the claimant at all on the 5th October 2020 pay date [285 & 288]. It is also correct that the claimant did not work during September 2020.

85. It is agreed that the claimant did not accept work in October 2020 because the respondent had altered the number of hours and the number of days on which she was expected to work.

86. The relevant factual background is as follows:

87. In May 2020, due to government amendments to the amount nurseries could claim from the CJR Scheme, the respondent returned four staff to work on a full time basis [162]. Doing so enabled the nursery to access local authority funding which was allocated to the support of specific children; one of whom was A.

88. A returned to the nursery but for financial/ Covid contamination risk reasons she was allocated to an appropriate qualified full time member of staff. Despite promising to inform the claimant of A's return, the respondent, did not do so. And following the claimant's written request for clarity [195], the respondent still did not do so.

89. I am satisfied that between May and early September 2020 the respondent had made a decision that A would remain with the new support worker; a decision which was financially beneficial to the respondent.

90. In September the claimant took a period of annual leave and, due to her child's ill health, her potential date for a return to work was delayed.

91. In late August 2020 Ms Scully informed the claimant that the respondent required the claimant to become the support worker for a different child. That in itself was not a difficultly [211].

92. However, the respondent wanted the claimant to increase her hours to 15 per week and to work on four days a week. For a single parent, reliant on family support for much of her childcare, the cost of travelling four days a week instead of two made the proposed working hour unreasonable; the claimant could not afford the anticipated burden of paying for an additional 50 days of childcare[2] and an addition 50 days of travel costs per year from her monthly wage of around £450.

93. The claimant made this clear to the respondent [209] and there was some subsequent discussion and proposals from the claimant about trying to re-arrange the hours on which child B attended and asking whether the respondent would increase the claimant's pay to mitigate the additional costs she would incur.

94. The above discussions continued throughout the month of September; a period in which the claimant was not on furlough and was willing to work in accordance with the agreed terms of her contract.

95. In the end, the respondent's owner and director, Mr Theobald, decided that the wage was not a matter for negotiation and by 24th September 2020 the claimant was unable to find a way in which she could accept the altered working pattern and be sure that she could financially "keep her head above the water" and declined the work [202].

96. In short, the claimant refused to accept a substantial change to her contractual terms.

97. Thereafter the claimant asked to be returned to furlough.

98. The Respondent did not make any payment to the claimant at all for the month of September 2020.

99. The respondent's contemporary documentary evidence on page [285] shows that an unknown person had struck through the claimant's name for the September 2020 pay records. It is common ground that the claimant was still engaged with the respondent throughout the month of September 2020 and, I find that, when recalled from Furlough the claimant had a contractual entitlement to be paid for the contracted hours of work for which she was available.

100. The respondent's instructions to its payroll company for the following month recorded the following for the claimant for the month of October 2020 [295];

    i. "Back pay" of £145.96 and

[2] I have taken into account that a large percentage of this cost was funded by the government.

ii. "Furlough" pay of £218.93. The sum of £218.93 is a similar amount to that which the respondent had paid the claimant earlier in 2020; [269][3].

101. Neither party examined the witnesses on these figures.

102. These documents include page 294 a pro forma document addressed to "Ben" and asks that the details of wages to be paid on 5th November 2020 are sent to the payroll company five days before the pay date.

103. The form has a section in which the respondent could list any document's it was sending to the payroll company relating to appointments of new staff and those who were leaving

104. On 294 there is a had written list of documents which the respondent attached; one of those documents was; "1 x leaver form"

105. The only "leaver form" before the tribunal, and place in the bundle with the above documents [297] stated the claimant's date of leaving the respondent's employment as the 31st October 2020.

Analysis

106. With respect to the sum titled "back pay", the only logical conclusion I can reach, in the absence of any comment by either party in submissions, is that, if the respondent had allocated the sum of £218.93 as a furlough payment for the month of October then the sum described as "back pay" must have related to an earlier pay period.

107. Given the claimant had received full furlough payments up to 31st August 2020, the sum of £145.96 is more than likely a payment for part of the month of September 2020; a month during which the claimant was on holiday and thereafter available to attend work; if appropriate work was available.

108. On the balance of probabilities, given the claimant does not assert an underpayment in respect of holiday pay, I have concluded that the "back payment" of £145.96 is the gross sum payable to the claimant for the balance of her contracted days of work in September 2020.

109. A separate schedule prepared for the respondent and dated 4th November 2020, recorded the same sums for the claimant as those set out at page [205] but had altered the character of the £218.93 payment from "Furlough" to " Holiday" pay.

110. The documents do not provide any insight as to how a sum referrable to October's Furlough payment became a payment for accrued holiday pay, nor how the respondent's calculations for two different types of payment (one for a percentage of a month's pay, the other for a year's accrued holiday entitlement) came to the same sum.

[3] Allowing for the Government's 10% reduction in state contribution to furlough payments (from the initial 80% of salary) on 1st September (70%) and then 1st October 2020 (60%).

111. Nor did the respondent's evidence explain why the intended October 2020 furlough payment had not been paid; given its instruction to the payroll company post-dated the claimant's refusal to undertake the four day a week role with "B".

112. The respondent's grounds of resistance stated:

> "The Claimant has alleged that she was not paid her furlough for the month of October 2020. However, as confirmed in paragraphs 15 and 26, the Claimant was advised by the Respondent that the hours on offer were no longer available and would be in contact if any more hours would be required. Furthermore, her furlough payments would cease due to the Respondent being able to open its premises. Therefore, the Respondent denies that the Claimant is owed any payments for October 2020."

Discussion and conclusion

113. As I have found, the claimant was an employee who was contracted to undertake a Support Worker role for 12 hours a week but the hours and days on which that work might occur could not be guaranteed by the respondent; such decisions were the sole province of the child's parents.

114. I have also found that the claimant could be asked to act as a Support Worker for any appropriate child and that she could be asked to undertake other activities. However, there was no contractual agreement that the respondent could unilaterally, or unreasonably, alter the claimant's hours or pattern of work.

115. It was also evident that child A's pattern of attendance had changed during the pandemic.

116. In this case the respondent asked the claimant to undertake 15 hours of work a week and to work on four days a week. It is evident that the claimant did not object to working with Child B but she did object to the significant alteration of the pattern of her weekly work.

117. Before I can identify whether an unlawful deduction occurred I must determine the "properly payable" wage as set out in section 13(3) ERA 1996.

September 2020

118. I have found that the claimant was on annual leave for part of the month of September and that she was available and willing to work in accordance with her contractual hours for the balance of the month.

119. I find that the respondent had, by the 5th November 2020, paid the claimant her properly payable wage for September 2020 because the November 5th Payment comprised of "back pay" and accrued holiday pay.

120. Although the correct total was paid by 5th November 2020, there was nevertheless "an occasion", for the purpose of section 13(3) of the Employment Rights Act 1996 on which the properly payable wage was not paid; the due pay date of 5th October2020.

121. Such an underpayment amounts to a "deduction" unless, it falls within the exemption set out in subsection (4):

"Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion".

122. In my judgment the cause of the one month delay was the action of the respondent of "striking through" the claimant as an employee on the instructions the respondent sent to its payroll company. It is, in my judgment very likely that striking through the claimant's name led the Payroll company to issue a P45 for the claimant close to the date on which the respondent paid its staff.

123. Further, given the claimant had removed the majority of her belongings from the respondent's premises in late September 2020, it is more likely than not that the respondent had a belief that the claimant 's conduct demonstrated she was leaving.

124. In my judgment the act of striking through an employee's name; and giving the impression that person was no longer on the payroll is not an error of computation; it is an instruction not to take the employee into account at all.

125. By reason of the above, I find that on the occasion of the 5th October pay date the respondent made an unlawful deduction from the claimant's pay in that it failed to pay the claimant for her period of annual leave and for the balance of the month when she was available and willing to work in accordance with her contractually agreed hours.

126. I note, that it may well be that the respondent's default was remedied by the payments made on the 5th November 2020, but it is evident from the contemporary documents that the claimant may well have incurred consequential losses in relation to debts and bills she was unable to pay until she received the respondent's 5th November 2020 payment.

October 2020

127. Before addressing this issue, I find that, on the 24th September 2020 Mr Theobald informed the claimant that the arrangements for child B would not be varied to reduce the claimant's travel/childcare costs and the respondent would contact her if further work became available,

128. The respondent asserts that the claimant's unwillingness to accept appropriate and available work means that her contractual wage was not payable at all; it was not contractually bound to pay a person who refused to undertake the work offered to her.

129. The claimant asserts that, as the respondent could not offer any work within the terms of her contract then she should have remained on furlough and received a sum in the region of £272.00, per month[4].

130. On a review of the respondent spreadsheet of payments due for the month of October 2020 [296-304] it is evident that 23 of its staff had undertaken work for the respondent in October 2020. Some had been fully employed, whilst a further fourteen received payments of salary and a furlough payment or "Covid SSP"; a reflection the changes made to the "Flexible Furlough" variant of the Covid Job Retention Scheme rules post June 2020.

131. In a business where the number of employed staff were few, it seems certain that bank workers were offered work in October 2020

132. I have found that the claimant was an employee. I have found that in October 2020 the claimant remained available to work in accordance with her contracted hours. I find that there was work being undertaken by bank workers in October 2020. I find that none of the work allocated to bank workers was offered to the claimant.

133. I am satisfied, on the documentary evidence produced by the respondent, that there was work, which the claimant could have undertaken, but was not offered to her and, in any event, the respondent remained contractually bound to pay the claimant in circumstances where her rejection of the work with child B was reasonable.

134. In my judgment, in the above circumstances the properly payable wage for the claimant on the 4th November 2020 was the claimant's contractual wage for 48 hours work in between 1st October and 31st October 2020.

135. The respondent's payment made to the claimant on 4th November did not make any payment in respect of the above contractual entitlement.

136. Accordingly, I find that the respondent made an unlawful deduction from the claimant's wage by failing to pay her for the said hours of work.

Unfair Dismissal

137. Section 104 of the Employment Rights Act 1996 states [emphasis added:

1)An **employee** who is **dismissed shall be regarded** for the purposes of this Part **as unfairly dismissed if the reason** (or, if more than one, the principal reason) **for the dismissal is that the employee**—

(a)brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b)**alleged that the employer had infringed a right of his which is a relevant statutory right.**

(2)It is immaterial for the purposes of subsection (1)—

(a)whether or not the employee has the right, or

[4] As noted in an earlier footnote, by October 2020 the amount may have changed.

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3)**It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.**

(4)The following are relevant statutory rights for the purposes of this section—

(a)any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b)the right conferred by section 86 of this Act

138. In this case I have found that the claimant was, at all material times an employee of the respondent.

139. The respondent admits it dismissed the claimant on the 31st October 2020.

140. There is documentary evidence in the form of an email dated 17th October 2020which states the following [221]:

“I have now received legal advice and have been informed that it is both my statutory and contractual right to continue receiving my wages on the Furlough agreement that I consented to.
Any deductions to which I have not consented are unlawful.
Although you failed to supply me with written particulars of employment, to which I have a statutory entitlement, there is nevertheless a contract based on an established course of dealings.

Namely I worked regular hours between November 2019 and March 2020.
Please pay my owed monthly salary which was due on the 5th of October 2020 and ensure that I continue to be paid my proper monthly salary.”

141. Before me, quite rightly, the respondent has not disputed that the claimant has alleged infringements of sections 1,2 4 and 13 of the Employment Rights Act 1996. It is not disputed that the claimant acted in good faith. It is not disputed that, as of the 17th October the claimant was complaining of past infringements.

142. The issue I have to determine is whether the reason, or the principal reason for the dismissal was the claimant’s relevant allegations.

143. The fundamental test for a 'reason' set out by Cairns LJ in Abernethy v Mott Hay & Anderson [1974] IRLR 213, [1974] ICR 323 as 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'

The Burden of Proof

144. In this case the claimant had less than one year’s service at the effective date of termination accordingly she must produce sufficient evidence to raise the question of whether the selection

may have been for an automatically unfair reason. If I were to reject the respondent's reason for the dismissal then it is open to me to accept the reason put forward by the claimant or decide that a different reason was the true reason for dismissal; Kuzel v Roche Products Ltd [2008] IRLR 530, CA.

The parties' arguments on the evidence

145. The relevant facts have largely been set out elsewhere in this judgment and so I will summarise, rather than repeat the facts.

The date of Termination.

146. In the Claimant's ET1 she stated her effective date of termination was the 30th October 2020 and the respondent's pleaded the 31st October 2020. However, it is clear on the respondent's pleading [29, paragraphs 20 -26] that the 31st October was a date the respondent selected in Mid November 2020; in effect choosing to treat the claimant's refusal to come back to work as evidence that the working relationship had ended and choosing a convenient date; the last payroll date.

147. The claimant's date for her termination is explained in her ET1 [page 8] in the sentence which begins; "finally they sent me my P45 in the post which they wrote false information on about my last day of employment.

148. The P45 to which the claimant refers is within the bundle at page 270 which is dated 2nd October 2020 and states that the claimant left the respondent's employment on the 31st August 2020.

149. Based on paragraph 45 of the claimant's witness statement this appears to have been received before the 17th October 2020. It is a document which I have found was generated by the crossing through of the claimant's name on the respondent's instructions for the September 2020 salary payments.

150. It appears that, with good reason, the claimant thought she had been dismissed around the 17th October and thought the respondent had been intentionally misleading about the date of her leaving (31st August 2020).

151. I accept that the Mr Theobald was unaware of the P45 because I have no evidence to contradict that assertion and his explanation, it evidences a somewhat questionable standard of management. But if Mr Theobald had been intent on misleading the tribunal , he might ell l have adopted the 2nd October 2020 as the date on which the decision to dismiss was made; it more than 10 days before the claimant's first assertion of her statutory right.

152. The claimant commenced Early Conciliation with ACAS on 30th October 2020; the date she asserts her employment terminated but she does not assert that the respondent communicated a decision to dismiss on that date. On her account she received the P45 before the 17th December 2020

153. Both parties placed reliance, in their pleadings and their witness evidence, on their ACAS negotiations and had effectively waived any litigation privilege that may have applied to such discussions.

154. Mr Theobald's evidence then went on to say that the respondent was informed of the ACAS conciliation, made an offer to re-intestate the claimant's furlough pay and back date it to 1st October 2020 which the claimant rejected around the 9th November; stating she would not work with the respondent given the manner in which she had been treated since September 2020. It was on a date shortly thereafter that the respondent decided to terminate the relationship and choose the 31st October as a convenient date.

155. From the above, I have concluded that the respondent is asserting that it decided to dismiss the claimant on or about the 10th November 2020; a date by which it was not only aware of the assertion of statutory rights in correspondence but also aware of the prospect of Employment Tribunal Proceedings.

156. The Parties Submissions

157. The claimant's argument is succinct; it was evident that the respondent was unhappy with her refusal to accept a new and more onerous working pattern; the 2nd October 2020 P45 is proof of that but the respondent didn't actually expressly dismiss; they could just insist she was "zero hours" and keep her on the books with no work. However, when the respondent received her written complaint about underpayment of wages and a failure to provide her with a written statement of her particulars of employment it could not tolerate her as an employee and dismissed her at the end of October 2020.

158. The respondent's case is somewhat different; Mr Theobald believed the claimant was employed on a zero hours contract as bank worker, the claimant had refused a good opportunity to work for child B on a contract that would give her the same income whilst only working 38, rather than 51 weeks of the year. After the claimant declined the job she also retrieved her personal and professional belongings from the Nursery, She took legal advice, made a complaint and went to ACAS, after the respondent made an offer to put her back on Furlough and make a payment for the month of October 2020 the claimant declined and stated she would not work for the respondent again. It was the claimant's clear statement that she would not work for the respondent which led to the decision to terminate her relationship. It was not the assertion of a statutory right at all; the respondent had kept her on after that and tried to remedy its default rather than dismiss her.

Decision

159. I have borne in mind the burden of proof rests upon the claimant on this issue. I have taken into account my findings of fact that the claimant had made statements that fulfil the statutory test for an assertion of a statutory right and the respondent was aware of those assertions; particularly the more forceful email of 17th October 2020, prior to the date of dismissal.

160. My decision has been reached without following each step the guidance to which I have directed myself, rather I have, in the course of weighing up the competing arguments and the

many ambiguities in the evidence, necessarily weighed the competing elements of each parties' case individually and thereafter as a whole. In doing so I have scrutinised whether, in the context of the claimant's case I found the respondent's account credible and reliable.

161. Mr Theobald was the person who made the decision to dismiss the claimant and so it is his evidence that determines my judgment. Mr Theobald was also, in my judgment the person who was responsible for the instructions to the payroll company on issues of appointment or dismissal of staff.

162. I find that Mr Theobald was a person who left most of the management of the respondent's business to the staff working in the nursery. He appeared to have little understanding of the level of work they were undertaking or how to distinguish a "worker" from "an employee". His distance from the business is reflected by his lack of knowledge that the claimant had been issued with a back dated P45.

163. I have no doubt that Mr Theobald was disappointed by the claimant's refusal of the 1-1 support work with child B and that he was aware that the claimant had removed the majority of her belongings (both professional and personal) in late September 2020.

164. She was thereafter treated, as Mr Theobald thought her; as a bank worker a person who was a resource, but not one to whom the respondent owed any pressing duty.

165. Mr Theobald's explanation for the decision to dismiss the claimant and the date of that decision is set out in his witness statement (paragraphs 25 – 28) Which I will summarise thus:

a. In the course of the ACAS discussions Mr Theobald offered to re-instate the furlough payments and redress underpayment of October 2020. The claimant did not dispute that evidence and it was clear that the claimant was by then unwilling to return to work with the respondent.

b. After the claimant had made it clear she would not work with the respondent in the future Mr Theobald decided to terminate the claimant's working relationship with the respondent.

c. It was the claimant's refusal to work with the respondent that led to the decision to dismiss her, not her complaint; she remained on the respondent's books until at least the 9th November when the ACAS conciliation was taking place but the respondent, at that date "considered that her last day to be 31st October 2020".

166. I have not found that account credible for the following reasons:

167. I find Mr Theobald's evidence (that the claimant's refusal to return to work, as stated during conciliation, was the factor that led to the termination of her employment) inconsistent with the leaver form sent to the Payroll company at the end of October 2020; which stated the claimant was leaving on 31st October 2020.

168. That documented, contemporary and unambiguous evidence is, in my judgment far more likely to reflect the true date on which the respondent decided to terminate the claimant's employment and the intended date on which the termination would be effective.

169. I find the evidence that the respondent backdated the date of dismissal to 31st October 2020 after the 9th November ACAS conciliation was unsuccessful inherently unlikely given the contemporaneous documentation to which I have referred. It is more likely a statement of convenience to enable the respondent to associate the reason for dismissal with an event (the claimant's refusal to return to work) which had not occurred when the respondent made its decision in late October 2020.

170. I find that the decision to dismiss the claimant was taken no later than the 31st October 2020 [297]. I find that the respondent's decision was not influenced by the claimant's statement during the subsequent ACAS conciliation.

171. Although I have rejected the respondent's evidence on the date and the rationale for the decision to dismiss, the burden rests upon the claimant to establish her case.

172. The claimant's email of the 17th October 2020 stated:
"

"Dear Ben Theobald,

I have now received legal advice and have been informed that it is both my statutory and contractual right to continue receiving my wages on the Furlough agreement that I consented to.

Any deductions to which I have not consented are unlawful.

Although you failed to supply me with written particulars of employment, to which I have a statutory entitlement, there is nevertheless a contract based on an established course of dealings

.Namely I worked regular hours between November 2019 and March 2020.

Please pay my owed monthly salary which was due on the 5th of October 2020 and ensure that I continue to be paid my proper monthly salary.

Yours Sincerely,

Merve Kalgidim"

173. It is evident that the claimant was well informed, serious in her intent and expected the respondent to pay a monthly salary, or furlough payment, for the foreseeable future.

174. It was also evident that she was not going to accept that she was a "bank worker", on a "zero hours" or allow the respondent to continue side step the provision of written particulars her of employment which would force the respondent to set out her terms in writing; which it had not done despite the claimant's previous requests.

175. It was also evident that the claimant's effort to obtain legal advice was an indication that she was unlikely to forgo that which she believed she was entitled to as a matter of law or contract

and, with each subsequent month which passed, her perception of her amount to which she was entitled would increase.

176. The claimant has no direct evidence that the respondent's reason for her dismissal was her correspondence. She relies on (a) inference and (b) the inherent in plausibility of the respondent's explanation before this tribunal.

Conclusion

177. In my judgment the respondent's reason for dismissing the claimant on the 31st October 2020 could have been for one of two reasons:

   a. The respondent's t doubt that the claimant intending to work for it again because she had removed her most of her belongings from its nursery in late August 2020,.

   b. The claimant's email of the 17th October 2020.

178. The claimant had not attended work in September; she had refused to work the hours associated with support for Child B, she had removed most of her belongings. Despite that ,the respondent was , as of the 12th October 2020 [219] still willing to retain the claimant and to state it would offer her work when it became available.

179. I also record that the respondent's email at page 219 was sent after the claimant had previously complained about the underpayment of her wages by an email dated 7th October 2020. At paragraph 27 of Mr Theobald's statement, he states that despite the claimant's perceived unwillingness to work, the respondent was content to keep her "on their books".

180. It is noticeable from the subsequent emails on the 12th October 2020 [218-216] that the tone of both participant's becomes more combative. The claimant challenges the assertion that she had a "zero hours" contract, refers to previous requests for a contract and asserts she has never been provided with one. In short she is directly challenging the truth of Mr Theobald's assertion that she was on a zero hours contract.

181. The next exchange between the claimant and Mr Theobald is the email of the 17th; as set out above. Mr Theobald does not acknowledge or respond to that email.

182. There is no further correspondence between Mr Theobald and the claimant before the 6th November 2020

183. In the interim, the only action of the claimant in evidence before me is the steps she takes to remove from the respondent's nursery some remaining personal items.

184. In light of the evidence set out above I have reached the following conclusions:

185. With respect to the claimant's removal of her belongings; this was not a factor which led the respondent to terminate its relationship with the claimant; it had not led to such a decision by the respondent between September and 12th October 2020 and no material change occurred

between that date and the 31st October 2020. As the claimant was, from Mr Theobald's perspective "on the books" and "zero hours" she did not represent any cost to the respondent and she had a useful skill set and experience that might be called upon.

186. What then caused the change in the respondent's view of the claimant?

187. In my judgment the claimant's email of the 17th October 2020 set out a series of challenges to the respondent's approach to its contractual relationships with some of its staff, and its poor compliance with the provision of particulars of employment . Perhaps most importantly, the claimant had made it clear that she was not going to accept the respondent's failure to pay her for each month the respondent did not offer her work. Logically, the claimant's assertions of a contractual right to pay would continue, and the notional liability for that pay, would increase with each month she remained "on the books".

188. At this point the potential value of keeping the claimant "on the books" was substantially outweighed by the potential disadvantages of doing so.

189. In my judgment Mr Theobald's reason for dismissing the claimant was the possible risk to the respondent of becoming embroiled in an extended dispute and/or liable for further salary payments if, as the claimant's email of the 17th October 2020 implied, she was likely to assert her contractual rights and her statutory rights.

190. In my judgment Mr Theobald's decision to dismiss the claimant was by reason of her assertion of the statutory rights set out in her 17th October 2020 email .

191. I therefore conclude that the claimant has discharged the burden upon her and proven that the reason for her dismissal fell within the definition of section 104 (1)(b) of the Employment Rights Act 1996 and was thereby an unfair dismissal.

Employment Judge R F Powell
14th June 2022