Case No: 2500016/2021

EMPLOYMENT TRIBUNALS

Claimant: A Lonsdale
Respondent: The Barn Childcare Ltd

Heard at: **Newcastle Upon Tyne** **On: 27 June 2022–1 July 2022 (1 July 2022 via CVP)**

Before: Employment Judge O'Dempsey, Mr Wykes, and Mr Gallager

Representation
Claimant: Mrs Lonsdale (claimant's mother)
Respondent: Mr Muirhead (solicitor)

REASONS

1. Judgment having been given orally and subsequently in writing, and the claimant having requested written reasons for the judgment of the tribunal, the tribunal now provides these reasons.

2. The aim of these reasons is to enable each party to know why they have respectively won or lost on particular issues. The reasons of the tribunal will be published on the employment tribunal decisions website, and the purpose of these reasons is not disproportionately to identify persons who do not need to be identified. For this reason the parties, being fully aware of the identities of those involved, and in particular having regard to the findings made by the majority of the tribunal we have not referred to the identities of the witnesses directly.

3. Thus where a person's job title is all that is relevant to these reasons, that is all that the tribunal will provide in respect of identifying witnesses and evidence.

4. We identify the witnesses from their position on the witness statement bundle index:

5. We heard evidence from
- the claimant (W1) ,
- her mother (W2), who also represented the claimant, and the following respondent witnesses:
- the proprietor and manager of the nursery ("The Manager") (W3);
- the two people who interviewed the claimant for the job with the respondent
o the manager of the Hartburn Nursery (W4), and
o the Manager of the Fairfield Nursery (W6)).
- The Deputy Manager of the Fairfield Nursery (W5) who spoke to the claimant about her green bag.

- one senior practitioner at Hartburn Nursery (W6).

6. Much of the evidence was directed at the question of whether the claimant satisfied section 6 of the Equality Act 2010 and whether the claimant was exhibiting behaviour which would have put the respondent on notice as to her status. We have not rehearsed all the evidence we heard on this point (a) as the question of disability was ultimately conceded by the respondent and (b) because much of it (such as evidence as to how the claimant behaved on an evening out) was ultimately irrelevant to the question of whether the respondent knew or ought reasonably to have known that the claimant was disabled within section 6 (section 15 knowledge defence, and defence to reasonable adjustments claim) or was affected by the provisions criteria or practices outlined below of the respondent.

7. Our reasons follow the outline of the "List of issues" presented to us by the parties. Our findings were unanimous, unless otherwise indicated. We were grateful for the oral submissions from both representatives.

Chronology

8. In broad outline the chronology of this case is that the claimant went on a placement with the respondent whilst a student on the Early Years Workforce (Early Years Educator) course at her college. She had a placement on Thursday and Fridays from 24 November 2016. She had been placed on the diagnostic Pathway for Autistic Spectrum Disorder (ASD) in June of that year. Having completed her course she subsequently, on 5 March 2019, via Facebook messenger communicated with one of the managers who subsequently interviewed, her asking whether there were job opportunities at the respondent. The manager replied saying that the respondent was taking on, and (page 133) that the respondent was looking for someone in the after school room 3-6 pm Monday to Friday but then extra hours would be available as and when needed.

9. The interview took place on 15 March 2019. The claimant says that she suffered bullying after starting at the respondent but there is no claim for harassment under the Equality Act 2010, so that material is not relevant for the purposes of these proceedings.

10. The claimant became anxious and depressed to the extent that she started a period of sick leave from 4 October 2019. She sent her fit notes to the respondent. On 18 November 2019 the claimant's mother phoned the respondent and was told that the claimant was due back to work because a sick note was about to expire.

11. On 18 November 2019 the respondent made contact with the claimant inviting her for a welfare meeting to be held on 22 November 2019. The claimant asked on 21 November 2019 for the meeting to be rescheduled and repeated that request on 22 November 2019. She received no reply. She made further attempts at contact on 26 November 2019, and on 5 December 2019 emailed the Manager to say that her fit note had been posted for the period 2 December 2019 to 2 January 2020. She said that the meeting needed to be rearranged and asked if it could be at her home with her mother present.

12. On 4 January 2020 the claimant emailed the Manager again advising that her further fit note through to 30 January 2020 had been posted.

13. There was a dispute as to whether the claimant's mother held a conversation with a member of the respondent's staff on 31 January 2020. We find that she did

have that conversation, which lasted around 6 minutes and consisted of the claimant's mother asking whether someone could contact the claimant. There was no response to the claimant following that.

14. On 19 October 2020 the respondent responded to an email from the claimant dated 15 October 2020 chasing up what was happening after an email on 9 October 2020 asking about the process of starting a new job having found alternative employment. In the email of 19 October 2020 the claimant was told that her contract for what was described as "bank work" was terminated at the end of January. The respondent said that several attempts had been made to contact the claimant after the last of her sicknotes had run out. We found that in reality the claimant had continued to send sick notes to the respondent. We also found that the respondent did not make any efforts to contact the claimant over the period from the end of January to October 2020.

Law on issues remaining in dispute

15. The tribunal applied the following provisions of the Equality Act 2010, sections 15, 20 & 21, 123 which can be found at https://www.legislation.gov.uk/ukpga/2010/15/contents. We applied the provisions of Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which can be found at https://www.legislation.gov.uk/uksi/1994/1623/contents/made.

Disability conceded by the respondent

16. At the material times, the Claimant had a physical or mental impairment which had a substantial and long term and adverse effect on the Claimant's ability to carry out normal day to day abilities. The respondent in closing submissions conceded that the claimant satisfied the requirements of section 6 of the Equality Act 2010 in respect of Autism, Depression and Anxiety. No distinction was drawn by the respondent between the treatment of the claimant on the ground of one of these impairments as opposed to any other conditions (or impairments) she has.

Knowledge of disability

17. A question arose as to whether the terms of section 15(2) Equality Act 2010 were satisfied in respect of the respondent's knowledge of the claimant's disability. The question for us was whether the respondent knew or ought reasonably to have known that the claimant was disabled. It is convenient, in dealing with this issue to deal with our primary findings of fact.

18. The claimant experienced a seizure on first day of her student placement in November 2016. The respondent is a children's nursery business employing approximately 55 staff. It is informed by the Scandinavian ethos of forest schooling educational philosophy. This is a child centred and child initiated method of learning. The Manager of the respondent heard about the seizure and went to talk to her about it. There was a risk assessment conducted.

19. The claimant had started on the Pathway to diagnosis of Autism in June 2016. We find that it is highly unlikely, given that the claimant's college probably implemented the ASD Framework referred to on page 111 of the bundle, that the college did not inform the respondent about the claimant's autism. The respondent did not challenge para 7 of the claimant's witness statement in which she said she was given help to complete tasks whilst on placement when struggling to prepare for observations from the college tutor as she felt uncomfortable being watched.

20. We have not seen the risk assessment but it is highly unlikely that the respondent would have been left in the dark about the risks arising from at least epilepsy. The claimant was given support for more than simply for epilepsy which was the condition which was notified at the time of the placement. However we are willing to accept that this notification of risks at that time indicates that she was not showing signs which would be unusual for a placement holder. Many a student would have wanted help when struggling to prepare for observations by their college tutor. To that extent we accept that the respondent was not put on notice by that behaviour.

The interview for the claimant's job with the respondent: 15 March 2019.

21. Having successfully completed her placement with the respondent the claimant attended interview for a substantive post once she had completed her training. She was of course a newly qualified practitioner.

22. We note that on the health questionnaire form, epilepsy is referred to.

23. The claimant's evidence was that she had mentioned the diagnosis of PDD NOS (Autism) at her interview with two of the nursery's staff (W4 and W6) from whom we also heard evidence. We find that the claimant did not mention expressly her diagnosis.

24. The medical questionnaire which she filled in on 18th March after the interview does not mention it, but we accept that this was because the claimant did not believe that her impairments had an impact on her ability to care for the children at the nursery. She did not view her impairments as mental illnesses and so did not tick that box on the form. We accept that she believed that those interviewing her knew of her Autism and that the respondent already knew about her condition because she had told them about being on the Pathway when she was in the placement with them. We accept that she did do this whilst on placement. This was sufficient to put an organisation of this size on notice of the disability in the sense that it should have lead to further inquiries being made (which in turn would have given actual knowledge of the impairments).

25. We find that the claimant made the respondent expressly aware of her autism either around the interview or shortly thereafter. She started in what we have found (see below) to be employment with the respondent on 23 April 2019 (being employed until as we also find 19 October 2020).

26. The reason we make this finding turns largely on what the respondent stated in its letter of 22 February 2021 (p213-217 of the bundle). The respondent wrote in reply to the claimant's complaint about her treatment (later in this process):

> "When you commenced your engagement with the company it is accepted you declared in your health screening questionnaire dated 18.04.19 that you suffered with epilepsy having previously had a seizure as a student but which you stated was now under control with the DVLA permitting you to drive. You also confirmed that you used an inhaler but did not consider either health problem amounted to a disability.
> You subsequently, made the company aware that you had also been diagnosed with autism spectrum disorder (ASD) and that you suffered from an airbourne fish allergy. As you are aware the company put a number of support measures in place including the removal of fish from our menu on any day that

you were allocated working hours. We also assigned mentors to you and took care to ensure they had completed training in mental health and/ or (ASD)."

27. The Manager sought, in her oral evidence, to explain these paragraphs by saying that they related to measures that were put in place because of an incident with a parent which had nothing to do with ASD or disability. However we reject that explanation as unlikely in the light of the words used in the letter of 22 February 2021, which refer to putting in place mentors having training in ASD, and the fact that this could not refer to the knowledge which The Manager accepts she had in October 2020 after the claimant had started sickness absence. The claimant did not refer, after she had gone sick, to her Autism until her request for reasonable adjustments, so logically the letter must be referring to a time before the claimant went sick. The respondent was saying that it had assigned mentors (sic) to the claimant.

28. The most likely explanation is that at some point after engagement the claimant made known her ASD and some of its effects and the respondent responded by putting ASD related adjustments in place. Thus the respondent had actual knowledge of both impairment and that it had more than minor or trivial effects on the claimant's ability to carry out normal day to day activities.

29. The Manager in fact said that she had put herself forward as mentor and could not have done that after the claimant went sick. We consider that the fact of and extent of the claimant's Autism did not come as a surprise to The Manager in October when a member of staff reported to her that the claimant had a green bag in which she said that she had medication (and made a reference to some of it being in respect of autism).

30. Even if The Manager did not have actual knowledge shortly after the claimant commenced employment, the events of September 2019 lead us to find that from at least the point at which she became aware of the Autism and its effects. The Manager had actual knowledge of the claimant's disability (and if not actual knowledge she was put on notice and ought to have known that the claimant was disabled).

31. We consider that the member of staff (W5) who reported it to the Manager, did see the green bag in the claimant's locker and received the explanation from the claimant that it was medication for epilepsy and Autism. She reported this to the Manager. Although there was a delay in reporting to The Manager until October 2019, from October 2019 the latter had actual knowledge that the claimant has Autism. For the purposes of the claimant's claims that knowledge is sufficient knowledge, but we also find that the Manager had knowledge of sufficient circumstances to put her on notice of the more than minor or trivial effects of that impairment at least from the time when the claimant wrote to her asking for adjustments.

32. In October 2019 the claimant put in a sick note for anxiety and depression. These the respondent conceded gave rise to section 6 disabilities. The first contact with the claimant is 18 November p167, and it is noted that this was the cause. The Manager also knew of the claimant's Autism at this stage. She however made no mention of Autism at this point.

33. So, as to whether the respondent ought reasonably to have known that the claimant was disabled and from when we concluded that there were a number of alternative points (each of which were sufficient):

a. The events during the student placement; (see p34) sufficient information is likely to have been given by the claimant during the placement to raise the question of whether she had Autism and how it affected her both during that placement (a period when the claimant was not employed by the respondent) and when she returned for the period we have found constituted employment. As a result of these matters the respondent was on sufficient notice to be fixed with knowledge for the purposes of section 15. Shortly after starting in employment the respondent put measures in place such as mentors trained in Autism for the claimant.
b. As a result of the events of September 2019: even if we were wrong in our findings concerning actual knowledge, we consider that the respondent was fixed with constructive knowledge, and ought reasonably to have known that the claimant was disabled either from the date of the decision to provide mentors (as the respondent was on notice to make inquiries with the claimant as to how Austism affected her) or from the date on which W5 had knowledge of the reference to Autism. The respondent as an organisation was put on inquiry at the point W5 was made aware of the condition (in September).
c. By the time The Manager was notified of this in October, the respondent in any event was put on inquiry as to how Autism affected the claimant. We note that there is no evidence of any attempt to find out from the claimant how autism affected her. We think that an employer who is put on inquiry in October would seek to find out more about the effects of autism by writing explicitly about it to the claimant and would not simply after a long gap, suggest a welfare meeting. In any event having been put on inquiry the respondent is fixed with knowledge because it ought reasonably to have made those inquiries.

Notification of depression and anxiety.

34. The events of October 2019 indicate that when the claimant notified of her sickness absence the respondent gained actual knowledge of the impairments, and is fixed with that knowledge. Furthermore it was clear that the conditions were impacting on the claimant's ability to carry out any work activities and that should have put the respondent on notice that the effects on normal day to day activities were being effected in a more than minor or trivial way. Even if the test of knowledge requires actual or constructive knowledge of this aspect of disability, we concluded that the respondent had such knowledge constructively because it should have made further inquiries of the claimant.

Disability Discrimination (section 15 of EQA 2010)

35. We found that the Claimant's dismissal was unfavourable treatment because of something arising from the Claimant's disability. The "something arising from", was the Claimant's sickness absence. The Respondent conceded that dismissal (if there was one) was unfavourable treatment arising from something arising from disability (absence).

36. We found that that there was a dismissal (see below). The only remaining question for determination in the light of the respondent's concession was whether the dismissal could be justified as a proportionate means of achieving a legitimate aim. It is for the respondent to prove each element of this justification defence.

37. The respondent led no evidence on either the legitimate aim being pursued or why the unfavourable treatment of dismissal was a proportionate means of

achieving a legitimate aim. Nonetheless in closing submissions the respondent submitted that the aim was the smooth running of the business and that dismissal was proportionate to that aim. We rejected the argument that it was a proportionate means of achieving any legitimate aim actually held by the respondent.

38. In January 2020 it was not proportionate to dismiss the claimant without making efforts to identify any impact on the business. The respondent appears to have introduced the idea of "bank" work (without any clear understanding of what that actually meant), solely in relation to the claimant's contract. What it appears to us to have meant is that the claimant could be called on to do different hours at different places as needed. There was no explanation of what "bank" meant at the interview or after, and it was plain to us that none of the respondent's witnesses understood what it means in reality. However, there is no limited pool of bank labour. There was no evidence before us that allowing the claimant to remain on the books (which is in fact what happened) caused any problem at all for the business. There was no evidence before us that any hiring exercise was necessary (or undertaken) in the light of the claimant coming off the books in the sense of being dismissed or having her "bank" contract terminated. Indeed if the respondent had truly believed that she was simply a bank worker, it would not have needed to write the letter it wrote in January 2020 at all. We were provided with no evidence as to what the aim was in October when the claimant was sent a letter purporting to have been sent to her in January. However such conduct was neither appropriate nor reasonably necessary to achieve any aim which an employer might seek to invoke.

39. The Respondent's lack of engagement with the Claimant in the period 21/11/19 to 19/10/20 was unfavourable treatment because of something arising from the Claimant's disability, the something arising from, being the Claimant's sickness absence.

40. We found that the respondent did not try to remain in contact with the claimant from the point she went sick in any meaningful way so as to constitute engagement with her. On 18 November 2019 (p167) the respondent sent a letter about the claimant's absence. This stated that the respondent was writing to see whether there is anything that the company could do to facilitate the claimant's return to work. It sought permission to contact the claimant's doctor directly. This referred to the possibility of terminating what was described as the claimant's employment.

41. On 5 December 2019 the claimant wrote to the Manager stating that she was aware that she still needed to have her meeting and asking for it to be held at home and with her mother with her. She said this "As stated previously, with being autistic I don't always manage to take in all of the information given to me so I need somebody there who will retain the details of the meeting and go over it with me later on."

42. There was no response to this letter and this was a request for a reasonable adjustment to have been made. Furthermore even if the respondent did not have actual or constructive knowledge of the claimant's disability after this date the respondent was fully aware that the claimant asserted that she has this impairment and of its effects. It accompanied the request for a reasonable adjustment.

43. On 16 December the respondent sent the claimant a letter inviting the claimant to a welfare meeting. It did not mention anything about the medical consent

previously requested. It did not note any failure on the part of the claimant to return that consent. It proposed a meeting at the respondent's office.

44. It was in response to this letter that, on 4 January 2020, p 181, the claimant emailed the Manager stating: "I'm sending you another message to inform you that I've posted your sick note, I've also enclosed the medical consent form as I wasn't sure if you still wanted that". There was a dispute as to whether this email was received. It was sent to the correct address, and this was conceded by the respondent. However the Manager claimed that it was never received; during the course of the hearing she indicated that she had asked the respondent's IT advisers to try to trace this email, and they had been unable to do so. No statement was produced from these advisers, and we consider that on an important point like this, the respondent ought to have produced some direct evidence to support the unlikely claim that an email sent to the correct address was never received. If it had not been received there would have been a "bounce back" email to the claimant. There was, we accept, no such bounce back. On that basis we find that the email was received by the Manager. She did not respond to it.

45. On 24 January 2020 the respondent stated that it had sent a letter terminating the claimant's contract. The claimant said that she never received it until much later (see below). We noted that the respondent does not appear to have a practice of solely posting letters. This is demonstrated by the fact that all the other letters sent to the claimant in November and December were emailed as well as posted. We do not understand why, if the letter of 24 January 2020 was sent at the time it is claimed, it was not also sent by email. We find that it is unlikely that it was sent at all at that time.

46. We accept the claimant's evidence that she was sending in her sick notes during this .time and that she sent in the medical consent which she was asked to send.

47. On 31 January 2020 the claimant's mother, who also gave evidence before us, made a call to the respondent concerning the claimant's sickness absence. The respondent did not respond to this. We find that this was a substantial phone call of several minutes and we accept the claimant's mother's account as to its contents. She was not told that the claimant had been dismissed (or anything similar).

48. The only engagement which the respondent appears to have had with the claimant from January to October 2020 was issuing a P60. This is only consistent with continued employment. The Manager sought to say that this was the result of an error by the accountant, but again there is no direct evidence from the accountant or any documentary evidence showing that there was any such error. The P45 appears only to be issued in November 2020. There is no satisfactory explanation for this. The most likely explanation, given that we do not accept that the letter of dismissal was sent, is that the employment continued as the claimant remained on the files of the respondent.

49. The Manager gave evidence that there was a transfer of accountants by way of explanation of the issuing of the P60. If there was such a transfer of accountant then it is most likely that the files that the respondent had with the first accountant would be sent to the second. Therefore it appears that the files contained the claimant's parents' address and the most likely explanation is that the respondent had corrected its file after 31 December 2019 to reflect the claimant's changed

circumstances: she had moved out of her parents' home and moved in with a partner. Subsequently during her period of sickness and because she did not have any income that relationship came under pressure and ended, so she moved back to her parents' accommodation. We also accept the point made by the claimant in her claim form that the respondent did not try to email to her email address or phone her. Both of those contact points of course remained the same throughout.

50. The respondent also produced no evidence to show any note or internal form relating to the dismissal informing the payroll or tax accountant of that fact. There was no evidence of any communication of a standard process of notifying the accountant of the need to issue a P45. If the respondent had made the decision to terminate in January 2020 we concluded that there would most likely have been a paper trail for the P45 to be issued. It is highly unusual for this not to happen and it is something that needs explanation by the respondent. The tribunal was not given any satisfactory explanation save for a general assertion of error by the accountants.

51. We find that sick notes were received by the respondent for the period of absence and that the respondent was receiving the sick notes for the whole period. The notes we have are genuine.

52. We reject the suggestion that the claimant may have been sending sick notes to the UC at DWP. P 184 shows that from 27/02/2020, there was no need to do so. The claimant was nonetheless sending sick notes and we accept her evidence that these were being sent to the respondent. There was no reason to suppose that they were not being received in due course. We concluded that there must therefore have been a decision, whenever a sick note was received, to ignore it. The respondent did not argue that there was any policy to this effect.

53. So we found that in a series of deliberate decisions the respondent did not engage with the claimant to October 2020.

54. We asked ourselves whether, if the unfavourable treatment (lack of engagement), the Respondent could show that the treatment was a proportionate means of achieving a legitimate aim. We rejected the suggestion that the respondent believed it had dismissed her because we do not accept that the respondent ever sent the letter of 24 January 2020.

55. We return to these issues when considering the application of time limits.

56. The tribunal found that the claimant's claim for failure to make the reasonable adjustments she says were not made was presented outside the time limit and therefore because it was not just and equitable to hear the complaint outside that time limit, we have no jurisdiction to hear it.

57. We also, however, considered the merits of that claim. First the respondent accepted that it applied a provision criterion or practice of requiring employees on sickness absence to attend a welfare meeting at its premises. It also accepted that this provision criterion or practice placed disabled people in general and the claimant in particular at a more than minor or trivial disadvantage compared to staff without disabilities.

58. We considered whether the respondent complied with its obligations to take such steps as it was reasonable in all the circumstances of the case to take in

order to avoid that disadvantage. We find that it did not take steps which were reasonable in the circumstances. It ignored the request. The meeting was put back to January and there was no attempt to address the adjustment sought.

59. The Respondent applied also a provision, criteria or practice of requiring employees absent on sick leave to attend a welfare meeting, without allowing a person of their choice to accompany them. We found that the provision criterion or practice placed disabled employees and the claimant in particular at a more than minor or trivial disadvantage because, as a result of the Claimant's ASD, she finds it difficult to process & retain information. Her request for her mother to be present was aimed at ensuring they could discuss the information at a later point. Not only would the claimant have been assisted in respect of her ASD, she would have also benefited from her mother's presence because depression and or the medication she was taking for it was at that time causing her to have problems with her concentration.

60. We found that the respondent did not take such steps as it would have been reasonable to take in order to avoid these disadvantages. The respondent ignored the requests.

61. We rejected the claim, which was not pursued by the claimant by provision of any evidence, that the respondent applied a provision, criteria or practice of requiring employees on sick leave to telephone the respondent on a daily basis for the first week of absence and weekly thereafter.

62. The failure to make reasonable adjustments occurred shortly after the request was made, and at latest by 6 December 2019. It is from that point, which is the act of discrimination about which complaint is made for the purposes of section 123 of the Equality Act 2010, that calculation of the time limit flows. As is noted below, there was a substantial time lag before presentation of the claim form.

Wrongful Dismissal

63. The tribunal had to consider whether the claimant was an employee and therefore whether it had jurisdiction for the purposes of the claim for wrongful dismissal. Although this is only a small amount of money, it took up a considerable portion of the hearing.

64. We asked ourselves whether the Claimant was an employee for the purposes of the extension of jurisdiction regulations. We concluded that she was. That conclusion was a unanimous one but the route by which the members of the tribunal reached that conclusion differs slightly.

65. These reasons set out the majority reasoning first. The documentation relating to the interview which was only produced midway through the hearing by the respondent, appeared in the view of the majority to have been modified after the event.

66. The tribunal as a whole accepted the claimant's evidence that she had originally been told that there was employment with set hours (3-6), and it is that for which she applied. It was not communicated by the series of messenger messages that appear in the bundle that this would be casual or bank work.

67. The respondent's witnesses sought to explain that the job for which the claimant was going to be applying for was somehow filled within the few days from the exchange to the interview.

68. The claimant's evidence was that she went into the interview for a 3-6 role, but with the flexibility to pick up extra hours.

69. Neither interviewer admitted to putting the title of the job on the application form and the majority concluded that this was done after (although they do not reach a conclusion how long after) the interview. The majority also found the explanation that a wrong template had been used for this interview, was not plausible. The majority concluded that the interviewers did not speak to the claimant about the bank job and concluded that the questions posed to the claimant in interview gave the claimant the impression that she would be working on a zero hours contract. They had no definite plan for bank work.

70. A number of aspects of the interview template document produced to the tribunal caused the majority concern. They concluded that the arrows which appear on the pages dealing with "bank" work were added later. There were other pages where there were multiple answers but on which arrows were not used (for example the second box on the same page). The majority concluded that the arrows were added in an attempt to bolster the respondent's case that the claimant merely had bank worker status and that they were inserted for this purpose, as had the whole of the last question on this topic. The claimant and the interviewers did not talk about "bank" work. The claimant was willing to be flexible over her hours. That is what was originally recorded but someone after the event inserted the whole of the last question post interview.

71. The majority is confirmed in its view by the fact that this was a highly relevant document to the respondent's own case on employment status which had always been in issue. It was easily accessible. It was not disclosed in the ordinary course of disclosure and no good explanation was provided for its late production. The majority therefore concluded that this document was not a genuine document but had been altered subsequently.

72. The minority on this question, and on balance, considers it to be unlikely to have been fabricated and that there was talk of "bank" work at the interview. However the minority does not accept that anyone understood what "bank" work meant at that interview (this was confirmed by the interviewers who both gave evidence and who confirmed this when questioned about it). The minority finds that such talk as there was (which might have included the term "bank" work) explained it only in terms of flexibility on hours. So the minority found that what was said in terms of an explanation of what "bank" working was amounted to an explanation simply that the claimant would be on a zero hours contract, and it was never explained (because the interviewers did not know) what the distinction was between a zero hours contract and a bank contract.

73. The end result is the same whether the majority approach or minority approach is adopted: at the time of the interview, no offer of casual bank work was being made to the claimant. We unanimously concluded also that when we look at the indicators of employment status they very largely point to employment status in the way in which the contract was actually operated.

74. This reflects the fact, we find, up to the date of the interview there was no evidence of any contemplation of bank workers being used by the respondent.

75. We find that most likely there was reference to hours not being guaranteed and there was discussion of zero hours and either (minority) the explanation of "bank" was simply in terms of zero hours or (majority view) that there was no mention of "bank" at all.

76. We accept that The Manager may have been contemplating introducing bank staff at this time or around this time and may have discussed this with her insurers. We were puzzled by the absence of any documentation surrounding the use of bank staff in general either at that time or after the claimant was appointed. We consider that it would be unlikely that the claimant was the only person to have been put onto a bank contract. However this appears to be the height of the evidence on this point.

77. In the bundle (page 142) is a document called "bank worker contract". It is not signed by the claimant and she denied ever receiving it. The tribunal accepts her evidence on this point.

78. The Manager and the staff who interviewed the claimant pointed to the fact that a box was ticked on the recruitment checklist. This stated "contract issued" (p136). The manager was not able to give an answer as to why there was no check when the contract is not signed or returned. This is an employer of 55 people with, we understand a relatively high turn over of staff. It would have been the first time the respondent issued a contract of that nature. If the document was issued at all, it would have been followed up. We conclude that the bank worker contract was never issued by the respondent.

79. We also note that there is no evidence of the Respondent ever using a bank worker after this even during the period from October when it was clear that the claimant was unlikely (for a reasonable period of time) to be able to work. If the respondent had been using bank workers their obvious solution (regardless of continued service by the claimant) would have been to employ another bank worker. There is no evidence that this was attempted.

80. Even if a contract stating that the claimant was a bank worker had been issued, we concluded that the other factors which we must consider in relation to employment status suggested an employment relationship rather than anything else.

81. The substance of the relationship appears to have been one of employment rather than bank or casual work. The claimant never declined any of the 3-6 hours. When the claimant was sick the respondent said that they would have to provide cover. The claimant had been given the impression that her core hours would be 3-6. At times the respondent required the claimant to take holidays. This is more consistent with an employment relationship than with the freedom that comes with bank working under which the claimant would have been entitled simply to refuse shifts without prejudice to the bank status.

82. The work done by the claimant as with all the staff working with the children in this nursery setting with its open air and child centred educational philosophy was that of a skilled, self-directed employee rather than someone whose work needed to be tightly controlled by the employer. There was however sufficient integration

and control for the tribunal to be satisfied when considering all of the tests applicable to employment status, that the claimant was an employee of the respondent. We find that the respondent's action in seeking medical consent during the claimant's illness was more consistent with employment than with the idea that they considered her a bank worker, to whom they would owe no or minimal duties outside any particular assignment to work.

83. We concluded that the effective date of termination for the purposes of the regulations was 19 October 2020. The claimant's contract subsisted until that date when she was sent the letter the respondent claims was sent on 24 January 2020. We found that this was not in reality communicated to the claimant until 19 October.

84. We conclude that the claimant was an employee for the purposes of section 230 of the Employment Rights Act 1996 and the extension of jurisdiction regulations; she is therefore entitled to 1 week's pay in respect of her minimum statutory notice. She was dismissed without notice. We find that the claimant did not resign by the letter on page 190 because it is simply a request for advice on how to proceed having been offered alternative employment. There is no evidence of an oral resignation and the wording of the letter on page 190 does not amount to words of resignation. They are at best words indicating a contemplation of resignation as a logical course given that the claimant had secured employment elsewhere.

85. In respect of holiday pay, the claimant's effective date of termination of the contract of employment was 19 October 2020. The Claimant was, the respondent accepted, entitled to accrued but untaken annual leave between the period between 4/10/19 and 19/10/20. The non-payment of accrued holiday leave represented unauthorised deductions from wages contrary to section 13 of the Employment Rights Act 1996.

Limitation (time limits)

86. We asked ourselves whether any of the claimant's claims had been submitted outside of the required 3-month time limit ending with the date of the alleged act. Clearly in respect of the allegations of discrimination relating to dismissal and failure to engage with the claimant under section 15 Equality Act 2010, the claimant's claims were presented within the three month time limit.

87. In respect of that unfavourable treatment non-engagement represented a continuing state of affairs. The dismissal was a one off act and was within the three month time limit extended by Acas early conciliation.

88. In respect of the alleged failure to make reasonable adjustments we found that the act of discrimination was dated 16 December 2019 (page 177). The claim was presented well after the time limit had expired in respect of that one-off act. We therefore asked ourselves whether it would be just and equitable in the circumstances to extend time.

89. We concluded that it would not be just and equitable because although the claimant can account for some of the delay as she says that she was not aware of time limits for the claim until October 2020, and went to Acas immediately after, she does not account for the delay between October and 2 January 2021 when the claim was presented to the tribunal.

90. In the absence of any attempt to explain that delay we do not consider that it would be just and equitable to extend the time limit in respect of the claim for failure to make reasonable adjustments.

Remedies

91. The claimant's claim for breach of section 15 of the Equality Act 2010 succeeds and it is declared that she experienced unlawful discrimination arising from disability.

92. The claimant was an employee of the respondent for the purposes of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and she was dismissed with an effective date of termination of 19 October 2020, without notice, and accordingly she is entitled to payment of 1 week's notice pay for breach of contract. The respondent was ordered to pay the claimant the agreed sum of £160.03 in respect of this claim.

93. The claimant's claim for unlawful deductions from wages under the Employment Rights Act 1996 succeeds and the respondent was ordered to pay to the claimant the sum, agreed between the parties, in respect of holiday pay of £907.37.

94. The claimant's claim for loss of wages arising from the breach of section 15 Equality Act 2010 does not succeed. This is because the claimant was too ill to work and at best could have claimed a loss of a chance of working. When she did not work she did not get paid. There is no evidence on the basis of which the tribunal could reach the conclusion that the claimant would have been engaged to do particular work during the time she was off sick (for that very reason). Hence the claimant did not provide any evidence to support a claim for financial loss. The burden of proof is on the claimant to do so, and as a result the tribunal cannot make a financial award in respect of lost pay or loss of a chance to earn. There was no evidence that had the adjustment sought been made the claimant would have resumed work at any point up to the date of dismissal.

95. The claimant's claim for injury to feelings arising from the breach of section 15 Equality Act 2010, having succeeded, the tribunal considered the appropriate award for injury to feelings compensation. The tribunal reminded itself that it must base its assessment on the evidence presented by the parties and that the claimant could point to evidence of having been upset as a result of the lack of engagement with her and as a result of the dismissal. We concluded that the appropriate sum was in the middle band of the Vento damages bands. The respondent was ordered to pay to the claimant the sum of £10,000 in respect of damages for injury to feelings for breach of section 15 Equality Act 2010. The respondent was also ordered to pay to the claimant interest on the damages for injury to feelings in the agreed sum of £2088 running up to the date of the judgment in this case.

96. The tribunal considered whether the claimant's compensation should be reduced on a just and equitable basis in respect of the extent to which the Claimant contributed to her dismissal. However we rejected the idea which formed the basis of this submission that the claimant did not co-operate. Rather the respondent did not engage with the claimant. She, on the other hand, made efforts to communicate.

Case No: 2500016/2021

Employment Judge O'Dempsey

Date: 8 August 2022