



# EMPLOYMENT TRIBUNALS

Claimant: Ms Agnieszka Lichwa

Respondent: Earl Rise Playgroup (trading as Earl Rise Preschool)

Heard at: Croydon Via CVP  
On: 3<sup>rd</sup> March 2023

Before: Employment Judge Codd

## Appearances

For the claimant: Ms Agnieszka Lichwa

For the respondent: Ms Julie Edwards

## Judgment

### Final hearing

1. The claimant was dismissed by reason of Redundancy.
2. The respondent shall pay a redundancy payment to the claimant of £2680.26.
3. The respondent shall further pay to the claimant £345.84 for failure to provide written particulars of employment.

## Decision and Reasons

### Background

1. The claimant was employed by the respondent as an early years nursery worker. The respondent is a preschool catering for children aged under the age of 5. The claimant was the deputy manager.

2. The claimant commenced her employment on 7<sup>th</sup> January 2011 and her employment ended on 1<sup>st</sup> of August 2022. Early conciliation was commenced on the 29<sup>th</sup> August 2022 and concluded on 27<sup>th</sup> September 2022. The claim was issued on 8<sup>th</sup> of October 2022. There has been no issue raised regarding Jurisdiction.
3. The respondent had initially traded under another entity, at some point in its past. It appears on the basis of the material placed before me that there must have been some form of effective TUPE transfer, in around 2016, as there has been no dispute that the claimant has 11 years of service at the time her employment came to an end.
4. The respondent is a voluntary association, as such it is administered by a board of Trustees who are themselves personally liable for the debts or responsibilities of the respondent. The respondent is registered as Earl Rise Playgroup number 1031833, with the charity commission. There are three trustees recorded for the respondent: Julia Edwards, Katie Haisman and Jackie Edwards.
5. Jackie Edwards is the mother of Julie Edwards and was said to be unwell and unable to attend any hearing now or in the future. Julie Edwards and Katie Haisman were present and advocated that the hearing continue in the absence of their fellow Trustee. I considered it was proportionate to continue in the circumstances.
6. It would appear that there is a sad history to the plight of the respondent. They have for many years provided preschool services for their local community. However, it is said that with reducing numbers of children and constraints of government funding, that the business has been struggling for some time. At the end of the academic year in 2022, there were no children registered for the following academic year and so the decision was made to close the respondent.
7. By this point the only remaining employees were Julie Edwards and the claimant.

8. The claimant argues that she was in effect made redundant and that she had approached the government insolvency service, in the first instance to obtain her redundancy pay, however, because the respondent was not insolvent and had Trustees, she was unable to access that service. The claimant has subsequently issued these proceedings.
9. Julie Edwards was present at the hearing and advocated on behalf of the Trustees.
10. The preschool closed on 22<sup>nd</sup> July 2022 as the last day of working. The claimant received pay in arrears for July 2022 and a further payment on 23<sup>rd</sup> August 2022.
11. Following the conclusion of proceedings, I received a request for written reasons on 2<sup>nd</sup> of May 2023, having handed down an oral decision at the original hearing.

#### The Application

12. The claimant sought to claim a statutory redundancy payment. In addition to this, she also sought to claim a payment in lieu of notice. This amounted to an application to amend her claim as the notice pay was not fully pleaded within her ET1.
13. The claimant argues that the end of her employment amounted to a dismissal and she did not receive any notice pay or redundancy payment.
14. In respect of the amendment application I have considered the criteria set out in Selkent and Abercrombie v Aga Rangemaster Limited [2014] ICR 209. I considered all the circumstances of the case. I considered whether the amendment was likely to involve a substantially different enquiry from the existing claim. And the balance of hardship and prejudice which would be caused to the respective parties, by allowing or refusing the amendment.
15. It seemed to me that based upon the information before me, there would be a substantial cross over of evidence relating to what payments had been provided to the claimant and why. I considered that the respondent had sufficient information to effectively argue the point, without suffering any material prejudice to their case. I considered that there would be unfair prejudice to the claimant by refusing that amendment. I therefore permitted the

amendment to the claim and this Judgment will therefore deal with both the notice pay arguments and the question of redundancy.

The Law

16. The burden of proof which I have applied to matters is the civil standard, namely the balance of probabilities.
17. Section 230 of the Employment Rights Act 1996 (ERA) deals with employee status. There was no dispute that the claimant was an employee of the respondent.
18. Section 94 of the ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95.
19. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). The burden of proof rests with the employer to demonstrate the reasons.
20. There are four potentially fair reasons set out in s98(4) namely capability, conduct, redundancy or some other substantial reason.
21. In respect of Redundancy dismissal it is possible for such a dismissal to constitute an automatically unfair reason under S105 ERA. This is particularly the case where, other employees of a similar role were not dismissed and the reason the claimant was selected was for a prohibited reason.
22. S13 of the ERA details the right for wages that are properly payable to a claimant, not to be unlawfully deducted by an employer. In dismissal cases, a claimant may also bring a breach of contract claim in respect of non payment of notice pay.

The Evidence

23. The material before me has been limited. I have not been provided with a any witness statements. I have had the opportunity of hearing evidence from the claimant and Julie Edwards, and I have considered their evidence in detail alongside their submissions.
24. It is accepted that there is no written employment contract and I have only been provided with the ET1, ET3, ACAS certificate as well as some payslips.

Findings and analysis

25. Julie Edwards told me that the business had slowly dwindled over the years and that for the 2022/23 academic year, that there were no children enrolled and therefore the business was due to close.
26. It seems to have been common knowledge that the business was closing, amongst the staff and only the claimant and Julie Edwards remained in the business.
27. Dealing first with the notice pay, I note that there was no written contract. I therefore can only work on the basis of statutory notice period, which for 11 years of service would be 11 weeks.
28. I noted that all employees were aware that the business was closing. It was common ground that on the 9<sup>th</sup> May 2022 that the claimant was informed that the business had no further enrolments and would be closing on the 22<sup>nd</sup> of July 2022. This is a period of approximately 8 weeks.
29. Julie Edwards told me in evidence that although the business had closed on the 22<sup>nd</sup> of July, there was enough money left in the account to pay herself and the claimant a further month's salary, (albeit that the number of hours had also been reduced as of the 9<sup>th</sup> May 2022 to 16 hours per week). The payment on 23<sup>rd</sup> August 2023 amounted to approximately a further 4 weeks pay,
30. I consider the fact that the fact that the hours had reduced over the preceding months to be inconsequential. No objection had been raised to this. The fact is that the claimant had

received notice, albeit verbally in May 2022 was not disputed. I therefore find that the cumulative effect of the 8 weeks notice prior to closing of the business and the payment of further wages paid in August 2022, covered the claimant's entitlement to notice pay.

31. It was perfectly acceptable for the claimant to have worked a portion of her notice and be paid for the remainder. That may have not been the purpose or intention of the August payment, but it was a measure equivalent in my view to a payment in lieu of notice.

32. I therefore find that the claim for unpaid notice pay fails and is dismissed.

33. Turning then to consider any entitlement to redundancy pay. Both parties agreed that the business had closed and that they were no longer employees.

34. I formed the sense that Julie Edwards had perhaps (along with others) become a trustee by coincidence rather than design, and had perhaps at times struggled with the responsibilities that this created for her as an employer. However, she was an employer nonetheless.

35. It would also appear that following the shutdown the claimant had approached the insolvency fund and had been denied a payment as the business was not classed as insolvent. Julie Edwards told me that her accountant had advised her that the business was just closing and that they were not insolvent and it was just closing down. That it would appear, was perhaps not the most comprehensive advice, and left the trustees liable personally for anything which came out of the woodwork, given that there were insufficient funds to cover redundancy payments. It also meant that the claimant and indeed Julie Edwards herself had no access to the insolvency fund. I suspect that no one had considered or advised that there may have been a redundancy situation arising out of the shut down.

That much ought to have been obvious.

36. Julie Edwards told me that she wanted the claimant to be able to access the insolvency fund and that she herself would also be able to access it if the claimant were successful. The claimant indicated that she did not wish to take personal funds from the trustees, and

that her ultimate aim would still be to make a claim against the fund. There was no ill will between the parties, and both wanted each other to be compensated, for a loss of livelihood and a vocation.

37. However, where there was a contradiction in the evidence was; that although Julie Edwards wanted (emotionally) for the claimant to be able to access a redundancy payment from the insolvency fund, she could not bring herself to admit when questioned that the claimant was redundant. She circled back to the fact that the business was closing. That was unfortunately a blinkered and flawed thought process.
38. There seems to me to be only one conclusion that Julie Edwards knew in her heart that a redundancy situation had occurred, but quite simply she and her fellow trustees did not wish to be personally liable for the costs. That much is understandable.
39. Whilst the concept of a dismissal was perhaps alien to the lay parties, it seemed overwhelmingly obvious that a dismissal had taken place. There was no argument of capability or conduct applying as a reason and therefore the only realistic options are between redundancy and some other substantial reason.
40. Julie Edwards argued repeatedly that the business was closing, that there was no money and that this was not a redundancy. However, in my view the fact that a business was closing did not evidence some other substantial reasons. The respondent has failed to evidence this reason or discharge its burden in this regard. Everything within the evidence pointed to a dismissal on the basis of a redundancy situation.
41. In terms of the trading status of the business, I have carefully considered the information publicly available on the Charity commission website and there is no indication that it has ceased to trade.
42. Julie Edwards evidence was that there was no insolvency situation and the business had simply ceased trading.

43. I find that the claimant had contacted ACAS within an appropriate time and although the respondent claimed not have received notice I find that this was served at the home of Julie Edwards and the registered address on the charity commission website.
44. It may well be that the trustees remain personally liable for the debts of the business, however that liability arose as a consequence of actions taken when the business was still trading. I have seen nothing to suggest that the legal entity, has changed in a way sufficient to defeat any claim in this Tribunal.

### Conclusions

45. Applying as I must then the law to the facts, I find that on the 22<sup>nd</sup> of July 2022 the claimant was dismissed. I find that the reason for that dismissal was one of redundancy within the meaning for S98 ERA.
46. I have carefully considered S105 ERA as to whether the claimant was unfairly dismissed by reason of her redundancy. However, I do not find that to be the case. I say that because Julie Edwards, who was the other employee and carried out a similar function to the claimant was also dismissed as part of the business closing down. She too was redundant. The only reason that the redundancy had arisen was due to a lack of uptake by children needing the preschool. In short these were matters beyond the respondent's control and these are in my view not circumstances which would give rise to an automatically unfair redundancy.
47. Even if it did, I would consider that it would not be just and equitable to award any sum over and above the claimant's entitlement to her redundancy pay.
48. The claimant has, as I have indicated a continuous period of 11 years service, a matter which was not challenged. Based upon her hourly rate of £11.50 per hour I assessed her weekly pay at £172.92 per week. Based on the claimant's age during her service I calculate that the claimant is entitled to 1 weeks pay at 172.92 and 10 weeks pay at 1.5 times £172.92 totalling £2680.26. I make that redundancy award accordingly.



49. I also note that as the claimant has succeeded in her claim, and as she has no written statement of employment particulars, that I can also make a further award. I have considered the matter carefully and I make an award of a further two weeks pay for the failure to provide written particulars of employment. I therefore make a further award of £345.84, in this regard.
50. I have considered whether to make any award for loss of statutory rights. However, as I have said this was not an unfair dismissal and a genuine redundancy situation. Even if such a payment did arise (and I find it did not) I consider that it would not be just and equitable to make such an award.
51. That is my Judgment.

Employment Judge Codd  
Date: 08 May 2023