EMPLOYMENT TRIBUNALS

Claimant: **Ms R Begum**

Respondent: **Lollyday Childcare and Education Services Limited**

Heard at: **East London Hearing Centre**

On: **28 March 2023**

Before: **Employment Judge O'Brien (sitting alone)**

Representation:

Claimant: In person
Respondent: Abisoye Adeniran, director

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of constructive unfair dismissal fails and is dismissed.**

2. **The claimant's claim for damages for breach of contract (or in the alternative for unauthorized deductions from wages) succeeds in part and the respondent shall pay to the claimant the sum of £140.**

REASONS

1 By consent, the respondent's name is amended to Lollyday Childcare and Education Services Limited.

2 In a claim form presented on 14 September 2022, the claimant brought claims of unfair dismissal and for various sums of unpaid wages.

3 The claims concern a series of underpayments which can be broken down into three categories. There are a series of days when the claimant says that she was forced work through her break and should be remunerated for that time. There is an alleged failure to make pay full payment in accordance with the respondent's bereavement policy. Finally, the claimant alleges a failure to pay for days in respect of the respondent says that the claimant failed without good reason to attend work.

4 In addition to the claimed loss of pay, the claimant says it was a combination of this series of underpayments which constituted a fundamental breach of her employment contract, either as a breach of the implied term of mutual trust and confidence, or a fundamental breach of the express term that she should be paid for her contracted work.

5 The respondent resists the claims.

EVIDENCE

6 The claimant gave evidence on her own behalf. On behalf of the respondent, I took evidence from: Abisoye Adeniran, director; Ololade Jinadu, senior nursery manager; and, Sana Hussain, nursery manager.

7 The Tribunal was also provided with a bundle of approximately 275 pages of documentary evidence.

8 The parties each made oral submissions which I took into account in their entirety.

FINDINGS OF FACT

9 In order to determine the issues as agreed between the parties, I made following findings of fact, resolving any disputes on the balance of probabilities.

10 The claimant worked for the respondent from 19 May 2019 to 31 August 2022 as deputy manager of a childcare setting.

11 In September 2021, the claimant was underpaid in respect of her pay. However, the underpayment was remedied in October 2021. At the time, the respondent's predecessors were still running or overseeing the setting.

12 On 21 January 2022, the claimant's father died and she took one week's bereavement leave in accordance with the respondent's staff handbook.

13 The relevant passage of the handbook, section 26, states:

> It is the policy of the Company to grant all employees up to one week bereavement time off without loss of pay when a death occurs in an employee's immediate family (i.e. mother, father, wife/husband, live in partner, sister, brother, daughter, son or grandchildren). An employee will not be eligible to receive paid bereavement time-off benefits while off or absent from work because of holiday, sickness (paid or unpaid) or for any other reason.

14 The claimant's normal contracted working hours were 4 days a week, working a minimum of 32 hours per week, term-time only. However, the contract also provided that the claimant may be required to work additional hours as necessary in order to fulfil the needs of the business. The claimant's contractual rate of pay was £10 per hour.

15 By the time of her father's death, the claimant was regularly working 5 full days per week and, I accept, was due to work 5 days in the week she took bereavement leave. Nevertheless, she was only paid 4 days' wages.

16 The next alleged underpayment concerns 29 April 2022, when the claimant says she should have been paid for six hours whereas the respondent paid her for five hours. However, in the hearing, the claimant accepted having seen the documentation that she had worked five hours and I find as a fact that she was paid correctly on that date.

17 The next inconsistency concerns a number of days in June 2022 in which the claimant says she should have been paid for breaks that she was unable to take. According to her contract, the claimant was entitled to a one hour unpaid break if expected to work 7 hours' continuous work. On each of the days in question, the claimant says that she was unable to leave the setting for that break because to do otherwise would have left the setting understaffed for the number of children in attendance. I accept the claimant's assertion, which was not challenged by the respondent, that it would have been inappropriate for here to leave the site of the nursery altogether. However, Ms Hussain was also present as nursery manager and on each occasion told the claimant to take a break, but to take it in the office (away from the children and not undertaking any work). The claimant disregarded Ms Hussain's instructions on each occasion. I preferred Ms Hussain's evidence on this point over the claimant's; Ms Hussain was a witness prepared to make appropriate concessions and was also unshakeable on the point in cross-examination.

18 The claimant complains that the respondent paid her six hours less in July 2022 than her contractual entitlement. The shortfall, it was agreed, arose from 7 July 2022. In that week, the claimant had been required to work 32 hours over five days. It was the respondent's case that she had unhappy to do so, believing that she should have been given more hours if required to work 5 days, and so had simply failed to attend without explanation. The claimant denied that that was the case. Moreover, Ms Hussain made clear that the claimant rarely failed to attend for work and never without explanation. She accepted that she would have remembered if the claimant had done as the respondent alleged. In the circumstances, I accept that the claimant did not fail to attend without explanation. Rather, it seems to me more likely than not that the claimant objected to working 32 hours over 5 days and someone at the respondent agreed to her not working on 7 July but that there was some internal communication breakdown which meant that the office was then left surprised that they had to cover a day. Nevertheless, this resulted in the claimant being paid for only 26 hours that week against a contractual minimum of 32 hours.

19 The claimant submitted her resignation letter on 1 August 2022, giving 4 weeks' notice.

THE LAW

Constructive Dismissal

20 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer. An employee is dismissed by his employer amongst other things if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct (s95(1)(c) ERA).

21 To establish such a constructive dismissal, the employee must prove that the employer was in fundamental breach of contract, that he resigned in response to such a breach, and that he did not act prior to resignation in such a way as to affirm the contract (**Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**).

22 In **Malik v BCCI [1997] IRLR 462**, the House of Lords confirmed that a term is implied into every employment contract that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is objective.

23 A breach of contract is a fundamental breach if it signifies an intention on the part of the party in default no longer to be bound by the terms of the contract.

24 A breach of the implied term of mutual trust and confidence is always such a fundamental breach (**Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347)**.

25 At common law, an employee accepting a fundamental breach must resign without notice or otherwise will be taken to have affirmed the contract for the period of employment covered by the notice. Section 95(1)(c) ERA varies the common law contractual principles discussed above for the purposes of a statutory claim of unfair dismissal by giving an employee the right to resign on notice without being treated as having affirmed the contract. That said, post-resignation affirmation is capable of being considered under s95(1)(c) ERA (**Cockram v Air Products plc [2014] IRLR 672**). In that case, an employee who had given 7 months' notice when the contract only required 3 months was taken to have affirmed the contract.

26 Conduct which has been affirmed cannot be revived by a later last straw; the employee must show repudiatory conduct which entirely post-dates the earlier affirmation (**Vairea v Reed Business Information UK Ltd [2017] ICR D9, UKEAT/0177/15/BA**).

27 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

Breach of Contract and Unauthorised Deductions from Wages

28 Pursuant to art 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim may be brought in the Employment Tribunal for damages in respect of a breach of contract arising or outstanding on termination of employment.

29 Pursuant to s13 ERA, an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

CONCLUSIONS

30 The claimant's constructive unfair dismissal claim arises from a series of alleged failures to pay sums due under her contract, and so it is convenient to consider first those separate claims.

31 The accepted failure to pay sums due in September 2021 was resolved in October 2021, long before the claimant resigned. To the extent that the failure was relied upon as an express breach of the claimant's contract, she remained in employment for so long that she undoubtedly waived the breach. Moreover, given that the respondent's predecessors remained in control of the setting, the failure cannot, I find, have contributed to the relationship of trust and confidence between the claimant and respondent.

32 The claimant was entitled under the provisions of the staff handbook to a week of bereavement pay in January 2022 with no loss of pay. She would have worked 5 full (8 hour) days but was only paid for 4 full days. She suffered, therefore, a loss of one day's pay, in respect of which she is entitled to consequential damages for breach of contract. The claimant's loss in this regard was £80.

33 The claimant, I have found above, suffered no loss in April 2022.

34 With respect to the claimant's complaint of not being paid for breaks she worked in June 2022, I am satisfied that she was told to take the break in the nursery office (away from the children and other work) and chose not to. She is not, in the circumstances, contractually entitled to be paid for the time in question.

35 In the week commencing 4 July 2022, the claimant was paid for only 26 hours whereas she was contractually required to work a minimum of 32 hours. The respondent had agreed with the claimant that she need not work on 7 July 2022. She had remained ready, willing and able to work her full minimum hours on the remaining days of the week, and so is entitled to be paid for the 6-hour shortfall, a loss of £60.

36 Turning to the claimant's constructive unfair dismissal claim, I have found that the September 2021 underpayment could not have undermined trust and confidence between the claimant and the respondent, and was waived as an express breach of contract. I have found that the claimant did suffer two unauthorised deductions from wages by the respondent: £80 in January 2022 and a further £60 in July 2022. In each instance, I am satisfied that the failure to make full payment was by way of a misunderstanding, in the first

instance as to the ambit of the bereavement policy and in the second instance because of a breakdown of communications. Neither of these failures, individually or collectively, were calculated or likely to seriously damage trust and confidence.

37 As for the deductions constituting breaches of the express term to pay the claimant for work done or for which she was ready, willing and able to do under the contract, the claimant continued working for six months after the first shortfall of pay before resigning and I find thereby affirmed the contract. As for the £60 shortfall in July 2022, I find that this amount was too insignificant as to constitute a fundamental breach of contract. Indeed, even if I had not found that the claimant waived the earlier underpayment of £80, I would have found that the two underpayments together fell well short of constituting a fundamental breach of contract.

38 Consequently, I find that the claimant was not entitled to resign and consider herself to have been dismissed. In short, she was not constructively dismissed.

Employment Judge O'Brien
Dated: 6 June 2023