Case Number: 2216903/2023

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs Ewa Kwasnik **v** **Mr Olgierd Wojtas**

Heard at: London Central (in public; CVP) **On**: 15 & 16 May 2024, 24 May 2024 (in chambers)

Before: Tribunal Judge RE Peer acting as an Employment Judge
Tribunal Member H. Craik
Tribunal Member S. Hearn

Representation

For the Claimant: In person, assisted by her husband Mr. S. Bizzotto
For Respondent: Mr J Chiffers of Counsel, direct access instruction

JUDGMENT

The unanimous decision of the tribunal is that:

(1) The complaint of automatic unfair dismissal is not well-founded. The claimant was not unfairly dismissed.
(2) The following complaint of pregnancy and maternity discrimination is well-founded and succeeds:
    a. Failure to pay for ante-natal appointments.
(3) The remaining complaints of pregnancy and maternity discrimination are not well-founded and are dismissed.
(4) The complaints of direct sex discrimination are not well-founded and are dismissed.
(5) The complaint in respect of holiday pay is not well-founded. The claim is dismissed.
(6) The complaint of breach of contract in relation to Ofsted registration costs is well-founded.
(7) The respondent must pay the claimant £191.75 as damages for breach of contract.
(8) The respondent shall pay the claimant the sum of £3,500 as compensation for injury to feelings.

REASONS

INTRODUCTION - CLAIM AND ISSUES

1. The claimant is Mrs E Kwasnik. The respondent is Mr Olgierd Wojtas. The claimant worked for the respondent as a nanny. Her employment started on 9 September 2021 and ended on 20 August 2023. Early conciliation commenced on 21 August 2023 and ended on 2 October 2023. The claimant presented her claim on 30 November 2023 bringing claims of automatic unfair dismissal, direct sex discrimination, pregnancy and maternity discrimination and breach of contract.

2. The respondent's defence is that the reason for the claimant's dismissal was not an automatically unfair reason and was for reason of redundancy in that the family no longer required a nanny. The respondent denies any discrimination or breach of contract.

3. A case management hearing took place on 7 March 2023 at which the claims and issues were clarified and confirmed and case management orders made to prepare the case for final hearing listed for 15 and 16 May 2024.

4. The issues for determination are as follows:

4..1. **Automatically unfair dismissal (section 99 Employment Rights Act 1996)** – was the reason or the principal reason for dismissal that the claimant was on maternity leave? – respondent says no, it was a redundancy situation, they no longer required a nanny. If so, the claimant will be regarded as unfairly dismissed.

4..2. **Direct sex discrimination (section 13 Equality Act 2010)** –

4..2.1. did the respondent do the following things:

4..2.1.1. Fail to pay the claimant for the time she spent at ante natal appointments.

4..2.1.2. Fail to respond to emails.

4..2.1.3. Dismiss her.

4..2.2. Was that less favourable treatment?

4..2.3. The tribunal will decide if the claimant was treated worse than someone else was treated and there must be no material difference between their circumstances and the claimant.

4..2.4. If so, was it because of sex.

4..3. **Pregnancy and maternity discrimination (section 18 Equality Act 2010)**

4..3.1. did the respondent treat the claimant unfavourably by doing the following things:

4..3.1.1. Fail to pay the claimant for the time she spent at ante natal appointments.
4..3.1.2. Fail to respond to emails.
4..3.1.3. Fail to pay for pregnancy related sickness.
4..3.1.4. Dismiss her.

4..3.2. Did the unfavourable treatment take place in the protected period?
4..3.3. If not did it implement a decision taken in the protected period?
4..3.4. Was the unfavourable treatment because of the pregnancy?
4..3.5. was the unfavourable treatment because the claimant was on maternity leave, seeking to exercise a right to maternity leave or had exercised a right to maternity leave?

4..4. **Holiday pay**

4..4.1. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
4..4.1.1. What was the leave year?
4..4.1.2. How much of the leave year had passed?
4..4.1.3. How much leave accrued?
4..4.1.4. Any carry over?
4..4.1.5. How much remains unpaid?
4..4.1.6. Relevant daily rate

4..5. **Breach of contract** – notice pay has been paid

4..5.1. Ofsted registration costs

HEARING

5. The hearing was a remote hearing. The form of remote hearing was fully remote by Cloud Video Platform. The parties agreed in advance to the hearing being held as a remote hearing.

6. In the ordinary way, it was confirmed at the outset of the hearing that all participants could see and hear each other clearly. The claimant was assisted by her husband, Mr S. Bizzotto. The respondent was represented by Mr Chiffers of Counsel. The hearing proceeded effectively as a remote hearing and no party raised any objection.

7. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

8. There was a hearing bundle of 271 pages (HB). The bundle contained copies of the claim form and particulars of claim, response form and grounds of resistance, tribunal correspondence, Record of Preliminary Hearing and Case Management Orders, Notice of Hearing, and other documents.

9. We read the evidence in the bundle to which we were referred and refer below to the page numbers of key documents relied upon when reaching our decision.

10. We heard evidence from the claimant and the respondent.

11. We heard submissions from each party.

FINDINGS OF FACT

12. Having considered the evidence, we found the following facts on a balance of probabilities.

13. The parties will note that not all the matters that they told us about are recorded below. That is because we have confined our findings of fact to those relevant to the legal issues. Where there were disputes as to factual matters between the parties, we have explained the reasons for the fact finding we reached applying the balance of probabilities standard of proof.

Pre-contract

14. The claimant was offered a job as the respondent's nanny and thanked them for the job offer by WhatsApp on 2 August 2021. The parties would discuss the details. On 13 August 2021 and whilst the claimant was on holiday, the respondent messaged to ask if she was Ofsted registered. The respondent wanted to access childcare vouchers. The claimant was clear that she was not Ofsted registered and that she would register 'if it is a strict requirement, but I wouldn't want to pay for it.' (HB 223-224). The respondent clearly understood the claimant's position and his written statement (WS) sets out that "The Claimant agreed to register …on the basis that I would cover the cost of the Ofsted registration.' (WS 15).

15. We accept the respondent's WS evidence on this point and we note the messages and we therefore find that between the parties prior to entry into the contract the mutual understanding was that the claimant would complete Ofsted registration if the respondent covered the costs of Ofsted registration.

16. The claimant emailed the respondent on 23 August 2021 at 0813 (HB 57). She referred to 'our recent conversation regarding the Ofsted registration'. The email sets out 'what I would need in order to be registered' and lists: £150 for a 2-day common core skills course, £40 for a new DBS check (enhanced with barred list check), £0 for first aid as she held this, and £103 per year Ofsted registration fee. The list equated to a cost of £293 plus £103 yearly. The claimant asked if the respondent was 'ok in covering the cost of the above'.

17. On 23 August 2021 at 2153, the respondent replied by email (HB 58) stating '293 GBP is the cost I am ok to cover. Please start your registration and let me know how and when you want me to cover it. We are interested in you being Ofsted registered for a short time only. I will leave the decision on keeping your registration in future to you entirely. As I mentioned before we will not require it from you.' The respondent explains his email as 'I approved

the list of costs over the email on the 23 August 2021…and this requirement was added to the Employment contract'. (WS 17)

18. We find that whilst the respondent stated that he did not consider registration a mandatory requirement for his nanny, it is also the case that he considered registration of benefit to him as it would facilitate access to and use of accumulated childcare vouchers. We also find that the clear understanding between the parties was that the claimant would complete Ofsted registration if the respondent paid for it. We accept the respondent's written evidence that this was the background to the inclusion of provision in the contract about Ofsted registration.

19. The claimant started work on 9 September 2021.

Contract of employment

20. A contact of employment was signed on 16 September 2021 (HB 59-70). Clause 2.3 of the contract provides that the employee must 'ensure you are registered and remain registered of the Ofsted Childcare Register'.

21. Clause 4 of the contract is headed 'Notice'. Clause 4.2 provides that 'Your employer will give you one month's written notice'. Clause 4.3 provides that 'Your employer will not be obliged to provide you with work at any time after notice of termination shall have been given by either party and your Employer may in his or her absolute discretion, require you not to work but will pay your salary entitlement in lieu of all or any part of the unexpired period of notice'.

22. Clause 6.2 of the contract provides for reimbursement of 'all reasonable expenses, properly, wholly and exclusively incurred by you and authorised by your Employer in the discharge of your duties under this contract upon production of receipts or other evidence for them as your Employer may reasonably require.'

23. Clause 8 is headed 'Holiday'. Clause 8.1 provides that the holiday year is the calendar year and the annual entitlement is 5.6 weeks including public holidays. The entitlement is stated to be 240.8 hours per year. Clause 8.3 provides that carry over is only if there are exceptional circumstances. Clause 8.8 provides 'Your Employer may require you to take outstanding holiday entitlement during any period of notice.'

24. We find that the costs of Ofsted registration taking account of the mandatory terms of clause 2.3 are to be considered as reasonable expenses, properly, wholly and exclusively incurred in the discharge of duties under the contract. The respondent does not dispute this. The respondent submits that clause 6.2 requires authorisation of those costs for them to be reimbursed. We accept this submission as to the interpretation of clause 6.2. We note written authorisation is not mandated.

Ofsted registration

25. The claimant updated the respondent in February 2022 about the registration process including referring in an email of 6 February 2022 (HB

71) to 'need to get (pay for) the public liability insurance and then as the last step I will be finally allowed to apply for the Ofsted registration.' By email on 8 March 2022 (HB 74), the claimant forwarded confirmation dated 4 March 2022 of her application for registration.

26. We noted our finding that before the contract the parties understood that the claimant would complete Ofsted registration if the respondent paid the costs. We found that the claimant would not have progressed Ofsted registration if she believed or knew that the respondent would not reimburse the costs.

27. A MATB1 records examination at an ante-natal clinic on 12 April 2022 and the expected week of childbirth as including 29 August 2022.

Ante-natal appointments.

28. Before the claimant started maternity leave, the claimant took time off work for ante-natal appointments. There is no dispute between the parties that 21 hours' time was taken off work for ante-natal appointments. We understand this time to include travel and the time taken with the appointment itself. There is however no documentary evidence confirming when the claimant first notified the respondent that she was pregnant or evidence such as appointment cards before us corroborating when any appointments took place other than the MATB1. The respondent told us that he couldn't recall how they were notified about ante-natal appointments taking place.

Sick leave

29. The claimant took time off on 12 May 2022 which she says was because she had pregnancy related sickness. In oral evidence, she said she was experiencing Braxton Hicks. The claimant notified the respondent by WhatsApp message that, 'I wanted to let you know that today I am unwell (feeling sick & nausea).' The respondent said in oral evidence that it would be speculation on the basis of that information to consider the sick leave as pregnancy related sickness. We were not told why the claimant's oral evidence as to the reason for the absence was different from the information in her WhatsApp message and her message did not expressly link the reason for feeling unwell to her pregnancy. We noted that feeling sick or nauseous is commonly associated with pregnancy and found that it was more likely than not that the absence was for pregnancy related sickness.

30. The claimant had no entitlement to contractual sick pay. She was only entitled to statutory sick pay and statutory sick pay is not available for the first three days of sick leave. We find that the claimant had no entitlement to statutory sick pay for 12 May 2022.

Progress with Ofsted registration

31. On 19 May 2022, the respondent emailed the claimant and asked about progress with Ofsted registration (HB 81). On 22 May 2022, the claimant informed the respondent by email (HB 82) that her Ofsted application wasn't approved and that she would apply again. The claimant clearly understood she was to progress registration. We find that the enquiry about progress with registration indicates that the respondent understood registration was

being progressed. We note the respondent had been informed about the item of insurance as necessary for registration in February.

32. The claimant's last day at work before maternity leave was 22 July 2022. The claimant told us in evidence that they parted on good terms and the respondent gave her presents.

33. On 16 August 2022, the claimant informed the respondent by email that she was now Ofsted registered (HB 88). On 17 August 2022, the claimant gave a breakdown of the costs incurred in relation to a list of items of common core course, postal costs, DBS, liability insurance, Ofsted approved first aid training and two application fees totalling £565.85 (HB 89).

34. A maternity cover nanny started work on 18 August 2022.

35. On 19 August 2022, the respondent emailed the claimant in reply to the confirmation that she was Ofsted registered. The email is as follows: "Hi Ewa, great news. Please register here: [Edenred website] After registration you should get an account number (starts with letter 'P') – please share it with me. Regards O." The claimant then registered to enable the respondent to use childcare vouchers and on 24 August 2022 the claimant emailed 'Brilliant, I am glad we could use this now.' We note that the respondent and the claimant each acted quickly to facilitate the use of childcare vouchers further to the completion of Ofsted registration. We further note that the tone of communications at this time was positive.

36. We were not told in evidence when the claimant gave birth. We find however that around this time the claimant was either heavily pregnant and/or gave birth noting the EWC recorded in the MATB1 was 29 August 2022.

37. On 7 September 2022, the claimant followed up about Ofsted registration costs and chased again for a reply via WhatsApp on 15 September 2022.

38. In cross-examination, it was put to the respondent that he knew the claimant had given birth at the end of August and he was asked how he justified his lack of care and interest in the claimant. The respondent said that he was aware that the birth was approximately late August/early September but usually when these events happened people shared this information with people they believed were in their close circle and he never received any messages. The respondent said that when they had contact from the claimant, their email reply on 26 September 2022 (HB 95) started, 'thank you very much for reaching out to us. We were wondering how you are' because they had received no news from her and they had been wondering how she was.

39. The respondent told us that his understanding was that you shouldn't make contact during maternity leave although we note that there were emails in late August 2022 when the claimant was on maternity leave. The respondent also said that to engage in conversation about private life, you needed to be invited in. The respondent said the expectation when people had a baby was that they told those they wanted to know. The claimant had not updated

them in this way. We acknowledge that none of the written communications from the claimant before us share any such information with the respondent.

40. We accepted the respondent's evidence to the extent that we acknowledge his concern about proactively contacting her in light of his awareness that she was due to give birth around this time. We consider it is reasonable to be cautious about contact during this sensitive time. We also appreciate that the respondent had no real information about the claimant's circumstances and may well have been wondering how things were. We reflected on whether there was a failure to reply to the email requesting reimbursement in light of the claimant chasing this. In any event the respondent did reply on 26 September and we do not find the period of time can be construed as a failure to reply.

41. The respondent's email of 26 September 2022 continued and set out that, 'Regarding calculation you send us over email. We are a little confused. The detailed list looks quite extensive. We agreed to cover the ofsted registration cost (103 GBP) and we know that there are some additional costs that come with it. Please review this list again and send us only costs related to Ofsted registration.' (HB 95). On 27 September 2022, the claimant emailed to confirm that the costs requested 'are definitely related to the Ofsted registration.' (HB 94).

42. On 5 October 2022, the respondent's wife emailed the claimant (HB 94). The email referred to email correspondence and set out 'As agreed, we are happy to cover the following costs' and listed the costs of the course, DBS and application fee and therefore the amount of £271.10 in total. The email also set out that the respondent was 'ok to additionally cover the unexpected post office costs but please provide relevant Invoices'. On 10 October 2022, the amount of £271.10 was paid.

43. We note that the respondent did not meet the costs to the amount of £293 and in fact paid the costs attributable to three items. The cost of £120 for the course which was lower than the £150 quoted in the claimant's email of 23 August 2021 in part explains the different amounts.

44. On 18 November 2022, the claimant emailed the respondent explaining again the breakdown of the total costs she had incurred to complete Ofsted registration. We note that rather than using the respondent and his wife's first names, this email is addressed more formally 'Dear Employer'. The claimant's email sets out that she had done this 'as a huge favour to you. I went through a very long Ofsted registration process which did cost me a lot of time, effort and money, and you very well know that I would not have seaked [sic] to be Ofsted registration had you not asked me to do so. I agreed simply as an act of my kindness.' We refer to our finding that it was understood between the parties that the claimant would register if the respondent would pay. We also note that it was a requirement of the contract that the claimant be registered. The claimant sent a WhatsApp message on 31 December 2022 that, 'I haven't heard from you or received the full reimbursement for the Ofsted costs that I incurred during the registration process.'

45. The respondent replied on 3 January 2023 and although this was after 6 weeks, we did not find this period of time could be considered a failure to reply in light of the holiday period. The respondent's email (HB 93) set out, 'You were reimbursed with all costs we agreed to cover. (As described in emails we exchange on this topic) In case there is sth we are missing like additional approval we gave in the meantime or email we missed please let us know. At this moment we believe we cover all agreed costs.'

46. The respondent submitted that the claimant had not been authorised to incur anything in excess of £293 in reliance on the respondent's email sent on 23 August 2021 prior to contract formation. We reflected on the difference between the email relied upon setting out '293 GPB is the cost I am ok to cover' and the respondent's written statement that by way of his email he approved 'the list of costs'. The list was for the course, DBS, first aid and registration fee. We further noted that in the email of 26 September 2022, the respondent refers to his understanding that there are costs in addition to the £103 fee, the list and asks for 'costs relating to Ofsted registration' and makes no reference to having only authorised costs of £293.

47. We refer to our finding above that the clear understanding was that the claimant would complete registration if the respondent paid for it. We found that the claimant would not have completed the registration process in circumstances where she did not know or believe that she would be reimbursed. We find that there was no reason for the claimant to complete the process not least as she was by then on maternity leave save that the contract required registration. We accept her evidence that she completed the process to facilitate the respondent accessing childcare vouchers. We note that when the claimant informed the respondent that the process had been completed shortly before she gave birth, the respondent's first step was to instruct her to register with the childcare voucher provider which was only to his benefit and did not communicate again until 26 September 2021.

48. We had no satisfactory explanation as to the respondent's approach. We accept that the written communication available to the tribunal does not record explicit and express authorisation of specific items and specific costs associated with those items. We note however that the contract does not mandate written authorisation. If the respondent had only authorised a total costs figure of £293 in line with the submission made on his behalf, the respondent did not adhere to that. We note that the respondent was content to allow the claimant to progress registration and was fully aware that in addition to the £103 registration fee there were costs and items necessary for registration and reflects this in his written communications. If the respondent understood he had authorised incurring the costs initially itemised in the email of 23 August 2022, he did not adhere to that either. The cost of the course was less but the cost of first aid was more and was not reimbursed. We note that the respondent asked in writing for the costs related to registration and we find this is indicative of an awareness the respondent was to meet those costs.

49. We find that in all the circumstances it is more likely than not that there was authorisation for reimbursement of costs related to Ofsted registration. We accept the claimant's evidence that the costs requested were costs related to Ofsted registration and incurred in order to complete Ofsted registration as she was required to do.

Holiday pay

50. On 15 March 2023, the claimant emailed the respondent and asked for payment for 14.3 days of holiday (HB 97). On 20 March 2023, the claimant sent an email stating that she did not see the payment requested on her March payslip. On 24 March 2023, the claimant sent an email which stated, 'I am still awaiting for your reply to my last email. I would appreciate timely communication and response.'

51. The respondent gave oral evidence that he hadn't failed to reply to the claimant's emails. The respondent said he would typically reply to an email when he had an answer. The claimant said that the respondent should have at least acknowledged her emails and told her he was working on it. We accept the respondent's evidence that he was checking records and replied when he had an answer. Whilst we accept that an acknowledgement would have let the claimant know that her email had been received and was not being ignored, we note that this was the first contact between the parties since January 2023 and the respondent replied reasonably quickly in any event. In all the circumstances, we do not find that the reply on 24 March 2023 to the request initially sent on 15 March 2023 represents a failure to reply to emails.

52. The respondent's email of 24 March 2023 set out that his records showed 307 hours of paid holiday in 2022 which was in excess of the 240.8 hours annual entitlement and that payroll would make the corrections and deduct £738.30 from pay for March 2023 and £323.98 from pay for April 2023 (HB 98). The respondent's written statement sets out that he discovered on checking his records that the claimant had taken 377 hours of leave in 2022 which comprised 70 hours of unpaid leave which had been agreed between the parties before the claimant started employment and 307 hours of paid holiday. On 27 March 2023, the respondent sent the claimant records of her absence. On 30 March 2023, the claimant emailed that the breakdown was helpful but there were things that were incorrect.

53. The parties referred us to a schedule (HB103, 104) which had been prepared between them in March 2023. We understand and find this schedule to record agreed dates the claimant took time off work and the number of hours paid for that time off work. A column recording the reason for the time off was completed by the claimant. The schedule records a total of 307 hours of paid leave. The table also records 21 hours of paid time indicated to be ante-natal appointments and 9 hours paid indicated by the claimant as a day she was sick and not on holiday.

54. The claimant explained in oral evidence that the table was correct as at the time completed and she accepted that 307 hours' time off work had been taken in 2022. There is no dispute between the parties that the claimant was

paid for 307 hours of time off work taken before she started her maternity leave in July 2022. This time off had been categorised as holiday. The claimant was entitled to 240.8 hours of holiday for 2022. We found that the claimant had no accrued but untaken leave at the end of 2022.

55. The respondent used a payroll service, Nannypaye, and they calculated that the claimant had been paid £1107.28 for 66.2 hours of holiday in excess of her 240.8 hours entitlement. The respondent instructed payroll to deduct that amount from pay due to the claimant for March and April 2023 (HB 144).

56. The respondent's instruction to payroll to make deductions from the claimant's pay for overpaid holiday included 21 hours referable to time off for ante-natal appointments. The respondent was aware that 21 hours related to ante-natal appointments. The respondent did not engage with the claimant's information in relation to ante-natal appointments on the schedule and nor did he raise any queries with payroll about the ante-natal appointments. The submission was made that the respondent relied on the payroll provider as he was not familiar with these matters. We find that in circumstances where the respondent said he relied on payroll, the reasonable step would have been to check on the accuracy of the position overall including as to the ante-natal appointments.

57. The respondent sets out in his written statement that the last conversation about 2022 holiday allowance was on 4 April 2023 when he sent an email setting out his position (HB 106) and that, 'Later on, I changed my view on ante-natal appointments compensation.' (WS 44). The respondent's grounds of resistance refer to the request on 15 March 2023, that they exchanged emails in the next few days and that, 'in the meantime I changed my opinion' (GOR 50).

58. We find that although the respondent did not deny the claimant time off work for ante-natal appointments, he required her to categorise this time as holiday and he did not pay her for time off for ante-natal appointments. The respondent's evidence is that he changed his view on this after April 2023 but this was not a subjective matter rather his employee's statutory entitlement. The respondent did not pay the claimant for time off for ante-natal appointments until after her employment had terminated and after she had recourse to ACAS. The respondent was liable for these matters as employer. The respondent was in contact with payroll raising queries and receiving advice about final pay arrangements in July and August 2023 including as to the handling of holiday pay given an error on the payslip initially prepared. The respondent only emailed payroll (HB 167) instructing payment for ante-natal appointments for 21 hours on 12 September 2023. Although the payslip dated 30 September 2023 records payment for the 21 hours, payment was not made until 30 November 2023.

59. We find that the respondent acted promptly to claw back the overpayment of holiday he had identified but not with regard to making payment for time off for ante-natal appointments he over-looked. We noted that the respondent did not provide any clear evidence as to when he understood the claimant was entitled to paid time off for ante-natal appointments. We

did not find the respondent's explanation as to reliance on payroll wholly satisfactory.

Respondent's redundancy and decision to dismiss claimant.

60. The respondent was made redundant from his employment and was placed on gardening leave from 26 April 2023 until his employment terminated on 31 July 2023. The respondent received money in settlement in relation to the termination of his employment.

61. On 19 May 2023, the claimant sent the respondent an email which stated, 'I would like to inform you that I will continue my maternity leave until July 2023.'

62. On 31 May 2023, the maternity cover nanny's employment ended. The respondent told us that although he was not allowed to publicise the fact of the termination of his employment until 31 July 2023, he ended the cover nanny's employment to test a situation without childcare. We found that the respondent would not have terminated the cover nanny if the family had a real need at that point for assistance with childcare. We accept that the respondent was not working and we had heard that his wife worked part-time and we find that they were in a position to cover all their childcare needs at that point. We further accept based on the evidence that the respondent had sufficient funds to cover his expenses for a reasonable period of time and that he did not plan to look for employment. We heard that he did not turn his mind at that point to the situation with the claimant. We accept this evidence in light of the fact that by late May, the respondent was aware that the claimant wished to continue her maternity leave and did not wish to return to work until July in any event. We accept and find that the respondent wanted to test the situation without childcare.

63. On 5 July 2023, the respondent sent the claimant an email (HB 131) which stated, 'as we are in July now, can you share with us your plans?' On 10 July 2023, the respondent sent the claimant an email (HB 132) which stated, 'this is a reminder for you to let us know what your plans are.' The claimant replied by email (HB 133) stating, 'Thank you very much for your email. Please note that I will be returning to work after my full 52 weeks maternity.'

64. The respondent gave oral evidence that the reason for dismissing the claimant was that a nanny was not needed anymore due to changes in the family circumstances. He was not looking for a new job and had decided to take care of the children. Whilst the claimant was on maternity leave, they were not thinking about her position but once she confirmed she wanted to return to work on 10 July the respondent and his wife started reviewing their options. They had considered sending one of the children to school a year earlier but decided not to sacrifice one year of the child's life. They considered whether they could manage with ad hoc support from family and friends. The respondent said during these 10 days from 10 July 2023 they reconsidered all their options.

65. On 14 July 2023, the claimant sent the respondent an email stating, 'I assume you are happy for me to be back at 0830AM next week (Thursday

20 July). Please confirm. Also, I would like to hear from you regarding daily arrangements and logistics going forward. Looking forward to hearing from you with further details.' On 17 July 2023, the claimant sent an email asking when she could expect to hear from the respondent. On 18 July 2023, the respondent sent an email stating, 'Can you please confirm if you are planning to get back to work full time 43h/week?' On 19 July 2023, the claimant sent an email stating, 'I would consider full-time or part-time. I can be flexible, depending.'

66. The respondent was asked several times in cross-examination why he had not informed the claimant earlier about his redundancy and asked about the claimant's plans if they didn't need a nanny and it was put to him that the claimant had said she could be flexible. The respondent said a reason he had not informed the claimant about his redundancy was that he was not initially in a position to do so and further that his understanding was that the protection during maternity leave quite rightly was that a person should not be put under any stress. His family situation was changing. He believed he had informed her in accordance with the contract when he did give notice.

67. The respondent consistently maintained his evidence with his answers. The respondent said they hadn't heard what the claimant's plans were and when they knew she wished to return to work they evaluated and reviewed all their options. The respondent said that he had not had any clear statement of the intention to return to work until the emails in early July and given his own experience that having children changed life, he had not speculated about the claimant's intentions. The respondent said he had genuinely wanted to know about the claimant's plans as they were considering whether they might use some assistance in the family such as part time or occasional help, his daughter going early to school. The respondent said that they realised if his daughter went to school early, she would need to develop her language skills and so they considered having a native English speaker for this. This role was not suitable for the claimant and they ruled out sending their daughter to school a year early. The respondent said they had heated discussions and it took time and he said he really didn't make his decision until the last moment. The respondent said that it was the last few days after 10 July when the decision was reached.

68. We accepted the respondent's evidence. The respondent had terminated the cover nanny's contract and in early July 2023 the family had been without paid childcare for several weeks. We found the respondent frank and forthcoming about the input of family and friends. We consider that ad hoc sharing of pick-ups and play dates is entirely ordinary and different from use of formalised regular paid childcare. We accept that the changes in the family's situation meant they had no requirement for a full time paid nanny or paid childcare. The respondent was asked a number of questions during cross-examination and a number of matters put to him testing and challenging his evidence on this and he maintained his evidence and shared additional detail and information about the options they had gone over.

69. We found that the reason for dismissal was redundancy. We further found that there was no suitable alternative vacancy.

70. On 20 July 2023, the respondent sent an email (HB 139) at 0130AM giving the claimant one month's notice of termination of her employment. The stated reason was 'the Nanny position is no longer available in our family. Unfortunately we do not need a nanny anymore. We were considering you for a different position but your experience is not matching job criteria.' The email also set out that 'We do not expect you to work during your notice period. You will be put on holiday starting immediately.'

71. We acknowledge that the claimant was shocked and hurt when she received notice of termination. We fully appreciate that news of termination of employment is upsetting in any circumstances. The respondent said that the notice email was sent at the time it was sent to avoid the claimant having to travel. We appreciate that it could have been handled differently by way of, for example, letting the claimant know she didn't need to attend on the first day of her return to work but arranging for discussion and then following up with the written notice. However, none of that detracts from the position and our finding that the respondent's actions were lawful in giving written notice of one month in accordance with the contract of employment.

72. The claimant did not take any paid holiday during her maternity leave which ended with her return to work on 20 July 2023. The claimant and the respondent agree that as of 20 August 2023, the claimant's accrued holiday entitlement was 152.8 hours as calculated by payroll.

73. On 20 July 2023, the claimant was given one month's notice in writing of the termination of her employment. This was in accordance with the contract of employment. The employer required the claimant to take her annual leave entitlement during her notice period. This was also in accordance with the contract of employment and lawful. We find that the claimant had therefore taken all her accrued annual leave entitlement when her contract terminated on 20 August 2023. We therefore find that the claimant was not owed any payment in lieu of accrued but untaken annual leave when her contract terminated.

74. We find that the protected period ended on 20 July 2023. We find that in so far as employment terminated on 20 August 2023 that was the implementation of the decision to dismiss taken during the protected period and is thus deemed to have occurred during the protected period.

75. There are two payslips dated 30 September 2023 in the HB. The first payslip recorded basic pay, 152.8 hours of holiday pay and 21 hours for ante-natal appointments. The second payslip removes the holiday pay item. We find that the first payslip did not conform to the instructions the respondent intended to convey. The second payslip records the amount £2300.82 net as due. That amount was paid to the claimant on 20 November 2023.

76. The claimant has not worked since her contract of employment with the respondent terminated. The claimant's schedule of loss includes the entry 'n/a' in relation to mitigation. The claimant was asked in cross-examination if she had taken any steps to mitigate her loss and looked for employment.

The claimant confirmed she understood what 'mitigation' meant and said she was surprised and shocked and it took her a while to accept that she needed a new job. She told the tribunal that she had not found any job suitable for her at the moment. We were not convinced that there was no childcare work that would have been suitable for the claimant to perform to be found in London in the relevant period and to date. We had no documentary evidence of any job-seeking by the claimant before us.

LAW

Automatically unfair dismissal

77. Section 99 (Leave for family reasons) of the Employment Rights Act 1996 is found at Chapter 1 (Right not to be unfairly dismissed), Part X (Unfair dismissal) and provides:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances.
> (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
> (3) A reason or set of circumstances prescribed under this section must relate to-
> (a) pregnancy, childbirth or maternity,
> ….
> (c) ordinary, compulsory or additional maternity leave,
> ….

78. Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999 provides:

> (1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if-
> (a) the reason or principal reason for the dismissal is of a kind specified in paragraph 3, or
> (b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.
> (2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if-
> (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;
> (b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
> (c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).
> (3) The kinds of reasons referred to in paragraphs (1) and (2) are reasons connected with-
> (a) the pregnancy of the employee;
> (b) the fact that the employee has given birth to a child;
> …
> (d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave.

79. Regulation 10 provides:

> (1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.
> (2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employer under her existing contract) alternative employment

with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3)(and takes effect immediately on the ending of her employment under the previous contract).
(3) The new contract of employment must be such that-
(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

80. Section 108(1) of the 1996 Act provides that the section 94 right not to be unfairly dismissed does not apply unless an employee has been continuously employed for a period of not less than two years but this qualifying period is disapplied if section 99 read with any regulations made under that section applies, section 108(3)(b).

81. Section 98(1) provides that in determining whether a dismissal is fair or unfair it is for the employer to show the 'reason (or, if more than one, the principal reason) for the dismissal. There is case law which provides authority for a different approach to the burden of proof in automatically unfair dismissal cases.

82. Overall, we have approached this on the basis that it is for the tribunal to reach findings and conclusions on the basis of the evidence presented. In **Kuzel v Roche Products Ltd 2008 ICR 799**, CA the burden of proof was considered in relation to a claim that the automatically unfair reason was the making of a protected disclosure (section 103A) where the employee had the requisite two year period of service. The Court of Appeal referred to three stages: (i) the employee produces some evidence to suggest the principal reason for the dismissal was the automatically unfair reason challenging the employer's evidence; (ii) the tribunal hears all the evidence and makes findings on the basis of direct evidence or reasonable inferences, and (iii) the tribunal must decide what the reason or principal reason for the dismissal was on the basis that the employer must show this. If the employer does not demonstrate the reason to the tribunal's satisfaction, the tribunal may accept the employee's reason or may find the true reason is one advanced by neither side.

Sex discrimination (section 13 Equality Act 2010)

83. Under section 13(1) of the Equality Act 2010 read with section 9, direct sex discrimination takes place where a person treats the claimant less favourably because of sex than that persons treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

Pregnancy and maternity discrimination, section 18 Equality Act 2010

84. Section 18 of the Equality Act 2010 provides:

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of the period).
(6) The protected period in relation to a woman's pregnancy, begins when the pregnancy begins, and ends-
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as –
(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

85. Section 136 of the Equality Act 2010 sets out the burden of proof in discrimination cases. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

86. Case law provides that the motivation or 'mental processes' of the decision-maker must be considered. Discrimination is often at the sub-conscious level and need not be the only or even the main reason for the less favourable treatment provided it significantly i.e. in a more than trivial way influenced the decision-maker. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out, **Nagarajan v London Regional Transport** [1999] IRLR 572, HL.

Holiday pay

87. The Working Time Regulations 1998 provide a right to be paid in lieu of accrued but untaken annual leave entitlement on termination of employment.

Right to payment/time off during pregnancy

88. Section 55-57 Employment Rights Act 1996 provide pregnant employees with the right not to be unreasonably refused time off to attend ante-natal appointments during working hours and the right to be paid for this period of absence. The right to 'time off' covers not merely the appointment but also travel/wait time.

ANALYSIS AND CONCLUSIONS

89. In light of the facts we have found, we have reached the following conclusions applying the law:

Automatically unfair dismissal

90. We refer to our findings above. We have concluded that we are satisfied that the reason or principal reason for the dismissal was redundancy.

91. We have therefore concluded that the reason for dismissal was not a reason of a prescribed kind. We concluded that there was no suitable available vacancy and therefore we are further satisfied that regulation 10 of the Maternity and Parental Leave etc. Regulations 1999 has been complied with. Accordingly, we have concluded that the claimant was not dismissed for an automatically unfair reason and was not unfairly dismissed.

Pregnancy/maternity discrimination, section 18 Equality Act 2010

92. We refer to our findings above. We have found and thereby concluded that the treatment complained of took place within the protected period. The protected period began when the pregnancy began and ended when the claimant returned to work on 20 July 2023, section 18(6). Although the dismissal took effect outside the protected period on 20 August 2023, the dismissal was the implementation of the decision to dismiss which was taken in the protected period and is therefore to be regarded as occurring in that period, section 18(5).

Fail to pay the claimant for the time she spent at ante-natal appointments.

93. We refer to our findings above. We have found that the respondent failed to properly categorise the time the claimant took for ante-natal appointments and required her to categorise that time and allocate it to her holiday entitlement. The respondent therefore failed to pay the claimant for time off *for* ante-natal appointments and failed to do so throughout her employment.

94. We found that given the failure to recognise her statutory entitlement to paid time off for ante-natal appointments, the treatment continued and the respondent deducted the amount of £351.33 from maternity pay for March 2023 to which the claimant was entitled. Thereafter, despite recognising what was referred to as a mistake, the respondent failed to raise the issue or instruct payroll to pay this amount to the claimant until 12 September 2023 after the claimant had contacted ACAS. We note that the claimant was not in fact paid the amount to which she was entitled to for time off for ante-natal appointments until 20 November 2023.

95. We have concluded that this clearly amounts to a detriment incurred by the claimant and is unfavourable treatment. The claimant was put in a position where she was required to treat time off for ante-natal appointments as counting towards her holiday entitlement, explain to and chase her employer in relation to her entitlement and communicate with payroll about this during her maternity leave. The claimant was also subject to deduction from her pay during her maternity leave.

96. Under section 18, the claimant does not have to identify any comparator. We have concluded that the claimant was treated unfavourably by the respondent failing and continuing to fail to pay her for time off for ante-natal appointments. We have no real or satisfactory explanation before us as to

why in particular there was a failure to pay the claimant from around April 2023 onwards or when the respondent understood that because of her pregnancy she had been entitled to be paid for time off for ante-natal appointments. We accept that the respondent had instructed a payroll provider but the respondent remained liable as the employer and at no point raised the issue as to payment for time off for ante-natal appointments during a period when there was communication as to holiday pay and an instruction to deduct monies from the claimant's pay during her maternity leave.

97. The causative reason for the time off for ante-natal appointments and the entitlement to be paid for that time off for ante-natal appointments was because of the pregnancy. We acknowledge that the respondent relied on payroll but he could reasonably at any point have raised questions with payroll rather than failed to engage with the claimant's request. We note the respondent was well aware that the time off was requested for ante-natal appointments. We refer to our findings above regarding this and the respondent's actions. In all the circumstances, we have concluded that this unfavourable treatment is to be regarded as influenced by the protected characteristic of pregnancy given it was the causative reason for the time off and as we had no reasonable or satisfactory explanation for not paying. We have therefore concluded that the claimant was treated unfavourably because of the pregnancy during the protected period by the respondent failing to pay her for time off for ante-natal appointments.

Fail to respond to emails.

98. We refer to our findings above. We have concluded that there was no failure to reply to emails. Accordingly, we have concluded that the claimant was not treated unfavourably in the protected period in relation to a pregnancy of hers because of pregnancy or maternity leave.

Fail to pay for pregnancy related sickness.

99. The claimant says that the respondent failed to pay her for pregnancy related sickness and that this is unfavourable treatment in the protected period because of the pregnancy. We refer to our findings above. The claimant was only entitled to statutory sick pay after four days of absence and in those circumstances, we have concluded that she was not treated unfavourably by not being provided with pay in relation to the one day of sick absence.

Dismissal

100. We have concluded that the reason or principal reason for the dismissal was redundancy. We have therefore concluded that the claimant's dismissal was not treatment in the protected period in relation to a pregnancy of hers because of the pregnancy, because of illness suffered by her as a result of it or because she is exercising, seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

Sex discrimination, section 13 Equality Act 2010

101. We refer to our findings above. We note that in so far as treatment is in the protected period in relation to her and is for a reason mentioned in section

18(2), (3) or (4), section 13 does not apply. We have therefore considered only the claimant's claims of direct sex discrimination in relation to the failure to respond to emails and the dismissal.

Fail to respond to emails

102. The claimant is taken to rely on a hypothetical comparator. We were not taken to any evidence that was cogent or persuasive to suggest that the claimant was treated less favourably than a male comparator. We concluded that there was no failure to respond to emails in any event.

Dismissal

103. We have concluded that the reason for dismissal was redundancy and refer to our findings and conclusions in relation to that. We have further concluded that the claimant was not treated less favourably than a comparator, namely a male nanny, would have been treated in the circumstances. We therefore do not need to consider the reason for less favourable treatment as we have not found there to be any in relation to the dismissal.

Holiday pay

104. We refer to our findings above that when the claimant's contract terminated on 20 August 2023, she had no accrued but untaken leave and was not entitled to any pay in lieu of accrued but untaken leave. Accordingly, we have concluded that the claimant's claim for holiday pay fails.

Breach of contract

105. The claimant claims that the respondent breached her contract of employment in failing to pay the amount of £191.75 in relation to Ofsted registration costs. This amount is the difference between the amount already reimbursed and a second fee of £103 and the total costs incurred of £565.85. We are satisfied this claim was outstanding on termination of employment. The respondent relies on the contractual provision that whilst reimbursement of expenses will be made this is only where authorised.

106. We refer to our findings above. We have concluded that there was authorisation for the claimant to incur costs related to Ofsted registration to be reimbursed by the respondent. We have further concluded that the respondent failed to pay the costs incurred in relation to Ofsted registration in full. We have therefore concluded that the complaint of breach of contract in relation to Ofsted registration costs is well-founded.

Remedy

107. We have considered what the appropriate remedy is in relation to the pregnancy/maternity discrimination experienced by the claimant. The claimant requests an award of injury to feelings to compensate her for the upset, distress and humiliation caused by the unlawful treatment she has received. The tribunal has discretion with regard the amount of any compensatory award. The claimant contends that she is entitled to the amount claimed for injury to feelings in her schedule of loss of £22,450 which is an award of compensation at the mid-point of the middle *Vento* band but this amount is claimed in relation to all her complaints of discrimination and we have dismissed all of her complaints other than in

relation to the failure to pay for ante-natal appointments. The respondent submits that any award should be low and thus the lower *Vento* band.

108. In the case of ***Vento v Chief Constable of West Yorkshire Police (No2)*** *[2003] IRLR 102*, the Court of Appeal identified three broad bands of compensation for injury to feelings and gave some guidance about their application. An award of sums in the top band should be in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. An award of sums in the middle band should be used for serious cases which do not merit an award in the top band. The lowest band is for less serious cases where the act of discrimination is an isolated or one-off occurrence. The figures have since been revised in various ways. We have taken account of the bands for cases brought on or after 6 April 2023 in light of the claimant's claim being presented on 30 November 2023 namely £1,100 – 11,200 for the lowest band and £11,200 - £33,700 for the middle band and £33,700 – 56,200 for the top band.

109. The claimant did not receive pay for time off for ante-natal appointments before she went on maternity leave in July 2022 as the pay she received was for holiday although we note she did in fact receive money at the time. During her maternity leave, and in March 2023 she queried her holiday entitlement further to which deductions were made to her statutory maternity pay and it was not until September 2023 that there was instruction to payroll that she was entitled to be paid for time off for ante-natal appointments after she had approached ACAS. During this period, the claimant was on ordinary and then additional maternity leave and her income was reduced by the deduction referable to the ante-natal appointments. The claimant felt hurt and upset during this period and had to push and chase both the respondent and payroll to make good what she was due at a time when she should have been able to focus on her maternity. We have reflected on whether what happened to the claimant should be categorised as a one-off incident noting its ostensible containment to the ante-natal appointments. We have concluded that this was more than a single isolated incident such as an isolated remark or act because it continued over a period of time as outlined above.

110. We have taken account of the fact that the discrimination experienced was in the context of an employer who was not familiar with employment law and used a payroll service in relation to a single employee being the family nanny. We also note that the claimant was in fact paid for time off before she went on maternity leave in July 2022 even though she was not paid for time off for ante-natal appointments and this money was thereafter taken away around March 2023. We note that payment was only made after the claimant went to ACAS. We note that the claimant gave evidence about the impact of the treatment occurring as it did during a time when she should have been focussed on maternity. We were also mindful that the injury to feelings and impact the claimant says she experienced because of the discrimination cannot be easily disentangled from her overall shock and distress at being dismissed and linked directly to the discrimination for which compensation is due. We noted our findings of fact above as to the impact on the claimant arising from the discrimination including that whilst on 19

May 2023 she opted to extend her leave, the claimant also indicated in July 2023 that she wished to return to work with the respondent.

111. We bear in mind some general principles in exercising our discretion. Awards should not be so low as to diminish respect for the policy and that society condemns discrimination whilst restraining excessive awards as the route to untaxed riches. We take into account the value in everyday life of the sum by reference to purchasing power or earnings.

112. In the circumstances, we have decided to exercise our discretion and make an award at the lower end of the lowest Vento band of £3,500 as compensation for injury to feelings. We did not exercise discretion to award interest on the award of compensation.

113. The claimant claims £191.75 in damages for the breach of contract being the amount related to the costs of Ofsted registration which was not reimbursed by the respondent. We decided to award £191.75 as damages for breach of contract.

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Tribunal Judge Peer acting as an Employment Judge

29 May 2024

Sent to the parties on:

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For the Tribunals Office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/