EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss K Easter-Bauly	v	T Jegajeevan

Heard at: Watford (via CVP) **On:** 10 & 13 September 2024

Before: Employment Judge Malik
Tribunal Member F Betts
Tribunal Member C Davies

Appearances
For the claimant: Mr Elliot (Counsel)
For the respondent: Did not attend and was not represented

RESERVED JUDGMENT

1. The claimant's complaint of automatic constructive dismissal is not well founded and is dismissed.

2. The claimant's claim that she was discriminated against because of pregnancy or maternity is not well-founded and is dismissed.

3. The claim of direct discrimination because of perceived race is not well-founded and is dismissed.

4. The claimant's claim for holiday pay is well founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended. The respondent is ordered to pay claimant the gross sum of £228.80.

5. The claimant's claim for unlawful deduction from wages is well founded. The respondent made an unauthorised deduction from the claimant's wages in the wageslip period in April 2023. The respondent is ordered to pay the claimant the gross sum of £65.64.

6. The claimant's remaining claims for breach of contract are not well founded and are dismissed.

7. The total gross amount the respondent is to pay the claimant is the sum of £294.44. The claimant is responsible for the payment of any tax or National Insurance.

8. The claimant's application for the respondent to pay its legal costs is refused.

We apologise for the delay in processing the reserved judgment due to unexpected judicial sickness.

REASONS

Introduction

1. The claimant was employed by the respondent, who trades in business as a pre-school, as a deputy/assistant manager from 7 March 2022 until 18 May 2022.

2. Early conciliation started on 11 August 2022 and ended on the same date. The claim form (form ET1) was presented on 14 August 2022.

3. The respondent did not present a response (ET3) when the claim form was sent to her. At a case management hearing on 13 June 2023, Employment Judge Spencer noted that the claim form did not give sufficient details of the claims and that the claimant was required to add additional information about her claim. The respondent's time for responding to the claim was extended until after the additional information was available.

4. The claimant makes claims for unfair dismissal, race discrimination, pregnancy/maternity discrimination, unlawful deduction from wages and breach of contract in respect of notice pay, holiday pay, arrears of pay and other payments.

5. The claimant claims that she resigned from employment in circumstances where she was entitled to treat herself as constructively dismissed. The claimant claims that the respondent breached the terms of her contract in that she failed to per her fully, discriminated against her on the grounds of her perceived race, discriminated against her on the grounds of pregnancy/maternity, harassed and bullied her by her conduct in meetings and excluded her from meetings, and that these actions caused her to resign.

6. In terms of her pay, the claimant claims she should have received notice pay after she handed in her notice, that she had accrued but had not taken holidays and should be paid for this, was underpaid throughout her employment and had expenses that had not been reimbursed.

7. A further case management hearing was held on 2 November 2023 at which a number of orders were made including one requiring the parties to agree a List of Issues. The parties did not comply with this requirement for an agreed List of Issues. The Tribunal have had to set the List of Issues during the Final Hearing.

8. A final case management hearing took place on 31 January 2024, the respondent did not attend nor send a representative to this hearing. At that hearing a Show Cause order was made for the respondent's failure to comply with the Tribunal's Order of 2 November 2023.

9. A judgment was entered on 16 April 2024 striking out the Respondent's response for failure to comply with the Case Management Order of 31 January 2024 and on the basis that the Response had not been actively pursued.

10. The Final Hearing took place on 10 September with panel deliberations on 13 September. At the hearing the claimant was represented by Mr Elliott of counsel, and gave evidence herself in support of her claim. The respondent did not attend and was not represented. We were satisfied that the respondent had been notified of the hearing and had chosen not to attend.

11. The claimant does not have two years continuous service which is normally required for the Tribunal to hear a claim of unfair dismissal. A previous case management hearing noted down the need to resolve the issue of jurisdiction to bring the claim of unfair dismissal. The claimant pleads a claim of automatic unfair dismissal; section 104 assertion of a statutory right, and therefore the two year rule is disapplied and the Tribunal had jurisdiction to hear the claim on its merits.

12. The Tribunal had access to a bundle of documents that ran to 59 pages, a 7 page Position Statement from the Claimant and an email from Claimant's representative referring to legal authorities they relied upon.

Issues to be decided

13. The issues to be decided were:

13.1. ***Constructive Unfair dismissal –***

13.1.1. Did the respondent do the following things:

13.1.1.1. Engage in persistent breaches of the employment contract;

13.1.1.2. Discriminate against the claimant on the grounds of her perceived race;

13.1.1.3. Discriminate against the claimant on the grounds of pregnancy and maternity;

13.1.1.4. Create a hostile work environment.

13.1.2. Was the respondent's conduct a reason for the claimant's resignation?

13.1.3. Did the claimant affirm the contract before resigning, by delay or otherwise?

13.1.4. Whether the Tribunal has jurisdiction to consider the claim given that the claimant did not have two years continuous employment with the respondent as at the date of her alleged constructive dismissal.

Remedy for Constructive Dismissal

13.1.5. If there is a compensatory award, how much should it be?

13.1.5.1. What financial losses has the dismissal caused the claimant?
13.1.5.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
13.1.5.3. If not, for what period of loss should the claimant be compensated?
13.1.5.4. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

13.1.6. What basic award is payable to the claimant, if any?

13.1.7. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

13.2. **Pregnancy and Maternity Discrimination**

13.2.1. Did the respondent treat the claimant unfavourably by doing the following things:

13.2.1.1. Verbally aggressive towards the claimant in a meeting on 11th May 2022.
13.2.1.2. Say " it's your fault for getting pregnant" when the claimant asked about maternity pay.

13.2.2. Did the unfavourable take place in a protected period?
13.2.3. Was the unfavourable treatment because of the pregnancy?

12.3 Race discrimination

12.3.1 The claimant is a British National but was allegedly by the respondent to be of Russian origin.

12.3.1.1 Did the respondent say that the claimant was a Russian spy on 7th March 2022 ;

12.3.1.2 Did the respondent leave the claimant out of meetings as a result of a belief that she was a Russian spy.

12.3.2 Has the claimant proven facts from which the Tribunal could conclude that the claimant was treated less favourably than someone in the same material circumstances of a different perceived race was or would have been treated?

12.3.3 Has the claimant proven facts from which the Tribunal could conclude that the less favourable treatment was because of her perceived race?

12.4 Remedy for discrimination

12.4.1 What financial losses has the discrimination caused the claimant?

12.4.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

12.4.3 If not, for what period of loss should the claimant be compensated?

12.4.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

12.5 Holiday Pay (Working Time Regulations 1998)

12.5.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

12.6 Unauthorised deductions

12.6.1 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

12.7 Breach of Contract

12.7.1 Did the respondent do the following:

12.7.1.1 Fail to pay the claimant the expenses she had incurred.

12.7.1.2 Make unauthorised deductions from wage by falsifying hours

12.7.2 If so how much should the claimant be awarded.

Findings of fact

13. The relevant facts are as follows. We were required to resolve disputes in the evidence and set these out as part of our findings of fact.

14. The claimant began working for the respondent on 7 March 2022 and her employed ended on 18 May 2022 following her resignation on 11 May 2022. The claimant worked for the respondent in the role of a deputy manager and worked between 8-4 every day. The claimant and other employees were allowed to leave early if they had not taken their break in that particular day. The claimant states that a contract of employment was provided to her but this did not feature in the bundle of documents provided to the Panel. The claimant was also not able to produce this when asked for it by the Tribunal.

15. The Tribunal were not provided with information about the claimant's salary. We were not provided with a contract of employment or any other written evidence about hourly rate, annual salary or any agreement on hours to be worked.

16. The claimant claims she worked 40 hours a week and was paid monthly. It is stated that she was to be paid an annual salary of £22,880 which equated to £11 per hour. The claimant also reports in her witness statement that she worked 1 weeks' notice. There was no clear evidence to support the number of hours worked and the annual salary. There were some unnamed and undated spreadsheets and detail in an undated witness statement from Hayley Gough that referred to an hourly rate of £11. The Tribunal can find that is more than likely than not that the claimant was paid an hourly rate of £11 however we can no make any other findings of fact beyond this.

17. The claimant states that she was to be paid monthly with a payslip being produced. The Tribunal have seen wage slips for 31 March in the net sum of £1305.64 and 30 April 2022 in the net sum of £1569. There is no wage slip for 30 May 2022.

18. The claimant provided screenshots of text messages where she had to chase the respondent for payment on the following occasions:
    a. 28 March 2022
    b. 8 April 2022
    c. 12 April 2022

19. The claimant received payments of £500 on 8 April, £740 on 13 April and £1569 on 11 May. The Tribunal do not know if any other payments were received as they only had the benefit of redacted and limited bank screenshots. It was clear the Tribunal that these payments were sporadic.

20. The claimant did not take any holiday in the time she worked for the respondent; the wage slips provided do not show any deductions for holidays.

21. The claimant started a new job on 30 or 31 May 2022. Her evidence about this was confusing and she initially claimed in her oral evidence that she was out of work for many weeks. When the panel asked her about the time period for her sicknote and reference in the ET1 to an earlier start date, the claimant conceded she started on/around 30 or 31 May 2022.

22. The claimant stated that she provided a one line handwritten letter of resignation on 1th May 2022 and worked one week of notice until 18 May 2022. The claimant was not able to provide a copy of the letter which she says was handed in to the respondent.

23. The claimant suffered a miscarriage on/around 9 June 2022, a few weeks after she left the respondent's employment. The claimant has produced a sick note and a screenshot of an entry from her medical record. She was paid statutory sick pay on 18 June 2022, in the sum of £59.61 and on 25 June in the sum of £99.35.

24. We found that the respondent did consider the claimant to be a spy from a nearby nursery and there may have been fears that the claimant was spying on her to report her to Ofsted. We did not find that the respondent called the claimant a Russian spy. The claimant's evidence on this is confusing and unconvincing. In her ET1 she refers to being asked if she was Russian and then moves on to a different allegation of being called a spy from another nursery. We noted that the claimant then went on in her witness statement to reiterate the same position and did not tie up the allegation of being Russian with the allegation that she was a spy from a neighbouring nursery.

25. It was not until her oral evidence that the claimant stated that she was taken aside by the respondent and said that she is untrustworthy of new people and it was because the claimant was Russian. The claimant then provided further oral evidence to confirm that her colleagues would make a joke about this to make things more jovial and that the claimant was told that the respondent mistrusted everyone. We therefore did not find the claimant's evidence convincing and did not find as a matter of fact that the claimant was called a Russian spy by the respondent. The claimant is however consistent in her account throughout her ET1, witness statement and oral evidence that she was asked by the respondent if her name was Russian. We find that this happened as a matter of fact.

26. The claimant states that she met with the respondent on 11th May 2022 to confirm that she was pregnant and that she was asked to leave by the respondent. The claimant states that this was the catalyst for her resignation letter. In her oral evidence the claimant expanded this to confirm that the respondent stood up and bashed her hands on the table and was told it was inconvenient to have a member of staff who had fallen pregnant. We did not find enough evidence to safely conclude as a matter of fact that this conversation happened or happened in the manner described by the claimant. The claimant's evidence was confused and inconsistent between her witness statement and her oral evidence, expanding facts and allegations that could and should have been in at an earlier stage.

27. The Panel accept as a matter of fact that the claimant sadly miscarried, there is no evidence that was provided to the Tribunal that links the miscarriage to the claimant's employment with the respondent.

Relevant Law

Constructive Dismissal

28. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).

29. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (*Malik v BCCI SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).

30. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is likely to be able to accept that repudiatory breach and terminate the employment contract (*Morrow v Safeway Stores Plc [2002] IRLR 9*).

31. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (*Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131*). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (*Garner v Grange Furnishing [1977] IRLR 206*.

32. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (*Wright v North Ayrshire Council [2014] ICR 77*). The tribunal is able to ascertain the true reason for the employee's resignation (*Weathersfield Ltd v Sargent [1999] ICR 425*).

33. When faced with a repudiatory breach of contract, an employee could choose to either accept the breach, which ends the contract, or could affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (*WE Cox Turner (International) Ltd v Crook [1981] ICR 823*). Affirmation may be inferred by conduct and what the claimant says or does

which shows that they intend the contract to continue (*Chindove v William Morrison Supermarkets Plc EAT 2001/13*).

34. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In *Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB)*, Calver J said, at para 121:

> *"It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case."*

Complaint under section 104 of the 1996 Act

35. We reminded ourselves of the provisions of section 104 of the 1996 Act which read;

Assertion of statutory right.

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

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

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

36. *Waddingham v NHS Business Services Authority [2011] UKEAT/0153/10/JOJ* - clarified that an employee could bring a constructive dismissal claim even with less than two years of service, provided the dismissal was for an automatically unfair reason, such as whistleblowing or asserting statutory rights. This principle extends to cases involving pregnancy and maternity discrimination under the Equality Act 2010.

Pregnancy and Maternity Discrimination

37. Section 18 of the Equality Act prohibits discrimination in pregnancy and maternity discrimination:

(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 sort 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 that 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. 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 two weeks beginning with the end of the pregnancy

38. This section protects expectant and new mothers against "unfavourable treatment" by their employer, and not "less favourable" treatment as in section 13. It is not necessary therefore to identify a comparator.

Burden of proof

39. We are required to apply the burden of proof provisions under section 136 EA when considering complaints raised under the EA.

40. Section 136 states:

" (*1) This section applies to any proceedings relating to a contravention of this Act.*

(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection 2 does not apply if A shows that A did not contravene the provision."

41. We have also considered the guidance contained in the Court of Appeal's decision in ***Wong v. Igen Limited [2005] EWCA 142***. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. It is the annex to the judgment particularly that provides guidance (the amended Barton guidance). We note the following particularly from the guidance (recognising that the guidance is now relevant to the application of s136 EqA)

    a. That it is guidance only and not a substitute for the statutory language

    b. It is for the claimant to prove on the balance of probabilities, facts from which the tribunal could conclude, in the absence of adequate explanation, that the respondent has committed an unlawful act of discrimination. If the claimant does not prove such facts, then the claim will fail.

    c. It is unusual to find direct evidence of discrimination.

    d. It is important to note the use of the word "could" at s136(2) – that, at this stage of analysis, a definitive determination does not have to be made.

    e. The Tribunal needs to decide what inferences of secondary facts can be made from the primary facts at this stage, on the assumption there is no adequate explanation for those facts?

    f. Where the claimant has proven facts from which the Tribunal could conclude that the respondent has treated claimant less favourably on the grounds of (in this case) the claimant's race then the respondent must prove that it did not do so. It must pro9ve that the treatment of the claimant was in no sense whatsoever on the grounds of the claimant's race.

    g. The tribunal will need to assess (1) whether the respondent has provided an explanation for the relevant facts and (2) that the explanation is adequate to discharge the burden of proof on a balance of probabilities.

    h. The facts necessary to discharge the burden of proof would normally be in the possession of the respondent and a tribunal would therefore normally expect cogent evidence to discharge that burden of proof.

42. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example ***Madarassy v. Nomura International [2007 ICR 867]*** where the following was noted in the judgment: "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*."

Race Discrimination

Direct discrimination

43. *Section 13(1) Equality Act 2010* provides:-

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*.

44. This means that the claimant would have suffered from direct discrimination if we find that she was treated less favourably than someone who was not of perceived Russian origin.

45. The claimant must establish that he was objectively treated in a 'less favourable' way. It is not sufficient for the treatment to simply be 'different' ***(Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL***). The person(s) with whom the comparison is made must have *"no material difference in circumstances relating to each case"* to the person bringing the claim (*section 23(1) Equality Act 2010*). The comparator should, other than in respect of the protected characteristic, *"be a comparator in the same position in all material respects as the victim" (**Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL**)*. There is no requirement for a comparator to be identical, but the greater the differences, the less likely it might be that the difference in treatment was because of discrimination and so more is likely to be required to shift the burden of proof (**Virgin Active Ltd v Hughes [2023] EAT 130**.

46. If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have the protected characteristic relied upon *(***Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA***)*.

47. The phrase 'because of' is a key element of a direct discrimination claim. In **Gould v St John's Downshire Hill [2021] ICR 1 EAT,** Mr Justice Linden said, in respect of determining 'because of':-

> *"It has therefore been coined the 'reason why' question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. In need not be the sole ground for the decision… the influence of the protected characteristic may be conscious or subconscious."*

48. Under *section 136(2) Equality Act 2010*, the claimant needs to show facts, found on the balance of probabilities, which could lead the Tribunal to properly conclude that the discrimination has occurred before any other explanation is taken into account. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). The Tribunal must first consider whether the burden does shift to the respondent. The claimant must show more than simply there is a protected characteristic and a

difference in treatment (*Madarassy v Nomura International Plc [2007] IRLR 246*). The operative point is whether the Tribunal could conclude there had actually been discrimination, not simply that there might have been (*Hammonds LLP v Mwitta [2010] 0026/10)*.

49. *S136* clearly sets out a two stage test, but the Tribunal is cautioned against applying that test in a way which is too mechanistic. This is important to ensure that discrimination is not incorrectly imputed into circumstances where the case is simply about unreasonable treatment for other reasons, or unfortunate circumstances (*Chief Constable of Kent Constabulary v Bowler [2016] EAT 0214/16*). There is a manifest difference between unreasonable treatment of a claimant, and unlawful discrimination (*Bahl v The Law Society [2004] EWCA Civ 1070*).

50. Once the burden has shifted, if it does, the respondent must show that the treatment was 'in no sense whatsoever' due to the protected characteristic *(***Igen Ltd v Wong [2005] IRLR 258***)*. In weighing up whether or not there has been discrimination, the Tribunal should consider all of the evidence from all sides to form an overall picture. Causation, or the 'why' the conduct was committed, is a subjective conclusion of law rather than objective conclusion of fact: what is the reason for the conduct and is that reason discriminatory (*Chief Constable of West Yorkshire Police v Kahn [2001] UKHL 48)*. It is almost always the case that the Tribunal needs to discover what was in the mind of the alleged discriminator (*The Law Society v Bahl [2003] IRLR 640*).

Unlawful deductions from wages

51. The Employment Rights Act 1996 ("ERA") provides:

13 *Right not to suffer unauthorised deductions*

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) 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

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

52. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.

Discussion and conclusions

Evidence and witness demeanour

53. Before we provide conclusions on the various heads of claim, it is important to set the scene about the weight attached to evidence and the emphasis we have placed on the witnesses and their reliability.

54. We have not found the claimant to be a clear and honest witness. A lot of the claimant's evidence was confusing and unclear and in parts changed between what was set out in her ET1, her statement and then her oral evidence. The claimant had large gaps in her evidence and a seeming unwillingness to provide information that she should and likely could have to support many allegations she was making. We also did not find that the claimant was totally reliable in relation to her evidence about how long it took her to find a new role after she left the respondent's employ. In her ET1 the claimant noted this down as 30 May 2022 and in her oral evidence she suggested a far greater period of unemployment. It was only when she was questioned about this by the Panel seeking clarification that she conceded she had only been out of work for a few weeks.

55. Ms Gough was not presented to give oral evidence and therefore the Tribunal did not have the opportunity to ask any questions to neutrally clarify her evidence. Ms Gough produced a witness statement signed but undated without a statement of truth. We also note that Ms Gough had her own tribunal case pending in the Employment Tribunal. We therefore were not able to give significant weight to the written statement particularly where it was not supported by the evidence elsewhere in the bundle provided to the panel.

56. We noted the absence of any reference to the issue of race discrimination. Ms Gough's statement alluded to the claimant being called a spy as a result of her previous employment at a competitor nursery. Further, we noted that Ms Gough's statement was silent on the issue of discrimination arising from pregnancy/maternity. Finally, we noted that Ms Gough's witness statement did not set out any figures of facts to support her allegations that the respondent was cutting the pay owed to the claimant. Whilst there is reference to amending break times in the screenshots of text messages between Ms Gough and the respondent, there is no further information to confirm how this affected payments that the claimant said she was owed.

Breach of contract

57. The claimant pleads multiple breaches of her employment contact. The Position Statement of the claimant dated 24 July 2023 states that there were multiple breaches of the employment contract dated 7 March 2022. The Tribunal have not been provided the contract of any evidence of the contents of the contract.

58. The alleged breaches were set out as:

    a. Payment of agreed remuneration
    b. Payment of expenses
    c. Unauthorised Deduction of Wages
    d. Pension Enrolment
    e. Grievance Procedure
    f. Payment of Holiday Pay at conclusion of employment

Payment of agreed remuneration and unauthorised deduction of wages

59. We found as a fact that the claimant was entitled to be paid £11.00 per hour as set out above however we made no findings beyond this in relation to annual salary and the dates on which the claimant was entitled to be paid. We were not provided any evidence upon which we could conclude with certainty the number of hours the claimant was entitled to be paid and on what day of the month. The claimant alleges payment arrears of £1279 which are made up of :

    7 April 2023 - £304.64
    7 May 2023 - £22.00
    7 June 2023 - £952.36

60. The evidence provided to us in the form of the claimant's bank screenshots support the idea that whilst there were sporadic payments overall, that the claimant was paid by the respondent and that the only underpayment was for the sum of £65.64 for her April payslip.

61. There is no cogent evidence to support any deduction of hours for the month of May and we have no evidence about any final payment to the claimant. We were not provided with a payslip or any corroborating bank statements. We were not persuaded by the claimant's witness statement or oral evidence in respect of this matter which was confusing and not clear and the figures provided by the claimant's representative were confusing and contradictory.

62. The evidence in respect of deduction of hours was confusing and unhelpful. The claimant relied upon screenshots of messages between Miss Gough and the respondent and then Miss Gough and the claimant. The messages were difficult to decipher and did not provide a clear position on which the Tribunal could be satisfied on the balance of probabilities that there had been an unauthorised deduction. At most we were able to conclude that there was discussion between the respondent and Miss Gough about entitlement for breaks and the claimant

did accept that the respondent allowed staff on occasion to leave early if they did not take a break. The timing and manner in which a break is taken does not provide us with the detail about whether a break should be paid for or not. The further confusion arose because the text messages shared were from July 2022, a few months after the claimant had left the respondent's nursery. The evidence as a whole was confusing and not persuasive.

63. We also did not have the benefit of a contract of employment or any communications between the parties about levels of pay or changes in levels of pay. The evidence put forward was in the form of unsubstantiated and unsigned documents in the form of a unsubstantiated spreadsheet, confusing evidence in text messages about hours owed and an undated witness statement from Hayley Gough which we applied very little weight to.

64. Therefore, whilst the claimant succeeds with her claim for failure to pay the agreed remuneration, the evidence only supported an underpayment of £65.64 in April 2022.

Expenses

65. The Tribunal were not persuaded that we had any cogent evidence to support the claim for a failure to pay expenses in the sum of £15.17 for snacks and drinks for the children at nursery. The only evidence was an entry on an excel spreadsheet which notes the figure of £15.17 but does not say how and why the claimant's entitlement to the expenses was established and no receipts or bank statements were provided to confirm the figure.

66. The Panel noted that Ms Gough's written statement did not refer to this underpayment. We therefore did not allow payment of this sum.

Holiday pay

67. Whilst we do not have a contract of employment we have been able to confirm that there were no payments for holiday pay noted on the two wage slips provided in the evidence bundle. The claimant is entitled to holiday pay, as a statutory right and we were persuaded by the calculations, as set out below, by the claimant in her Position Statement:

    a. 5.6 weeks annual entitlement
    Pro rata calculation based on time employed = 44.8 hours
    b. Minus 3x Bank Holidays @ 8 hours = 24 hours
    c. Hours Accrued = 20.8 hours
    d. Hours Accrued (20.8) x Agreed Hourly Rate (£11.00) = Amount Owed (£228.80)

68. This calculation is based on the statutory entitlement and reflects the finding of fact made that the claimant was paid £11 an hour. We therefore found on the balance of probabilities that the respondent had not paid holiday pay for the accrued holiday that the claimant was entitled to. The sum payable being £228.80.

Miscellaneous breach of contract

69. The claimant's position statement refers to breaches of contract relating to Pension Enrolment and Grievance Procedures however the claimant's witness statement and oral evidence did not address this at all and neither did the claimant's representative and there was no further evidence in the bundle in respect of this. As a result both these aspects were not proven.

Conclusion on breach of contract

70. Overall, we concluded that the respondent did breach the claimant's contract, in this case what can be deemed implied terms of a contract, in respect of failing to pay her holiday pay and for the underpayment of wages in April.

Pregnancy/Maternity Discrimination

71. The claimant's pleaded case is that on 11 May, during a meeting with the respondent in which she confirmed her pregnancy, the respondent became verbally aggressive towards her forcing her resignation. The claimant states that the tone and volume used by the respondent caused the claimant significant alarm and distress and she was told by the claimant "that's your fault for getting pregnant". The claimant states that the respondent's behaviour and demeanour resulted in the claimant being fearful and handing in her resignation.

72. The Panel noted that the claimant did not make mention of this meeting in her ET1, although she did tick the box alleging discrimination arising from pregnancy. Further in her unsigned and undated witness statement the claimant refers to the respondent being frustrated and saying "if I was pregnant I should leave". Finally, in her oral evidence the claimant stated that respondent had reacted horribly and had said that being pregnant was her fault.

73. The claimant's accounts were different in all three places, whilst not markedly so and there were similarities in some of her accounts but overall the Panel did not judge the claimant to be a reliable and convincing witness.

74. It is of course for the claimant to prove on the balance of probabilities, facts from which the tribunal could conclude, in the absence of adequate explanation, that the respondent has committed an unlawful act of discrimination. If the claimant does not prove such facts, then the claim will fail. We found the claimant did not persuade the Panel that there had been an unlawful act of discrimination.

Race discrimination

75. In our factual findings we did not conclude that the claimant was called a Russian spy by the respondent. As noted the claimant flitted between being called a spy for a nearby nursery and being called a Russian and only tied up the two issues in her oral evidence.

76. The Panel noted that even the claimant's own witness; Ms Gough did not make reference to the claimant being called a Russian spy. The evidence in the bundle supports the notion that the claimant was told by colleagues that the respondent was mistrustful of all staff.

77. We therefore did not find that the claimant was treated any less favourable than someone who was not perceived to be of Russian origin and therefore do not conclude that the claimant was discriminated against.

Constructive dismissal

78. The claimant pleads a claim of automatic unfair dismissal; section 104 assertion of a statutory right, and therefore the two year rule is disapplied and the Tribunal had jurisdiction to hear the claim on its merits.

79. The question that the Tribunal has to conclude is whether or not where the claimant was entitled to terminate her employment contract because she says that the respondent seriously breached the contract in a way which goes to the root of the employment contract. We would need to consider whether the respondent has conducted herself in a manner that would be likely to destroy or seriously damage the relationship of trust and confidence.

80. As a result of factual findings and conclusions already set out in this judgment, we do not find that any actions by the respondent were of such a nature that they destroyed or seriously damaged mutual trust or confidence.

81. The claimant relies upon the following actions by the respondent to support her pleaded claim of automatic constructive dismissal; persistent breaches of the employment contract, Race Discrimination and Pregnancy & Maternity discrimination which amounted to the harassment and bullying of the claimant.

82. We have already concluded that the claimant's claims for Race and Pregnancy & Maternity discrimination fail and therefore these cannot be adequate bases upon which the claimant states that she is entitled to resign.

83. We are then left with the allegations of breach of contact. We have concluded that there were some breaches of contract, in failing to pay holiday pay and one underpayment of wages in April in the sum of £65.64 however we do not consider these to be so serious that they would destroy or seriously damage the relationship of confidence and trust.

84. We therefore conclude that the claimant was not entitled to terminate her employment contract in the way she did and that the claim for constructive dismissal is therefore without merit.

Overall disposal

85. We found that all claims apart from the claim for holiday and unlawful deduction from wages, were not well founded and did not succeed.

86. The claimant's claim for holiday pay is well founded. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended. The respondent is ordered to pay claimant the gross sum of £228.80.

87. The claimant's claim for unlawful deduction from wages is well founded. The respondent made an unauthorised deduction from the claimant's wages in the wageslip period in April 2023. The respondent is ordered to pay the claimant the gross sum of £65.64.

88. The total gross amount the respondent is to pay the claimant is the sum of £294.44. The claimant is responsible for the payment of any tax or National Insurance.

Employment Judge Malik

Date: 18 March 2025

Sent to the parties on:

20 March 2025

For the Tribunal Office: