# EMPLOYMENT TRIBUNALS

**Claimant:** Malgorzata Slyk

**Respondent:** Nursery @ Aspire

**Heard at:** Croydon

**On:** 7-11 July 2025

**Before:** Employment Judge Liz Ord
Tribunal Member Norina O'Hare
Tribunal Member Christine Lloyd-Jennings

**Representation:**
Claimant: Mr Michael Cairns (lay representative)
Respondent: Ms Lucy Evanson (counsel)

Judgment having been given orally on 11 July 2025, subsequent to a request for written reasons by the claimant in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure, the following judgment and reasons are provided.

# JUDGMENT

The unanimous decision of the panel is:

1. The breach of contract claim is dismissed.

2. The complaint of pregnancy and/or maternity discrimination is dismissed.

3. The tribunal finds that there was a breach of the flexible working time provisions.

4. The complaint of detriment due to making a flexible working request is dismissed.

5. The constructive unfair dismissal claim is dismissed.

6. The victimisation complaint is dismissed.

7. The tribunal finds it just and equitable to make an award of 4 weeks gross pay to compensate for the breach of the flexible working time provisions. The respondent is ordered to pay the claimant the sum of £2,351.92 (4 x weekly gross pay of £587.98).

# REASONS

## The Complaints and Issues

1. The complaints and issues are set out in the attached Annex. The List of Issues was agreed at the Case Management Hearing on 25 June 2025.

## Evidence

2. The tribunal had before it the following documentary evidence:

   Documents bundle (368 pages), cast list, chronology (including claimant's comments), witness statements for claimant and the four respondent witnesses detailed below, mitigation bundle, written submissions from claimant and respondent.

3. On behalf of the claimant we heard evidence on oath from:

   3.1. Malgorzata Slyk

4. On behalf of the respondent we heard evidence on oath from:

   4.1. Stephen Elson (former Volunteer Trustee of respondent).
   4.2. Chantel Ariannejad (Nursery Manager).
   4.3. Claudia Lorena Tesillo Gomez (Aspire Centre Development Manager).
   4.4. Panagiota Valogianni (Safeguarding Lead at Nursery).

5. Number references in brackets ( ) are to the documents bundle. References in brackets in the format [XX 01] are to paragraphs within witness statements.

6. Only findings of fact relevant to the issues, and those necessary for the tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The tribunal has not referred to every document it read and/or was taken to in the findings below, but that does not mean it was not considered if the tribunal was taken to the document in evidence or as part of a reading list.

## Findings of Fact

7. The claimant worked for respondent as a nursery assistant from April 2014 to October 2015 and from November 2016 to January 2019. From 1.6.2020 to 17.5.2024 she was employed by them as a room leader.

8. The nursery, which is a charity, is a small organisation. It had around 12 full time staff and 14 bank staff in 2023 (Report to the Trustees for year-end Dember 2023)(Figures for February to September 2024 at 197 are similar). It was connected to Southfields Academy, although it was a separate body. It did not have a full time HR Officer, although it was given some assistance from Southfields Academy.

**Maternity Pay**

9. In 2018 the respondent introduced Occupational Maternity Pay (OMP) for the first time (189). The provision was set out in the Maternity Leave Booklet (159) and read:

   "OMP is paid for 12 weeks on top of SMP equating to 90% of pay."

10. The claimant went on maternity leave on 13.2.2023 with her proposed return date being 12.2.24.

11. On 20.6.2023 Ana Maria Gelves (a new part time HR Officer for the nursery) wrote to the claimant about overpayments made by a new payroll provider, leading to errors in her payslip. They identified an overpayment and requested it be paid back (145).

12. On 6.7.2023 the claimant replied (153-155) saying she had read the Maternity Leave Booklet and asked for clarification on how maternity pay was calculated, saying she had been underpaid by approximately £5,000 gross. She set out her interpretation of the maternity pay provision which was that OMP of 90% was to be paid on top of SMP. She said she had not received OMP for 12 weeks and did not receive higher rate SMP for 6 weeks on top of OMP.

13. Ms Gelves replied on 10.7.2023 (152) saying that the payment of OMP was on top of SMP without surpassing 90% of her current salary. She attached the claimant's maternity pay schedule.

14. The schedule (137) in the top right hand corner stated:

   "12 wks @ 90% (SMP offset)"

15. It had columns for SMP and OMP. For weeks 1 to 6 it showed a figure equating to higher rate SMP at 90% pay. In the OMP column the figure was zero. From weeks 7 to 12 it showed a figure for lower rate SMP and in the OMP column, a figure topping up salary to 90%. Thereafter the SMP figures were at lower rate and there was no OMP.

16. On 10.7.2023 the claimant texted her colleague, Peggy (Panagiota Valogianni), who had recently been on maternity leave, and asked her whether she had received occupational maternity pay on top of statutory maternity pay for 12 weeks.

17. Peggy replied no. She said the statutory payment is 6 weeks but the nursery gives us 6 more weeks of 90%. She said she didn't know it was called occupational (text chain at 216 - 217).

18. In XX evidence Peggy said that when she joined the nursery she was aware that she would get 90% pay, being 6 weeks statutory and a further 6 weeks. She never thought she would get any more weeks at 90%. She said several women had been pregnant and they all got the same. She thought the claimant was confused. She was asked whether she knew it was OMP. She said that didn't matter. She knew it was 6 weeks and another 6 weeks of 90%.

When asked whether she had asked Lorena (Ms Gomez) for clarification, she said no, because she knew it was 6 week and 6 weeks.

19. On 11.7.2023 the claimant replied to Ms Gelves (150) saying that, according to the spreadsheet, she had 1) only received 6 weeks OMP and not 12 weeks as stated in the booklet and 2) OMP for weeks 7 to 12 were simply topping up the lower rate SMP to 90% of salary, and that was not what the booklet said. She continued to suggest that, if the spreadsheet was correct, the booklet should have been written as:

    - OMP is paid for 6 weeks
    - OMP is paid from week 7 to week 12
    - OMP will be paid on top of lower rate SMP from week 7 to 12
    - OMP payments will be calculated to top up your lower rate SMP payments to 90% of your average pay.

20. Claudia Lorena Tesillo Gomez (Aspire Centre Development Manager) replied to the claimant on 12.7.2023 (149-150) saying that the nursery followed the guidance provided by Southfields Academy, which in turn followed government guidelines. She explained that weekly payments did not exceed 90% of weekly salary for up to 12 weeks and the calculation included the amount given by the government. She noted the claimant's suggestion to reword the booklet and said she would bring it up at the next trustees meeting.

21. Southfields Academy's own provision for support staff (206) states that:

    "Occupational Maternity Pay (OMP) is paid at a rate of 9/10ths of a normal week's pay (offset against payments made by way of SMP … for the first 6 weeks of maternity leave. … the subsequent 12 weeks (7-18), OMP of half a week's normal pay …"

22. In XX Ms Gomez said the nursery had always paid 12 weeks at 90% from weeks 1 to 12 and her understanding was that SMP was offset. We accept her evidence.

23. On 17.7.2023 the claimant wrote to Ms Gomez (245-246) saying she had spoken to ACAS and they said the 12 weeks OMP should be from week 7 to 18. The claimant asked for a copy of the Southfields Academy documents. These were only forwarded her on 29.4.2024 after a Freedom of Information Act request (206).

24. The same day (being 17.7.2023) Ms Gomez replied (246) asking for details of the relevant ACAS person (246) but the claimant was unable to give this information as no notes were kept by ACAS (246).

25. On 20.7.2023 Ms Gomez emailed the claimant saying she could have a meeting with the trustees to discuss her queries (247).

26. On 24.7.2023 the claimant wrote to Stephen Elson (a volunteer trustee of the nursery) saying the only outstanding question she had was: "in which 12 weeks did she receive 12 weeks OMP paid on top of SMP, equating to 90% of salary".

27. An informal meeting was held on 26.7.2023 with Ms Gomez and Mr Elson. There are no minutes, but in an email to Mr Elson of 27.7.2023, the claimant summarizes the meeting (251-252). She records that they went through the payroll spreadsheet, which recorded OMP for weeks 7-12 only. She said that he and Lorena (Ms Gomez) had conflated 6 weeks of SMP with 6 weeks of OMP. She asked for further clarification.

28. She received an automated response saying Mr Elson was on annual leave until 7 August. She therefore, emailed Ms Gomez and indicated she was happy to wait until 7 August for a reply (252).

29. The claimant wrote another email on 7.8.2023 (not in the bundle), which is referenced in an email reply from Ms Gomez of 7.9.2023 (253). This email of 7.8.2023 was considered by Ms Gomez to be a grievance and therefore she invited the claimant to review their Grievance Policy, which she attached, and to attend a meeting to discuss her specific grievance (253).

30. The claimant replied on 14.9.2023 saying she was in Poland and she would be available the first week of October. She said her grievance was focused solely on whether she had been paid 12 weeks OMP. She queried whether she was now at Stage 3 of the procedure (253-254).

31. Ms Gomez replied on 26.9.2023 saying she was at Stage 2 and if she found herself dissatisfied with Stage 2, she had the right to invoke Stage 3 (254-255).

32. There was then an exchange of emails trying to find a suitable date for the meeting (255-256), which was arranged for 9.10.2023.

33. During September 2023 the maternity pay provision was revised so as to avoid any future confusion (359). It now reads:

> "Occupational Maternity Pay (OMP) is paid at a rate of 9/10$^{th}$ of a normal week's pay (offset against payments made by way of SMP … during the 7$^{th}$ to 12$^{th}$ week. OMP is paid for 6 weeks on top of SMP equating to 90% of pay."

34. On 3.10.2023 the claimant emailed Ms Gomez asking whether the trustees were willing to enter ACAS Early Conciliation if a resolution was not found at Stage 2 (256). Ms Gomez replied on 3.10.2023 that the trustees were committed to resolving the grievance (257).

35. The meeting on 9.10.2023 was with Mr Elson as Trustee, Ewan Macfarlane as HR Advisor, and Ms Gomez as Nursery HR Officer. The minutes of the meeting (187-188) record that Mr Macfarlane acknowledged the possible ambiguity of the booklet, and clarified the terms of maternity pay that had been applied since OMP had been introduced for the nursery.

36. The record also shows that he explained that the claimant was entitled to receive 90% of her average weekly earnings for the first six weeks, being a standard statutory provision (legal entitlement) for the first six weeks of maternity leave, and the subsequent six weeks were paid at 90% of her average weekly earnings inclusive of SMP. He said this was referred to as

OMP. He clarified that the nursery would top up SMP to 90% of earnings for weeks 7 to 12.

37. Mr Elson in XX said he believed the intention of the provision was to provide 90% for the first 6 weeks and 90% for the next 6 weeks.

38. On 11.10.2023 Ms Gomez sent an outcome letter to the claimant enclosing the minutes (189). She stated that the claimant was entitled to 12 weeks of paid leave at 90% of her salary, which equated to 6 weeks of nursery provision for OMP. She said that the policy had been consistently applied to all employees working for the nursery since 2018 and prior to that there had been no OMP provisions. The claimant was informed of her right to invoke Stage 3.

39. On 12.10.2023, the claimant emailed Ms Gomez and said she did not agree with the minutes. She queried whether the nursery was offering 6 weeks or 12 weeks of OMP(257-258).

40. On 16.10.2023 Ms Gomez enquired of the claimant whether she had any specific reason for not agreeing the minutes. She reiterated that a total of 12 weeks were paid at 90% of earnings and within that period 6 weeks were designated as SMP and the remaining 6 weeks as OMP (258).

41. On 19.10.2023 the claimant emailed Ms Gomez and said she had been advised by ACAS that SMP and OMP could not be conflated, and that they had advised her to start a tribunal case (259).

42. The claimant presented her first ET1 on 20.10.2023 (7).

43. On 30.10.2023 the claimant wrote to Mr Elson, Mr Macfarlane and Ms Gomez to say she was invoking Stage 3. She informed them that she had made a tribunal application on 20.10.2023 (260).

44. On 1.11.2023 Ms Gomez suggested meeting on 7.11.2023 for Stage 3 (261).

45. The claimant responded on 3.11.2023 saying she would be on holiday and would return on 13.11.2023. She said she had nothing new to add and if the trustees had no new documents or information, it might be best to wait for notification from the tribunal and for the trustees to explain their opinion directly (261).

46. On 8.11.2023 Ms Gomez explained that Stage 3 would be with the full board including the Chair of Trustees. She suggested it take place on 24.11.2023 (263). Although the email did not specifically say it, these trustees were Stephen Elson, Susan Hayday and Jacqueline Valin as Chair.

47. On 15.11.2023 Ms Gomez emailed the claimant again to say the documentation would be the same, the meeting would be attended by all the Board of Trustees, and also herself and Mr Macfarlane (264).

48. On 21.11.2023 the claimant wrote to Ms Gomez and said she believed it would be better for everybody to wait for the Tribunal and ACAS to receive a reply from the trustees (265).

49. Ms Gomez emailed back on 22.11.2023 saying she concluded that the claimant would not be pursuing Stage 3 (265).

50. The same day the claimant replied yes and confirmed that they should wait for the tribunal to receive a response from the nursery and for ACAS to start conciliation (266).

51. In XX Ms Gomez gave evidence that she had worked in the nursery for 10 years and this was the first time there had been a grievance. There had been no previous grievances and nor had there been any complaints about maternity pay. We accept this evidence.

**Flexible Working**

52. The claimant returned to work on 12.2.2024.

53. In March 2024 the claimant had a discussion with Chantel Ariannejad (Nursery Manager) about reducing her hours. Ms Ariannejad explained that the role of room leader was full time and there might not be the flexibility to accommodate this request. She gave the claimant examples of other staff who had made similar requests but were declined due to the nature of the role [CA p3 para 9].

54. The claimant followed up this discussion with an email on 1.4.2024 to Ms Ariannejad (267) formally asking to reduce her daily hours from 7 to 5 for a period of 5 months until 1.9.2024 when she planned to put her child in nursery.

55. On 2.4.2024 Ms Ariannejad emailed the Chair of Trustees, Jacqueline Valin, copying in Mr Elson (200). In it she said that she had had a brief conversation with the claimant about her desire to work part time.

56. On 4.4.2024 Ms Ariannejad replied (267) to the claimant saying, as previously mentioned, the room leader position is a full-time role at 35 or 40 hours. She would discuss the request with the trustees.

57. Ms Ariannejad met with the trustees and put forward reasons to them why flexible working would not work in this instance. She copied the minutes of that meeting into an email to Ms Gomez of 23.4.2024 (202). The minutes record the reasons for Ms Ariannejad deciding to refuse flexible working, including the second in charge going on maternity leave, the need for a senior member of staff in the Froggy room to guide staff and prioritize tasks, the need to maintain legal ratios of staff to children, and the impact on the children.

58. In her evidence [CA p3 para 11] Ms Ariannejad said she also considered the fact that the reduced working time would be over the holiday period when some staff were away, and the difficulty in guaranteeing coverage of those two hours. In XX she said it was difficult to recruit. We accept this evidence.

59. The claimant had a good relationship with Ms Ariannejad and Ms Ariannejad tried to be as flexible as she could with the claimant.

60. Ms Ariannejad had temporarily re-organised staff by moving Victoria (another room leader) from her own room to accommodate the claimant whilst the claimant took accrued annual leave to enable her to reduce her hours from February when she returned to work. However, Victoria needed to go back to her own room leader role and Ms Ariannejad felt there was no option available to re-organise the nursery staff roles [CA p4 para 13]. We accept this evidence.

61. On 19.4.2024 at 11.14am Ms Ariannejad emailed the claimant (268). She said that currently all room leaders were working full-time. A room leader was required to open or close the nursery on a rotational basis each week and the Froggy Team (where the claimant was working) specifically needed a full-time room leader. A reduction in hours was not feasible. She went on to say she had tried to accommodate the claimant's return as best as possible. She had temporarily assigned Victoria to the claimant's team, but Victoria needed to return to her role in the coming months. This meant the claimant would have to resume her full-time position, as she had been working part-time hours due to using her annual leave.

62. A little over an hour later at 12.20pm the claimant gave notice of resignation, to take effect on 17.5.2024 (269). She cited the rejection of her statutory flexible working request and her outstanding occupational maternity pay grievance as the reasons.

63. On 22.4.2024 Ms Ariannejad emailed the claimant (269) saying she was surprised to receive her resignation. She said that, as discussed, she was willing to accommodate Victoria in the Froggie classroom until the beginning of June, allowing the claimant flexibility to utilize her annual leave and phase back into her full-time role. She said another option would be a bank staff contract, which would provide even more flexibility. She stated that although she had discussed these options in person, she wanted to formally present them to the claimant. If the claimant still wanted to resign she confirmed the last day would be 17.5.2024.

64. On 25.4.2024 the claimant replied asking how being bank staff would work and whether she would return to her current position and hours in September (270).

65. Ms Ariannejad replied on 2.5.2024 (270). She said that the room leader position required someone available during core hours to effectively support their staff from 10.30am to 3.00pm. As such, shifts were set from 7.00am to 3.00pm and 10.30am to 6.30pm to accommodate this need.

66. On 5.5.2024 Ms Ariannejad sent another email to the claimant (271) saying she had encountered some difficulties accessing the nursery email address. She referred to the bank staff enquiry and clarified that it was a zero hours contract at £13.00 per hour. Regarding the room leader role she said that the claimant would need to reapply for the position if it was still available.

67. Ms Ariannejad in her evidence [CA p6 para 19] stated she had a casual conversation with the claimant asking whether she would reconsider her resignation as Ms Ariannejad wanted to her stay. She denies using the words "are you leaving or not". Her statement was not tested in XX and we accept Ms Ariannejad's written evidence.

68. Peggy, who had also been a room leader, explained in her WS [PV pp1-3) and in XX that she had to step down from this position after coming back from maternity leave because she could no longer commit to working the alternative shift patterns. She said that she understood why this was necessary. It was a senior role with responsibility for organising staff, allocating tasks, being present for both early and late shifts and fostering strong relationships with parents.

## The Law

### Contract Law

69. Where there is an ambiguity, contract law states that the provision should be construed according to what was intended. This is an objective test, which involves ascertaining what the reasonable person would have understood, taking relevant surrounding circumstances into account. Context is important. When choosing between constructions, the court is entitled to prefer that which is consistent with business common sense. A fair construction best matches the expectations of the parties. The purpose or intention of the provision is more important than the niceties of language. Language should not be read in a pedantic way.

70. This principle applies to employment contracts as well as commercial contracts. In **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, the Court of Appeal took the view that general contractual principles should also apply to contracts of employment.

71. The **Social Security Contributions and Benefits Act 1992** states in Schedule 13, paragraph 3(2)(b) under *Contractual remuneration*:

3 (1) Subject to sub-paragraphs (2) and (3) below, any entitlement to statutory maternity pay shall not affect any right of a woman in relation to remuneration under any contract of service ("contractual remuneration").

(2) Subject to sub-paragraph (3) below –

(a) any contractual remuneration paid to a woman by an employer of hers in respect of a week in the maternity pay period shall go towards discharging any liability of that employer to pay statutory maternity pay to her in respect of the week, and

(b) any statutory maternity pay paid by an employer to a woman who is an employee of his in respect of a week in the maternity pay period shall go towards discharging any liability towards paying OMP.

### Pregnancy and Maternity Discrimination

72. Section 18 of the Equality Act 2010 states:

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristics 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 that period).
(6) The protected period, in relation to 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) …

**Flexible Working**

**Consideration of request by employer**

73. The relevant statutory provisions are set out in section **80G** of the **Employment Rights Act 1996**. There is also guidance in the **ACAS Code of Practice on Requests for Flexible Working.**

74. Amendments to both the Act and the Code came into effect on 6 April 2024. A new subsection (aza) was added to section 80G of the Act, introducing a requirement to consult. A new 2024 ACAS Code, adding a section on consultation, replaced the 2014 ACAS Code.

75. The relevant parts of section 80G read as follows:

(1) An employer to whom an application under section 80F is made –
  (a) shall deal with the request in a reasonable manner,
  (aza) shall not refuse the application unless the employee has been consulted about the application.
  (aa) shall notify the employee of the decision on the application within the decision period, and
  (b) shall only refuse the application because he considers that one or more of the following grounds applies –
    (i) the burden of additional costs
    (ii) detrimental effect on ability to meet customer demand
    (iii) inability to re-organise work among existing staff
    (iv) inability to recruit additional staff
    (v) detrimental impact on quality
    (vi) detrimental impact on performance

(vii) insufficiency of work during the periods the employee proposes to work
(viii) planned structural changes
(x) such other grounds as the Secretary of State may specify by regulations.

**Detriment due to flexible working request**

76. The statutory provisions are in section **47E** of the **Employment Rights Act 1996**, the relevant part of which states:

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee –

(a) made (or proposed to make) an application under section 80F.

**Constructive Dismissal**

77. As per section **95(1)(c)** of the **Employment Rights Act 1996**, an employee is constructively dismissed if:

the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

78. In **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221, Lord Denning put it as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

79. The implied term of trust and confidence is relied on by the claimant.

80. The implied term of trust and confidence was formulated by the House of Lords in **Malik and Mahmud v BCCI** [1997] ICR 6060 as being an obligation 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."

81. In **Frenkel Topping Ltd v King UKEAT/0106/15/LA** the EAT warned about the dangers of setting the bar too low. That decision makes clear that it is a demanding test, and simply acting in an unreasonable manner is not sufficient.

**Victimisation**

82. The statutory provisions are contained in section **27** of the **Equality Act 2010** which states**:**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
   (a) B does a protected act, or
   (b) A believes that B has done, or may do, a protected act

(2) Each of the following is a protected act –
   (a) Bringing proceedings under this Act;
   (b) Giving evidence or information in connection with proceedings under this Act;
   (c) Doing any other thing for the purposes of or in connection with this Act;
   (d) Making an allegation (whether or not express) that A or another person has contravened this Act.

**Other law**

83. All other law as raised by the parties was considered.

## Discussion and Conclusions

### Breach of Contract – OMP

84. The clause "OMP is paid for 12 weeks on top of SMP equating to 90%, is ambiguous. This was accepted by Ms Gomez and Mr Macfarlane and it was why Ms Gomez offered to bring it to the attention of the trustees.

85. The claimant initially thought it meant she received an additional 90% of pay on top of SMP for the first 12 weeks of maternity leave, and later suggested it meant OMP was a top up for weeks 7 to 18.

86. Where there is an ambiguity, contract law dictates that the provision should be construed according to the principle of intention. This means considering what the reasonable person with background knowledge would have understood in the circumstances of the case.

87. Whilst employment contracts may be treated differently from standard commercial contracts, their interpretation nonetheless involves relevant legal principles such as the principle of giving effect to the parties' intentions.

88. The claimant referred to the Contra Proferentem rule, which states that ambiguities should be interpreted against the drafter. This has in modern cases been superseded by the above approach.

89. We have applied the objective test of intention of the contract to the facts of this case.

90. The nursery followed Southfields Academy's lead and the Academy also used the term OMP for the first 6 weeks of maternity leave, despite there being no enhancement from SMP. Their relevant policy reads:

"Occupational Maternity Pay (OMP) is paid at a rate of 9/10th of a normal week's pay (offset against payments made by way of SMP … for the first 6 weeks of maternity pay."

91. The Social Security Contributions and Benefits Act allows for such an offset.

92. The claimant's maternity pay schedule says 12 weeks at 90% (SMP offset).

93. OMP was introduced in 2018. It has been applied consistently throughout. Peggy's evidence was that she had been with the nursery for 6 years and she knew from the start that she would get 90% pay for the first 12 weeks only, regardless of what it was called (OMP or SMP). In the time she had worked for the nursery there had been several women who became pregnant and she was aware that they were also paid 90% pay for 12 weeks. There was no evidence of anybody else challenging the clause and, to the contrary, Ms Gomez said there had never been any previous grievances, nor had there been any complaints about this.

94. When the claimant challenged the clause, both Ms Gelves and Ms Gomez were consistent in their replies that the claimant should receive 90% pay for 12 weeks. Mr MacFarlane also explained verbally that the 90% maternity pay was for the first 12 weeks.

95. The fact that the respondent amended the wording of the clause in September 2023 does not mean that the original clause could not be interpreted as 90% pay for the first 12 weeks. The amendment was simply an acknowledgement of the ambiguity and a desire to avoid any future confusion.

96. Business common sense suggests that the intention was for SMP and OMP to run together for the first 12 weeks of maternity leave. There is nothing in the maternity pay clause or otherwise to suggest that OMP runs from week 7 to 18. If that had been the intention of the parties, they would have specifically included it in the provision.

97. Taking all of the relevant circumstance into account, considering the clause in context, and applying a flexible approach to the language, we find that objectively, the intention of the maternity pay provision was to pay 90% pay for the first 12 weeks of maternity leave only. This is what the claimant was paid.

98. Therefore, the claimant was paid the amount of OMP she was entitled to and accordingly there is no breach of contract. This claim is dismissed.

**Pregnancy/Maternity Discrimination**

99. The claimant was paid the correct amount of OMP. There is no evidence at all of any discrimination, and we find that there was none. This complaint is dismissed.

**Flexible Working**

100. The law at the time the claimant made the formal request on 1.4.2024 did not require the employer to discuss or consult the employee on the request.

The guidance in the then relevant ACAS Code of Practice of 2014 simply suggested that employers should discuss the request with the employee.

101. The changes in the law requiring consultation, and the new guidance in the ACAS Code of Practice 2024 advising that a consultation meeting should be held with the employee to discuss the request, only came into force on 6.4.2024. This was after the claimant's request was made but before the decision was taken.

102. The respondent is a small employee, which had about a dozen salaried staff plus bank staff at the relevant time. It did not have a full time HR Officer although it had some assistance from Southfields Academy. Resources were therefore limited.

103. A discussion did take place with the claimant in March 2024 about the informal flexible hours request. Whilst formal consultation with the claimant did not take place, the amended law was less than 2 weeks old at the time of the refusal decision on 19.4.2024.

104. However, we take the view that Ms Arianejad ought to have explored potential options with the claimant in a meeting after receiving the formal request. We find the lack of such a meeting to be a shortfall in the respondent's approach.

105. Turning to the reasons for refusal; we find that they fall within the permitted reasons provided by the legislation, and the main reasons were adequately communicated to the claimant in the refusal email.

106. To conclude, there was a minor breach of the amended statutory requirement for consultation and the 2024 ACAS Code of Practice in that there was no consultation meeting after the formal request.

107. The claimant resigned shortly after receiving notification of the refusal. There is no evidence of any detriment to the claimant because of making the request. We find that there was no detriment and this complaint is dismissed.

**Remedy for breach of flexible working time provisions**

108. We have considered whether to make any financial reward as a result of the lack of consultation. In our judgment it would be just and equitable to do so. We can award up to a maximum of 8 weeks gross pay (capped by statute).

109. We take the view, in the circumstances of this case, that an award of 4 weeks gross pay is just and equitable, and we accordingly order this amount.

**Constructive Unfair Dismissal**

110. The claimant set out the reasons for her resignation in her resignation email of 19.4.2024, which are the rejection of the flexible working time request and the outstanding occupational maternity pay grievance. None of the other reasons set out in the list of issues were cited. When the claimant was asked in XX whether she had read the list of issues, she said that she had not. This

throws doubt on whether all the allegations under this heading contributed to her resignation.

111. To succeed with this claim, the claimant must show that the respondent conducted itself in a manner that was calculated or likely to destroy or seriously damage trust and confidence. This is a high bar to prove. If the tribunal finds that there was reasonable and proper cause for the respondent's conduct, the test will not be achieved.

112. Some of the allegations in paragraph 13 of the list of issues concern simple advice given in response to the claimant's questions regarding maternity pay and the bank staff role (ai, ii, iii; d, p). These are not breaches. In any event allegation p was on 5.5.2024 after the resignation, and could not have contributed to it.

113. Other allegations are just steps in the grievance procedure (g, h, i, j, k, m). None of these are breaches.

114. With respect to 13b - requesting the Southfields Academy booklet on 20.7.2023 – there is no request on 20.7.2023. There is a request on 17.7.2023. Not being provided with the Southfields Academy OMP contract until the Freedom of Information Act request was made is a minor breach.

115. With respect to 13c - the ACAS recording matter – there is no obligation on the respondent to listen to advice given to the claimant. This is not a breach.

116. As regards 13e - the meeting on 26.7.2023 - this was informal and was before the grievance letter of 7.8.2023. The is no breach.

117. As regards 13f - delays in the grievance process. These were slight and mainly over the summer holiday period. Some of the delay was due to the claimant. There is no breach

118. Allegation l - not giving names of trustees to the claimant. Whilst this may not be best practice, it is not a breach.

119. Allegation n - Ms Ariannejad rejecting the claimant's statutory flexible working. There was a minor breach in terms of not adequately consulting.

120. With respect to allegation o – the claimant alleges that on 25.4.2024 Ms Ariannejad said "The Trustees want to know are you leaving or not?". We accept Ms Ariannejad's evidence that she did not use the words "leaving or not". In any event, this was after the resignation and could not have contributed to it.

121. Considering those allegations which are minor breaches, none of them either individually or combined are so fundamental as to be calculated or likely to destroy or seriously damage trust and confidence.

122. Accordingly, the constructive dismissal claim cannot succeed and is dismissed.

**Victimisation**

123. Submitting the ET1 on 20.10.2023 was a protected act. The claimant says that the refusal of flexible working was because of this.

124. The reasons for the flexible working refusal were because the respondent needed the claimant's role of room leader to be full-time for the reasons given above. This was explained to the claimant in Ms Ariannejad's email of 19.4.2024, 6 months after the ET1.

125. Peggy had also been a room leader and had to step down after maternity leave because she could not continue working full time.

126. The decision was made by Ms Ariannejad and the claimant had a good, ongoing relationship with her. There is no evidence that Ms Ariannejad refused the request because of the tribunal claim.

127. The claimant said in evidence that victimisation was just her assumption.

128. In conclusion, there is no causal link between the tribunal claim and the refusal. Accordingly, the complaint is dismissed.

_____

Employment Judge Liz Ord
Date **12 July 2025**

JUDGMENT SENT TO THE PARTIES ON
**16 July 2025**
.....

.....
FOR THE TRIBUNAL OFFICE

Notes

**Public access to employment tribunal decisions**
Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

# ANNEX

---

## AGREED LIST OF ISSUES

---

**Breach of contract**

1. Was the respondent in breach of contract by not paying the Claimant 12 weeks of Occupational Maternity Pay ('OMP')?

2. If so, how much OMP pay is due?

**Pregnancy and/ or Maternity Discrimination – s. 18 Equality Act 2010**

3. The Respondent concedes that the Claimant was within the protected period.

4. Did the Respondent subject the Claimant to the following treatment:

    a. Not being paid OMP that the Claimant alleges she was entitled to.

5. If so, does the Respondent's conduct amount to unfavourable treatment?

6. If so, can the Claimant prove that the alleged unfavourable treatment was <u>because of</u> her pregnancy and/or because she was on maternity leave?

7. If so, what is the Respondent's explanation, and can the Respondent prove a non-discriminatory reason for any proven treatment?

**Request for flexible working**

8. Did the Claimant make a request for flexible working pursuant to section 80F of the Employment Rights Act 1996?

9. Did the Respondent deal with the Claimant's request in a reasonable manner considering their duties under section 80G of the Employment Rights Act 1996?

10. Were the reasons for rejecting the Claimant's request for flexible working communicated? Was the request unreasonably refused?

11. Was the Claimant subjected to a detriment on the grounds of making a request for flexible working?

12. If so, what was that detriment, and how was it as a result of making the request?

**Constructive Unfair Dismissal**

13. Was the Respondent in repudiatory breach of the Claimant's contract's implied term of trust and confidence in the following ways:

    a. Mrs Gomez made the following statements to the Claimant on 12 July 2023, which the Claimant alleges are false;

        i. "*Please note that nursery@aspire follows the guidance provided by Southfields Academy, which in turn follows the Government's guideline's*";

        ii. *"Regarding the specific part you mentioned in the booklet, it states: "...OMP is paid for 12 weeks on top of SMP equating to 90% of pay..." Essentially, this means that you will receive weekly payments that do not exceed 90% of your weekly salary"; and*

        iii. *"Upon reviewing the schedules of your Maternity Pay, we have found that they are all correct".*

    b. The Claimant requested a copy of the Southfields Academy OMP contract on 20 July 2023 and alleges she was ignored;

    c. The Claimant sent a recording of her conversation with ACAS to the Respondent and alleges she was ignored;

    d. Mr Elson informed the Claimant on 24 July 2023 that shad been paid correctly and said that he could not comment in detail and to "*save that for the meeting*";

    e. The following actions which took place in respect of the informal meeting held between Mrs Gomez and the Claimant on 26 July 2023 to discuss the Claimant's queries on the Maternity Booklet;

        i. The meeting was labelled 'informal';

        ii. No minutes of the meeting were taken;

        iii. The Claimant was not invited to bring a colleague;

        iv. The procedure for settling staff grievance was not supplied to the Claimant ahead of the informal meeting; and

        v. An 'extra meeting' was added to the three-stage grievance process.

    f. A delay in the grievance meetings being arranged due to Mr Elson being absent from work until 7 September 2023;

g. Mr Elson attended both Stage 1 and Stage 2 grievance meetings, which the Claimant understands to be the informal grievance meeting and Stage 2 grievance meeting;

h. Ms Gomez wrote to the Claimant on 26 September 2023 to confirm the grievance was progressing to Stage 2;

i. Mr Elson took the minutes of the Stage 2 grievance meeting on 7 October 2023 rather than Mr Macfarlane who was allegedly intended to be the minutes taker, and these notes were allegedly inaccurate, and the Claimant's questions/statements were allegedly partially omitted;

j. Mrs Gomez made the statement on 3 November 2023 that all Trustees would be present at the Stage 3 grievance meeting;

k. Mrs Gomez made the following comment on 15 November 2023; "*The documentation will be the same, the meeting will be attended by all of the Board of Trustees, including the Chair, myself and Ewan McFarlane will be also attending the meeting*";

l. On 15 November 2023, Mrs Gomez did not provide the names of the three Trustees who would be attending the Stage 3 meeting;

m. On 15 November 2023, Mrs Gomez stated the evidence would be the same as contained in the previous meetings, including the Claimant's maternity payroll spreadsheet and the maternity OMP.

n. On 19 April 2024, Miss Ariannejad rejected the Claimant's statutory flexible working request;

o. On 25 April 2024, the Claimant alleges Miss Ariannejad said, "The Trustees want to know – are you leaving or not?" to the Claimant in the office;

p. On 5 May 2024, Miss Ariannejad emailed the Claimant and answered the Claimant's previous questions about the bank staff option and made the following comment, "*Regarding your inquiry about the bank staff contract, I want to clarify that it is a zero-hour contract, meaning there are no guaranteed hours. Our bank staff work on a weekly basis when needed to accommodate the number of children present. You would need to reapply for the position if it was still available*".

14. If so, did the Claimant accept the breach(es) of contract?

15. Did the 'last straw' principle apply?

16. Did the Claimant resign <u>because of</u> the breach(es)?

17. Did the Respondent waive the resignation?

18. Did the Claimant affirm the contract?

**Victimisation**

19. Did the Claimant carry out a Protected Act?

    a. Does submitting an ET1 to the Employment Tribunal on 20 October 2023 amount to a Protected Act?

20. Did the Respondent subject the Claimant to a detriment because of the Protected Act?

    a. Was the Respondent's refusal of the Claimant's flexible working request a detriment because of the Protected Act?

**Remedy**

21. If proven, what financial loss has the Claimant suffered as a result of a breach of contract?

22. If proven, what financial losses has the discrimination caused the Claimant, if any?

23. If proven, what injury to feelings has the discrimination caused the claimant, if any, and how much compensation should be awarded for that?

24. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

25. If so, did the Respondent or the Claimant unreasonably fail to comply with it?

26. If so, is it just and equitable to increase or decrease any award payable to the Claimant?

27. By what proportion, up to 25%?

28. Should interest be awarded?

29. If so, how much?