EMPLOYMENT TRIBUNALS

Claimant: Ms M Changleng

Respondent: Hertsmonceux Pre-School Limited

Heard at: London South (by CVP**)** **On:** 21 December 2022 and 3 July 2023

Before: Employment Judge Kumar

Representation
Claimant: Mr C Devlin, counsel
Respondent: Mr N Porter, director

JUDGMENT

1. The second respondent is removed from proceedings as a respondent.
2. The claim in respect of accrued but unpaid annual leave is dismissed upon withdrawal.
3. The claim for automatically unfair dismissal contrary to section 104 of the Employment Rights Act 1996 is well-founded and succeeds.
4. The claim for wrongful dismissal is well-founded and succeeds.
5. The claim for unauthorised deductions from wages is well-founded and succeeds.
6. The claim for breach of contract in respect of pension contributions is well-founded and succeeds.

REASONS

Claims

1. By a claim form presented on 22 November 2021 the claimant who was employed by the respondent from 25 July 2013 until her dismissal on 23 August 2021 complained of unfair dismissal (including automatically unfair dismissal), wrongful dismissal, unauthorised deductions from wages, and breach of contract in respect of pension contributions. A claim in respect of holiday pay was withdrawn.

2. The respondent's ET3 and grounds of resistance indicated that the respondent denied the claims.

3. At the outset of the hearing in discussion with the parties I identified the issues to be determined as follows:

1) Who is the correct employer?

Unauthorised deductions

2) Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?
3) Was any deduction required or authorised by statute?
4) Was any deduction required or authorised by a written term of the contract?

Breach of Contract

5) Did the respondent fail to pay the claimant her full wages and pension entitlement?
6) Was that a breach of contract?

Wrongful dismissal / Notice pay

7) What was the claimant's notice period?
8) Was the claimant paid for that notice period?

Unfair dismissal

9) What was the reason or principal reason for dismissal?
10) Was the reason or principal reason for dismissal that the claimant asserted a statutory right? If so, the claimant will be regarded as unfairly dismissed.
11) Was the reason or principal reason conduct? The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
12) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
    i) there were reasonable grounds for that belief;
    ii) at the time the belief was formed the respondent had carried out a reasonable investigation;
    iii) the respondent otherwise acted in a procedurally fair manner;
    iv) dismissal was within the range of reasonable responses.
13) Was the reason, some other substantial reason, namely loss of trust and confidence?
14) If so was the reason capable of justifying dismissal?
15) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
16) The respondent says that the reason for the dismissal was some other substantial reason, namely that the claimant's conduct during her misconduct interview amounted to a repudiatory breach of her employment contract. Does dismissal for this reason amount to a potentially fair reason under section 98(1) of the Employment Rights Act 1996

separate from loss of trust and confidence or conduct under section 98(2) of the Employment Rights Act?

17) If so, was the reason capable of justifying dismissal?
18) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

The hearing

4. The hearing took place remotely over two days on 21 December 2022 and 3 July 2023. The claimant was represented by Mr C Devlin of counsel. The respondent was represented by Mr N Porter, one of its directors. I heard evidence on behalf of the respondent from Mr Porter and from his wife, Mrs R Dicken, also a director of the respondent. I heard evidence from the claimant and from Mr C Blackman, the claimant's trade union representative.

5. I read witness statements from each of the witnesses and was directed to pages within a 369 page bundle. I was provided separately with a 53 page transcript of the disciplinary investigation meeting that took place on 23 August 2021 which I read in full and on the second day of the hearing I was provided with the audio recording of the same meeting. Mr Porter, on behalf of the respondent, invited me to listen to this in full which I did.

6. At the conclusion of the evidence the parties provided written submissions and also made oral submissions.

Findings of Fact

7. Having heard the evidence I made the following findings of fact based upon the balance of probabilities.

8. The respondent operates as a pre-school. The claimant was employed by the respondent, as an early years practitioner, from July 2013 (following, it is understood, a TUPE transfer) until her dismissal on 23 August 2021. The respondent is a company with two directors, Mr N Porter and his wife Mrs R Dicken. Mr Porter and Mrs Dicken took over Herstmonceux Pre-School from its previous owner in April 2017.

The claimant's pay

9. It is evident from the extensive email correspondence between the parties that over the course of her employment various issues had arisen in respect of the claimant's pay and in particular in the context of the Coronavirus pandemic. The issues during the pandemic related to i) the calculation of the claimant's statutory sick pay (SSP) whilst she was shielding on account of being clinically vulnerable, ii) the calculation of the claimant's holiday pay, iii) payment of holiday pay during furlough, and iv) whether the claimant would continue to be paid pro rata.

10. A contract of employment between the previous owners and the claimant dated 18 April 2017 and signed by the claimant on 25 April 2017 that was in the bundle confirmed that the claimant was contracted to work 40 hours a week for 38 weeks of the year. The contract provided for payment to be

made *'monthly in arrears, for 12 months of the year'* and the claimant received her pay pro-rated over the course of the calendar year.

11. A new contract dated 1 August 2020 also appeared in the bundle. It provided for the claimant to work a minimum of 24 hours a week over 38 weeks of the year. It stated that the claimant was entitled to an unpaid break of 30 minutes. The new contract read:

    '*Your hourly rate of pay will remain unaffected by this change in contract. You will continue to be paid each month, in arrears on or before the last day of each month'*.

12. Unlike the 2017 contract the new contract did not state that payment would be '*monthly in arrears, for 12 months of the year'*. Mr Porter relied on the removal of the phrase 'for 12 months of the year' as varying the claimant's contract such that she was no longer required to be paid pro-rata. The claimant continued to receive her pay pro-rated over the course of the calendar year subsequent to the new contract.

13. Upon receiving her payslip at the end of January 2021 the claimant believed that she had been underpaid in respect of SSP and holiday pay. She also believed that between September 2020 and December 2020 she had been receiving a pro-rated salary based on 17.9 hours a week whilst she had been working 24.5 hours a week. The claimant also subsequently realised that between March 2020 and August 2020 she had not been paid full holiday pay while furloughed.

SSP

14. On 26 February 2021 the claimant rang Mr Porter to discuss discrepancies in her pay and raised that she had not been paid SSP for the February half-term and that she had been underpaid £71 in her January pay. She followed this up with an email on 1 March 2021 setting out her calculations in relation to the underpayment. There was then an exchange of emails between the claimant and Mr Porter setting out their respective interpretations of how SSP was calculated. There appeared to be two points on which they differed, namely whether the claimant should be receiving SSP for just 4 days of the week reflecting her hours of work or at the full rate and secondly whether she should be paid during the holidays. On 3 March 2021 Mr Porter suggested seeking an independent view and the claimant indicated she had passed on the details to an accountant and would also phone up HMRC. On 11 March 2021 the claimant followed up saying that she had spoken to HMRC who had confirmed her interpretation of how SSP should be calculated. Mr Porter sent an email in response also on 11 March 2021 which stated,

    "*I agree that you should receive the full SSP instead of 4 days per week pro-rata, however I can't agree that you qualify for SSP during half terms.'*

15. He went on to explain that he had also spoken to HMRC who provided different advice to that which the claimant had received.

16. The claimant understood from Mr Porter's email that the first aspect of the dispute over SSP was resolved. The email exchange continued and Mr

Porter invited the claimant to raise a dispute with HMRC and the claimant agreed to do so. On 12 March 2021 Mr Porter received an email from an HMRC employee who explained she worked in the Statutory Payment Disputes team. She informed Mr Porter that based on the information provided by the claimant she was entitled to a payment for SSP during the February half-term. Mr Porter responded to this email at length firmly challenging what had been said and explaining his interpretation of HMRC's guidance on SSP entitlement. The email ended '*If [the claimant] and I can have an evidence-based unambiguous final decision from HMRC then I am very happy to pay [the claimant] everything that she is rightly entitled to….I have no reason not to…but we do have to be absolutely clear on the law on this."*

17. The response from HMRC was that a dispute would be raised and the forms sent out for the claimant and the respondent to complete.

18. On 21 April 2021 the claimant wrote to the Mr Porter and Mrs Dicken asking them to correct the underpayment of £71 in her January payslip relating to her being paid SSP for 4 days rather than the full week. This was an entirely reasonable request given that Mr Porter had confirmed in his email sent on 11 March 2021 that he agreed the claimant should receive full SSP.

19. Mr Porter's response on 25 April 2021 would have therefore been somewhat surprising for the claimant who assumed that aspect of the dispute had been resolved. Mr Porter said '*I haven't replied because this matter won't be finalised until the HMRC decision is finalised. Until we know what SSP you are entitled to, we can't complete any payments (if there is any due).'* The email then went on to appear to once again challenge that the claimant was entitled to full SSP, despite Mr Porter having conceded it in his email of 11 March 2021 and paying her the full amount of SSP from February. It is of note that nowhere in the emails relating to this issue did Mr Porter identify what he was relying on in forming the view that SSP should be reduced to take into account that the claimant ordinarily worked a 4-day week. Mr Porter's email ended stating:

'*I hope this makes it clear? I will not be entering into any further dialogue with you about this until the result of the HMRC ruling is given.'*

Pro-rata pay

20. Upon receiving her April payslip, on 30 April 2021 the claimant raised a further query about her pay asking the respondent to provide a breakdown of her pay calculations. Mr Porter responded substantively on 3 May 2021. The response was lengthy and contained various tables setting out alternative scenarios with SSP calculated in different ways from January onwards and identifying that he thought there had been some errors in calculations from the payroll company. It is self-evident from the email that the respondent was struggling with the complexity of the calculations, particularly in light of the fact that the claimant received her pay pro-rated over the year. Mr Porter explained that the claimant had been paid for the hours she had worked in April (with an additional week paid which he said would not be deducted until HMRC had ruled on the SSP issues).

21. He went on to state in the email,

> '*However, from now on we are going to have to pay you for the 'hours you work' (up to 21st of each month) rather than splitting your pay over the 12 months. You will still be paid your holiday pay each month across the full year, and that won't change, but you won't get your equal amounts of 'normal pay' each month. So, for instance, in May, you will be paid all the hours you work from 22nd April to 21st May plus your holiday pay that will remain unchanged. Your overall yearly pay will be the same, you won't lose out at all. We have to do this though because your wages have to be 'recalculated' because of the period of time you were paid SSP.'*

22. It was evident from this that the respondent had ceased, without previously informing the claimant, to pay the her on a pro-rated basis provided for in her contract over the course of the year.

23. The claimant responded to the email on the same morning thanking the respondent for his email and explanations and saying she would look into it and get back to him.

Informal conduct meeting

24. On Friday 7 May 2021, at 20:11 Mr Porter sent an email to the claimant informing her that she was being invited to a meeting the following Monday to discuss 'the standards that were expected' of her on account of concerns about her conduct at work. The concerns were explained to be that she had *'a number of grievances regarding your SSP, furlough and holiday pay, and that [her] repetitive airing of your grievances to the rest of the team has created an unwelcome and unsettling atmosphere.'*

25. The claimant accepted that she had raised the issue of her pay with Ms A Colwell, her manager on two occasions. She had done so in the context of Mr Porter stating that he was unwilling to discuss the matter with her further until they had a ruling from HMRC. The claimant accepted that Ms Colwell had become upset but she understood (as Ms Colwell had explained in a WhatsApp message within the bundle) that she had felt upset because she could not help and it made her feel as though she was not fulfilling her duties as the claimant's line manager.

26. The following day the claimant responded to Mr Porter's email acknowledging receipt, asking what time the meeting would be and asking for confirmation if it was an informal or disciplinary meeting.

27. Mr Porter's response was as follows:

> "*It is so encouraging to see your contrition and empathy towards your colleagues!! I had hoped that a simple apology would be forthcoming from you and an acknowledgement that your whining has been causing discontent; but no, I should have guessed!!*

It is was a formal disciplinary I would have told you....and it will be sometime after forest school. Now go into work on Monday and get on with the job you're paid to do."

28. The meeting took place between Mrs Dicken, Ms Colwell and the claimant and no further action was taken.

Grievance

29. On 25 May 2021 the claimant raised a formal grievance relating to:
    i) Mr Porter failing to acknowledge that he had agreed to pay full SSP and refusing to enter into further discussion about it
    ii) The claimant's pay being changed from pro rata without consultation with her
    iii) The respondent's failure to pay full holiday pay during furlough
    iv) Mr Porter informing the claimant that she could not be furloughed whilst shielding
    v) The lack of communication around the claimant returning to work
    vi) Mr Porter's increasingly hostile email communications

30. Following receipt of the claimant's email raising her grievance, Mr Porter replied on 26 May 2021 asking the claimant to confirm or clarify further information. Looking at the specific requests it is difficult to see how most of the information requested of the claimant was relevant to her grievances. By way of some examples, Mr Porter asked her to confirm that she accepted the terms of her 2017 employment contract (the claimant had signed her employment contract and had at no time suggested that she did not). Mr Porter asked the claimant if she had claimed any government benefits whilst shielding (this does not appear to have any relevance to whether or not the respondent had told the claimant that she could not be furloughed). Mr Porter asked the claimant if she had applied for or received any 'income protection insurance' whilst furloughed (this had no bearing on the grievance the claimant raised).

31. On 28 May 2021 the claimant replied, providing the evidence upon which she relied in support of her grievance and responding to several of Mr Porter's questions.

32. On 2 June 2021 Mr Porter wrote to the claimant stating:

    "*Having reviewed the evidence that you sent in your email and the copies of emails/documents that you provided to Ruth, it appears that you haven't supplied information for the following questions I asked:"*

33. Mr Porter then went on to again request answers to irrelevant questions and in fact raise new questions. By way of example in respect of the claimant's complaint that the respondent had informed her she could not be furloughed Mr Porter asked the claimant "*please provide formal documentary/written evidence why you weren't eligible to receive SSP instead."* At no time had the claimant suggested that she was not entitled to SSP.

34. On 3 June 2021 Mr Porter sent another email requesting 'further information'. This was a list of questions asking questions of the type that might be asked in cross-examination, essentially asking the claimant to

agree with what he was asserting, in circumstances where she clearly did not agree.

35. On the same day as Mr Porter's third request for information the claimant was admitted into A&E having suffered a flare up of her ulcerative colitis. The claimant's parents wrote to Mr Porter and Mrs Dicken to inform them of this. The claimant remained in hospital until 14 June 2021.

36. On 29 June 2021 the claimant wrote responding to Mr Porter's requests for information made on 2 June 2021 and 3 June 2021. Mr Porter then confirmed that her grievance would be finalised.

37. On 2 July 2021 the outcome of the claimant's grievance was communicated to her by email. No grievance meeting had been arranged or taken place. Mr Porter and Mrs Dicken had indicated that as the first and sixth complaints related to Mr Porter, they would be investigated by Mrs Dicken. During oral evidence it was explained to me that the outcomes were then combined into a single document before being sent to the claimant as the outcome email by Mr Porter.

38. The outcome of the grievance was that the claimant's complaints were dismissed in turn, save in relation to payment of full holiday pay during furlough which was said to be partially upheld. The respondent accepted that the claimant should have been paid full holiday pay so it is unclear on what basis this complaint is said to be only partially upheld rather than upheld.

39. Within the grievance outcome email the response given to the claimant's sixth complaint relating to Mr Porter's hostile email communication was that the grievance was not upheld. It was however acknowledged that one email (it was not specified which) was 'too blunt' in nature and that Mr Porter had been asked to reflect on the tone. In relation to this complaint within the tribunal bundle was an email sent by Mrs Dicken to Mr Porter on 29 June 2021 which appears to contain a draft of her finding in relation to this complaint and also in relation to fifth complaint. It is unclear why Mrs Dicken was sending a draft of the finding in relation to the fifth complaint when it had been confirmed that Mr Porter would be investigating that complaint and she would be investigating the first and sixth. In respect of the complaint about emails this was approached somewhat differently within Mrs Dicken's draft to the response that found its way into the final outcome email. Mrs Dicken concluded in her draft:

"*I do agree that one email response was unprofessional and I believe that since that email all other, and previous, emails have been professional. I spoke with Nick about the email in question and he does regret sending it; a combination of frustration and human error. Grievance upheld... an apology for tone will be given."*

40. Mrs Dicken was asked about the differences between the draft and the outcome email in oral evidence. She explained that Mr Porter had fed back on her original findings (an email providing Mr Porter's feedback, challenging the complaint was included in the bundle) and she believed that the outcome on that particular complaint had been amended to 'partially

upheld'. Mrs Dicken was unable to explain how the finding within the outcome email was that this complaint was not upheld and she was adamant that she had found it to be partially upheld. Mr Porter said that he had combined both his and Mrs Dicken's findings on the respective complaints they had each addressed into one email and sent it to the claimant as the grievance outcome. He denied altering the outcome of the grievance relating to the hostile emails. He said that it was a joint decision between him and his wife not to uphold the complaint. Mr Porter's explanation differed from Mrs Dickens and I preferred Mrs Dicken's evidence on this point. I generally found her to be a more straightforward and reflective witness and she was clear in her recollection that the complaint was partially upheld and I accept that evidence. This leads to the conclusion that Mr Porter did in fact change the outcome of the complaint about hostile emails when he compiled the responses to the claimant's grievance.

41. The grievance outcome invited the claimant and her union representative to respond with any views or observations that they had on the conclusions reached. Mr Porter indicated that if the claimant wished to appeal it could be considered by a manager for "Little Skaters" (which appears to be a nursery operated by a company of which Mr Porter is sole director) or a mediator from ACAS.

42. On 12 July 2021 the claimant wrote to Mr Porter and Mrs Dicken informing them that she wished to appeal the outcome of her grievance and asking to whom she should appeal. She went on to raise various questions in respect of the grievance outcome. Much like the questions raised by Mr Porter in his email of 3 June 2021 these were very much in the form of cross-examination type questions. Mr Porter responded on the same day and asked the claimant to set out her grounds of appeal. Although the claimant did not appear to have responded to his suggestion that a manager from Little Skaters heard the appeal Mr Porter stated, '*As we have offered you the option of having an independent manager from Little Skaters to hear the appeal but you have not agreed to that option, and as ACAS can't help, we are left with myself and Ruth hearing your appeal*". Mr Porter then went on to respond to the claimant's questions. He concluded his email by asking the claimant to 'reflect on her tone' and to reflect on the way she conducts herself in the work place. Mr Porter ended the email with the comment '*I have reflected on my tone. You need to too.*'

43. The claimant responded to that email the same day, saying that she did not consider Mr Porter had adequately answered her questions and that she would be in touch with her grounds of appeal. Mr Porter then sent a further email responding to the claimant's questions raised previously, essentially saying they had already been answered. In respect of one question that the claimant had raised which said '*Is this lack of understanding of Furlough as a Managing Director not a lack of 'Duty of care'?'* Mr Porter responded *'This is just insulting and unnecessary....please reflect on the tone of your correspondence.'*

44. On 15 July 2021 the claimant wrote again setting out her views and observations of the outcome of her grievance. Mr Porter responded on 21 July 2021 indicating that the conclusions on the claimant's grievance

remained unchanged and indicated the matter was closed unless she appealed formally.

45. On 27 July 2021 the claimant set out her grounds of appeal. On 28 July 2021 Mr Porter responded dismissing the claimant's appeal. No meeting took place contrary to the provision which was set out in the staff handbook that the appeal chair would meet with the person raising a grievance to discuss the appeal. In his oral evidence Mr Porter expressed the view that there was a hearing (presumably by virtue of the grounds of appeal being considered on paper), it just had not taken place in person.

Disciplinary

46. The email dismissing the claimant's appeal was sent at 8.26am. At 8.57am a further email was sent by Mr Porter to the claimant inviting her to a disciplinary meeting to investigate alleged gross misconduct. The email identified that the investigation related to:

"*1. In an email from yourself dated 27.07.21 you stated that I was being deceitful by stating that two of your colleagues at Herstmonceux Pre-school receive 'hours worked' pay.*

.

2. In an email from yourself dated 27.07.21 you stated that you were subjected to "emotional abuse" by myself."

47. The email from Mr Porter went on to state,

> "*It has been assessed that, should your misconduct be proven, your conduct could be classed as Gross Misconduct, the definition being "Any act of misconduct, both whilst at work or outside of work, which is sufficiently serious to destroy the mutual trust and confidence between the setting and the employee concerned."*
>
> *An investigation into your conduct has commenced, part of which will be a need for you to attend an investigatory meeting. The investigatory meeting is confined to establishing the facts of the case, and is NOT a discipline hearing in itself. I am confident that Colin (or UNISON) colleague will be able to support/provide advice about the process of the misconduct investigation, but if you do require any further information about the process then please do ask. Although you do not have a statutory right to be accompanied by a colleague or Union Rep to an investigatory meeting, we welcome you having a representative with you."*

48. The claimant responded the same day informing Mr Porter that as it was the school holidays neither she nor her union representative (whom Mr Porter had invited to attend) were available until the start of term.

49. Mr Porter responded at length setting out his view that the claimant's request to delay the meeting until term time was unreasonable and he set the meeting for 6 August 2021. He concluded his email stating

"*If you are unable to make this date then please suggest an alternative day/date/time within 5 working days of the 06th August. Please be aware that failure to comply with this request, without reasonable excuse, could be classed as serious insubordination as the request is made in order to comply with Codes of Practice, and in order for us to fulfil our operational needs."*

50. The claimant responded on 30 July 2021 stating,

"*As you are aware due to the undue stress the work situation/ issues/ grievances and what it has entailed, has caused me to have a flare up. I had to be admitted into hospital due this flare up in my Ulcerative colitis. It was so severe enough for me having to reside there for 11 days. I had a number of tests and procedures carried out, however I still needed a Gastroscopy and a Colonoscopy. This has been arranged for the 6th August. I have got to start my self isolating as of the 2nd August, and depending on the results of these two procedures I will then know the way forward physically/ medically Therefore I am unable to clarify an exact date of which I will be available. The letters of evidence are attached."*

51. Mr Porter responded in turn on 2 August 2021 rearranging the meeting for 11 August 2021 and adding a further allegation of gross misconduct to be investigated at the meeting, that of 'emotional bullying' arising from what he outlined as

"*In relation to your accusation that 'undue stress at work' caused you to be hospitalised due to a flare-up, you have not provided any evidence to support this accusation. Having lived with suspected Crohns/IBD for a number of years myself, I have extensive experience of the suspected causes/symptoms (albeit they vary in different people). 'Stress' is not a medically recognised cause. In fact, Crohn's & Colitis UK states ulcerative-colitis.pdf 'Viruses, bacteria, diet and stress have all been suggested as environmental triggers, but there is no definite evidence that any one of these factors is the cause of Crohn's or Colitis'. Your accusation that you have suffered hospitalisation due to stress at work is considered to be you using emotional bullying against your employer. As such, this accusation will be investigated as a potential gross misconduct matter and will form part of the investigation interview on 11th August.*"

52. On 3 August 2021 the claimant requested that the meeting be put back to 23 August 2021 to enable her to digest the outcome of medical investigations. Mr Porter agreed to this in his response on 6 August 2021.

53. On 16 August 2021 Mr Porter sent the claimant a list of questions that he said would form the basis of the meeting. Around the same time a separate exchange of emails took place between the claimant and Mr Porter in relation to the disputes over pay calculations.

54. The investigation meeting took place on 23 August 2021. The claimant was accompanied by her union representative Mr Blackman. Both Mr Porter and Mrs Dicken attended for the respondent. Mr Porter impressed upon me the importance of listening to the audio recording of the meeting in addition to reading the transcript. As the respondent's case was that the claimant had been dismissed because her behaviour in the meeting was so 'vile' and

'repugnant' that there was no option but for the respondent to summarily dismiss her, I considered it appropriate to do so.

55. Having listened to the recording and read the transcript I make the following observations:

- I have struggled to identify from either the transcript or the recording what it is the claimant is said by the respondent to have said or done during the meeting that gave rise to the dismissal.
- Mr Porter's complaint appears to be that within the meeting the claimant did not withdraw the allegations that she had made. Mr Porter's questioning appears to be aimed at pressurising the claimant to withdraw her complaints against him. I remind myself that the allegations made by the claimant arose in the context of a dispute about pay.
- Mr Porter during the meeting expressed frustration that the claimant was not prepared (on the advice of her union representative) to answer questions not relevant to the allegations of gross misconduct raised. Many of the questions asked by Mr Porter had no relevance either to the charges set out in the letter inviting her to the meeting nor to the additional charge added in Mr Porter's email of 2 August 2021. Some of them seemed quite inappropriate and antagonistic. In fact much of Mr Porter's questioning seemed aimed at pressuring the claimant agree with his assertions, when she clearly did not. By way of example Mr Porter by repeated questioning tried to force the claimant to accept that there was no evidence that stress is a cause of Ulcerative Colitis.
- Mr Porter interrupted the claimant and cut her off before she had an opportunity to provide an answer to his questions. He moreover refused to allow her to present any of her evidence despite the Staff Handbook expressly identifying that an objective of an investigation meeting is '*allowing the person alleged against to provide their evidence*'.
- On at least six occasions Mr Porter responded to an answer the claimant had given by stating 'in your opinion'. Eventually the claimant started herself qualifying her answers with 'in my opinion' presumably to stop Mr Porter interrupting her.
- Towards the end of the hearing at Mr Blackman's request Mr Porter set out the next steps. He informed the claimant that Mrs Dicken would consider all the evidence and decide whether there should be a hearing.

Dismissal

56. At 19.11 the evening of the meeting, Mr Porter sent an email to the claimant terminating her employment. The letter read as follows:

> *"I am writing to inform you that the decision has been made to immediately terminate your contract of employment with Herstmonceux Pre-school Ltd due to a number of fundamental repudiatory breaches of your employment contract that are so serious that they completely undermine the mutual trust and confidence needed in an employment contract. We, therefore, treat your employment contract as void.*

The breaches that you have made include, but are not limited to:
· Falsely, and without any foundation, accusing me of being dishonest and lying....an accusation made in an attempt to further your own personal gain;

· Falsely, and without any foundation, accusing me of emotional abuse and "gas lighting"....accusations made in an attempt to further your own personal gain and made as a direct attempt to cause me emotional abuse:

· Falsely, and without foundation, accusing me of causing yourself, your daughter, and your parents to suffer personal and financial loss.....accusations made in an attempt to further your own personal gain and made as a direct attempt to cause me emotional abuse:

· Falsely, and without any foundation, accusing me of discrimination on the grounds of disability....accusations made in an attempt to further your own personal gain and made as a direct attempt to cause me emotional abuse.

As per section 11 of your contract of employment, you will receive four weeks' pay in lieu of notice minus any monies owed to the Company by yourself. It is anticipated that this payment will be made to you by the last working day of September 2021.

Arrangements will be made for collection/return of any items belonging to Herstmonceux Pre-school Ltd."

57. On 24 August 2021 the claimant sent an email to Mr Porter asking him to advise on the appeals procedure and also requesting a copy of the staff handbook and copies of the policies and procedures.

58. Mr Porter responded as follows:

"*There isn't an appeals procedure for the termination of your contract. I use the analogy of you entering into a contract with a builder to build you an extension. The builder verbally abuses you, makes false allegations against you and calls you a liar, so you terminate the contract with that builder. The builder doesn't have a right to appeal.*

Even if there were an appeals procedure for the termination of your employment contract for a repudiatory breach, I cannot believe that there is any reasonable excuse for the abhorrent and repugnant accusations you have made. The absolute contempt that you have shown to myself and your colleagues has been wholly unacceptable.

With regards to your request for a copy of the handbook etc....you are no longer employed by us and therefore not entitled to access to these documents."

The Law

Unfair dismissal

59. There is no dispute as to whether the claimant was dismissed.

60. Section 98 of the Employment Rights Act 1996 (ERA) provides that

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it –**
> **(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;**
>
> **(b) Relates to the conduct of the employee;**
>
> **(c) Is that the employee was redundant; or**
>
> **(d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

61. The claimant pursues a claim for unfair dismissal under section 104 Employment Rights Act 1996 which, so far as relevant, provides as follows:

> **(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)…**
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **(2) It is immaterial for the purposes of subsection (1)-**
> **(a) whether or not the employee has the right, or**
> **(b) whether or not the right has been infringed;**
> **but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.**
>
> **(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.**
>
> **(4) The following are relevant statutory rights for the purposes of this section:**
>
> **(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal…**

62. Protection of wages rights (under section 13, 15 18 and 21 ERA) are relevant statutory rights covered by section 104(4)(a).

63. Any shortfall in payment of wages on any occasion is to be treated as a deduction, including late payment or non-payment (Elizabeth Clare Care Management Ltd v Francis UKEAT/0147/05, following Delaney v Staples [1991] ICR 331).

64. Mennell v Newell & Wright (Transport Contractors) Ltd [1997] ICR 1039, in which Mummery LJ gave guidance on the application of the provision now contained at s.104 ERA, as follows "It is sufficient if the employee has alleged that his employer has infringed his statutory right and that the making of that allegation was the reason or the principal reason for his dismissal. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed. The allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided that the claim was made in good faith."

65. The reason for a dismissal is "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee": Abernethy v Mott, Hay and Anderson [1974] ICR 323.

66. Where the decision is made for more than one reason the Tribunal is obliged to identify the principal reason. The burden is on the employer to show what the reason or principal reason was and that it was a potentially fair reason under section 98(2) ERA.

67. Following Kuzel v Roche Products Limited [2008] ICR 799 (although it specifically addresses a section 103A dismissal) the correct approach when a claimant has qualifying service is to consider:

    i) Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent is not the real reason?
    ii) If so has the employer proved the reason for the dismissal?
    iii) If not has the employer disproved the reason advanced by the claimant?
    iv) If not the reason for dismissal is the automatically unfair reason.

68. It remains open to the respondent to show that the automatically fair reason is not the reason or principal reason for dismissal even if it is found by the tribunal that the reason advanced by the respondent.

Wrongful dismissal/notice pay

69. A wrongful dismissal concerns a dismissal by an employer in breach of the employee's contract of employment. This can, and often does, focus on whether an employment contract has been terminated without the necessary notice period. Required notice periods are provided for through agreement in the employment contract, or through the statutory scheme contained at section 86 of the Employment Rights Act 1996 ("ERA"). Section 86 ERA provides a statutory minimum notice entitlement, which cannot be reduced by contractual agreement. This provides that after one month of continuous employment, an employee would be entitled

to at least one week's notice, with increases in entitlement based on years of service. Section 86 ERA does not provide any entitlement to notice period for employment that has not yet reached one month in length.

Deduction from wages

70. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

Analysis and conclusions

Unfair dismissal

71. Whilst the tribunal may have every sympathy for the owner of a small business having to navigate the complexities of employment law, particularly in the context of the Coronavirus pandemic, this does not obviate an employer's responsibilities towards its employees.

72. It is in this case self-evident that the directors of the respondent had a misconceived understanding of employment law and what amounts to a fair dismissal. Mr Porter maintained right up to and during his closing submissions that the reason for the claimant's dismissal was a series of what he said were repudiatory breaches of her employment contract. He expressly asserted that the claimant was not dismissed for gross misconduct and rather for the repudiatory breaches. He seemed to be under the lingering misconception that by terming the reason for the claimant's dismissal as a repudiatory breach of her contract this somehow enabled the respondent to summarily dismiss her without a disciplinary hearing, without a right of appeal and with almost complete disregard pf the ACAS code.

73. In Mr Porter's oral evidence he insisted in respect of the claimant that '*all along she's asserted she was dismissed for gross misconduct and should have had a hearing. Her comments and accusations were so vile that we terminated her employment contract and did not dismiss her for gross misconduct.*"

74. Mr Devlin referred me in his closing submissions to the case of Derby City Council v Marshall [1979] ICR 731 in which the EAT considered that where an employer has failed to put forward a potentially fair reason for dismissal the tribunal was bound to find that the dismissal is unfair. I however draw a distinction between However I consider the approach in Kuzel to the burden of proof to be the proper one in a case where a claimant with qualifying service advances a claim of automatically unfair dismissal. The legal burden of proving the reason for the unfair dismissal lies with the employer but its failure to prove that the reason for a dismissal was a potentially fair reason does not mean that the respondent

loses the opportunity to disprove the competing reason advanced by the employee. It would not be correct to say that it is incumbent on the tribunal to find that, if the reason for dismissal was not that asserted by the employer then it must have been that asserted by the employee.

75. I take into account that whilst denying gross misconduct was the reason for the claimant's dismissal Mr Porter has made repeated references to the claimant's conduct. Moreover I remind myself that there can be more than one reason for a dismissal and if that is found to be the case the task of the tribunal is establishing what was the principal reason.

76. Considering all the evidence as a whole, whilst I find that the respondent's belief that the claimant had committed misconduct played a part in the decision to dismiss, I conclude that the principal reason for the claimant's dismissal was her assertion of her statutory rights in relation to her wages. In reaching this conclusion I take into account the following:

i) It was evident from the correspondence in the bundle that the respondent had on numerous occasion made errors in calculating the claimant's (and it seems other employees') pay including prior to the Coronavirus pandemic. The respondent's error in respect of furlough holiday pay (which affected other staff) only came to light because it had been raised by the claimant.

ii) The claimant was therefore entitled to have a degree of scepticism in respect of whether Mr Porter's pay calculations were correct and she raised her allegations in good faith.

iii) In both raising her grievance and her grounds of appeal it was clear that the claimant was making allegations that her statutory rights concerning pay were being infringed.

iv) The claimant's raising of issues with her pay had been met with increasingly dogmatic responses from Mr Porter. Having accepted her position in relation to being paid the full amount of statutory sick pay in his email of 11 March 2021 Mr Porter then retreated from that position and indicated he was unwilling to pay the January shortfall or to discuss it further with the claimant until there was a ruling from HMRC. Mr Porter's irritation at the claimant challenging his views on calculating pay was increasingly evident in his email communications.

v) The disciplinary investigation arose in response to claimant's grounds of appeal relating to her complaints over pay. The two were inextricably bound together. Mr Devlin acknowledged that the claimant's grounds were forceful and drafted with some emotion. This is correct. However in the context of the volume, length and tone of Mr Porter's email correspondence about pay and the respondent's approach to the claimant's grievance, it is also understandable. It is fair to say that both the claimant and Mr Porter had by this stage corresponded in forceful and emotive language with allegations being made on both sides.

77. Looked at as a whole I conclude that there was a causal link between the assertion of the claimant's statutory rights in relation to pay and her dismissal. Mr Porter did not appreciate being subject to challenge in respect of his calculations and considered the claimant's pursuit of her rights in respect of her pay to be insubordination.

78. Having reached the conclusion that the principal reason for the claimant's dismissal fell under section 104 it is not necessary for me to consider the arguments that were made in the alternative.

Wrongful dismissal/notice pay

Conclusions

79. The parties are in agreement that the claimant was contractually entitled to 4 weeks' notice pay. The claimant calculates her notice pay as £166.63 based upon her being contracted to work 24 hours a week for 38 days of the year, paid monthly on a pro rata basis. The respondent paid the claimant £391 stating that the sum of £238.38 was deducted as the claimant had been overpaid. The respondent referred to the emails contained in an email to the claimant dated 26 July 2021. The respondent asserted within that email that the claimant was contracted to work 22.5 hours a week taking into account a 30 minute unpaid lunch break each day, rather than the 24 hours stated in the claimant's employment contract. It is clear to me that this is not what was provided for in the claimant's employment contract, and not how the claimant's pay had been calculated previously as is evident from the fact that Mr Porter calculated the claimant's pay rise in an email sent to her on 30 September 2020 based upon her working 24 hours a week. I therefore reject the respondent's calculations as contained in the email of 26 July 2021. I conclude that the claimant had not been overpaid. The respondent was therefore in breach of contract in failing to pay the claimant 4 weeks' wages in lieu of notice.

Breach of contract -deduction of pensions

80. The only information before the court in respect of the rate of the respondent's pension contributions is contained within an email dated 27 January 2019 sent by Mr Porter to the claimant and to other employees. It produces a table showing that the employer's pension contribution was 3% (that being the minimum required by law). The respondent did not provided an explanation as to why the contributions shown within the claimant's payslips were considerably less than 3% of the claimant's qualifying earnings. Instead Mr Porter complained that the claimant had not raised the issue over her pension previously and that if she had, '*the simple explanation of contributions fluctuating could have been explained*'. He does not then however go on to explain what his simple explanation of contributions fluctuating was. When asked about pension contributions in cross-examination Mr Porter explained that he sent the information to the payroll provider who did the calculation.

81. In the absence of any explanation as to why the pension contributions showing on the claimant's payslips are less than 3% I come to the conclusion that the respondent has breached the claimant's contract by not paying her full pension entitlement.

82. Mr Devlin produced within his written closing submissions a schedule of underpayments in respect of pension contributions. I reproduce that

schedule below. I direct the respondent to agree the schedule or respond to it in advance of the remedy hearing.

Month	Gross pay	Employer contribution	Contribution at 3%	Underpayment
Oct 2020	£759.81	£7.19	£22.79	£15.60
Nov 2020	£821.75	£9.05	£24.65	£15.60
Dec 201	£821.75	£9.05	£24.65	£15.60
Jan 2021	£333.35	£0	£10.00	£10.00
Feb 2021	£480.24	£0	£14.41	£14.41
March 21	£467.32	£5.71	£14.02	£8.31
April 21	£710.07	£5.71	£21.3	£15.59
May 21	£1,247.67	£21.84	£37.43	£15.59
June 21	£568.75	£1.47	£17.06	£15.59
July 21	£958.89	£13.17	£28.77	£15.60
August 21	£207.42	£0	£6.22	£6.22
Sep 21	£629.37	£18.42	£18.81	£0.39

Unauthorised deductions from wages

83. The claimant asserts that she should have been paid for her contractual 24 hours per week on a pro rata basis from 21 July 2021 to 23 August 2021. The respondent appears to assert that the claimant's contractual right to be paid on a pro rata basis was varied by her revised 2020 contract and/or by an email that Mr Porter sent to the claimant on 3 May 2021.

84. The removal of the words 'for 12 months of the year' in the 2020 contract does not amount to a variation to the claimant's contract in respect of her pro rata pay. It is directly contradicted by the contract providing '*Your hourly rate of pay will remain unaffected by this change in contract. You will continue to be paid each month, in arrears on or before the last day of each month by credit transfer directly into your bank account.'* The claimant continued to be paid pro rata over 12 months until April 2021 when the respondent unilaterally and without notice started to pay her for the hours she worked.

85. The email of 3 May 2021 does not contractually alter the claimant's contract. The claimant did not agree to the variation expressly or impliedly. On the contrary she pursued grievances in respect of her pay.

86. The claimant was entitled to her contractual pay on a pro rata basis and the deduction was a breach of section 13 ERA. The deductions made to her pay in July and August were not authorised by a statutory provision or by the claimant's contract, not did the claimant consent to the deduction in writing.

Remedy

1. By 24 July 2023, the respondent is i) to send to the claimant a counter schedule of loss for the remedy hearing; and ii) to confirm if the claimant's pension contribution calculations are agreed or otherwise send to the claimant a counter schedule of pension contribution calculations.

2. A hearing is listed at 10am on 1 August 2023 to determine remedy. The hearing will take place by CVP.

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Employment Judge **Kumar**

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Date **5 July 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date **6 July 2023**

FOR THE TRIBUNAL OFFICE