

mf



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms J Harding

**Respondent:** A Stars Nursery & Pre-School Ltd

**Heard at:** East London Hearing Centre

**On:** 15-16 August 2017

**Before:** Employment Judge Prichard

## Representation

**Claimant:** In person (Mrs S Guy (mother) assisting)

**Respondent:** Mrs R Harrison (owner of A Stars Nursery and Pre-School)

## RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The claimant's claim for a redundancy payment succeeds. She is entitled to a redundancy payment of £713.40.
- (2) The claimant's claim for 2 months' contractual notice pay succeeds. The claimant is entitled to notice pay of £1,158.94 (giving credit for £524.80 paid to the claimant in January).
- (3) The claimant was expressly orally dismissed by the respondent by telephone on 3 January 2017.
- (4) The claimant was unfairly dismissed.
- (5) Under the principle in *Polkey* the claimant has not established a right to any compensatory award, nor for loss of statutory rights.
- (6) The respondent is ordered to pay the claimant a total of £1,872.34.

## REASONS

1 The claimant, Ms Jade Harding, is currently 28 years of age. She has a qualification in Early Years.

2 The respondent, Mrs Ronke Harrison (it is her company), has a NVQ Level 3 in Early Years and Childcare.

3 The claimant started work for the respondent in December 2013. It is a pack-away pre-school and nursery facility run in the old Baptist Church, London Road, Purfleet. Mrs Harrison pays rent to the Church for her use of the hall where the pre-school is based. They also had the use of the garden outdoor space.

4 The numbers of children fluctuated but never exceeded 20. More usually attendance was about 15.

5 As background, the claimant relates that the pre-school was regularly short of staff. Shortage of children was also a problem, and attendance was different on different days of the week. It was not a very profitable business. Later in the narrative I heard the pre-school decided to close on Thursdays because of the low numbers of children expected on a Thursday; staff were paid but leafleted the local area instead, to try to increase numbers.

6 When the claimant started at the nursery she was employed as a Pre-School Assistant. That is the lower grade, paid the national minimum wage.

7 The following year the existing Manager of the pre-school (Jodie Burleigh) left. At that stage Mrs Harrison asked the claimant to act up into the manager's role. The claimant was daunted by this, not having had previous managerial experience. But she said she would like to rise to the challenge. It was a good opportunity for her to develop her skill and experience in a relatively small nursery.

8 The following April 2015 she was officially confirmed established in the post of Pre-School Manager. There is a good deal of regulation surrounding the running of nurseries / pre-school establishments. They are regulated both by OFSTED and also by the local council, in this case Thurrock. Thurrock operates a procedure known as a RAG (red, amber, green) assessment. Having seen the RAG reports there is a focus on training, child protection, parent involvement, and safety.

9 At this hearing the evidence of the claimant and that of the respondent have differed starkly. The respondent paints a generalised picture of herself supportively overseeing the claimant's work. The claimant's experience was the opposite. She was officially made Manager of the Pre-School in April 2015 having acted up for a year, but it had always been a struggle because, as she complained, there were insufficient staff recruited to support her in her role. She effectively had to do the work of a Pre-School Assistant in order to keep the regulation staff ratios correct and within the legal limit. These complex staffing ratios of staff to children also vary on the age of the children. The 2-year olds require a higher staff/child ratio than the 3-5 year olds.

10 I find as a fact, as the claimant states, that Mrs Harrison was seldom counted into the staff/child ratio herself. She has lived throughout in Chelmsford and I find, as the claimant states, she was not that frequently at the pre-school. I cannot quantify it any more precisely. Her visits were also unpredictable. One did not know when she was going to be there, and could not count on her attendance when making rotas..

11 Mrs Harrison, as I accept, described her role as a “strategic” role. That seems to have been the reality. She wanted the day to day management of the home to be the claimant’s responsibility. However, without sufficient support from qualified staff trained the claimant was unable to carry out many regulatory and management duties. The claimant could only carry out central management duties by putting in many extra hours in her own time both at the nursery and at home. She also complained of not being provided with basic IT and other equipment to do the job.

12 One stark example was Ms Helen Emmerman who joined as a Practitioner Assistant in May 2016. Disclosure & Barring Service clearance was not obtained at all right up to the time when she left again in October 2016. Without DBS, a practitioner cannot work alone unsupervised with young children. So the claimant had to abandon her management duties to make sure that she was supervising Helen Emmerman over the 5 months she worked there.

13 During this time the respondent received a red RAG marking from Thurrock. On 28 September 2016, following a visit from Jenny Bond of Thurrock, there were a number of recommendations. The majority of the criteria were marked “not met”, other than health and safety lead practitioner, and food hygiene level 2 training.

14 The claimant rightly and fairly pointed out that less than a month later, 17 October 2016, on another visit from Thurrock council some of the previously not met criteria were marked partially met. The overall RAG grade was then amber.

15 Her work became easier after the appointment of an experienced staff member, Ms Charlene Miller, who was appointed as Deputy Manager. However, then the claimant’s complaint was that Mrs Harrison was giving Ms Miller the more important jobs and communicating with her more, as if she had ceased to trust the claimant as Manager. She seemed to be treating Charlene Miller as the Manager. I accepted the claimant’s evidence which she recalled in clear practical detail, which commended its accuracy. I also accept the claimant’s evidence that Charlene Miller found the tension awkward and embarrassing. There was similar feedback to the claimant from another Deputy Manager Ellie who attested to the awkwardness of the tension between the claimant and Mrs Harrison.

16 Despite her long-term dissatisfaction with aspects of her job, the claimant introduced several new members of staff. Among them was another Jodie, Jodie Braun, who had returned to work at the pre-school. The claimant also introduced Helen Emmerman, and Tracy. The claimant is in a network of mothers at the local school therefore was more likely to know suitable assistants and managers from her circle of local friends. The respondent lived in Chelmsford.

17 The claimant and Charlene Miller are now close friends. It was apparently quite late in these proceedings the claimant found that Charlene was unavailable to attend this hearing to support her tribunal case.

18 The claimant felt that Mrs Harrison was criticising her competence to be a manager, when the problem, as she saw it, was she was not given sufficient time to carry out management functions. The claimant said she found Mrs Harrison unsympathetic. There was the QUILT initiative run by Thurrock Council. That was a grading in which the pre-school could have passed a module for care of 2 year old children. She says Mrs Harrison blamed her for the fact that QUILT had to be put on hold and the pre-school missed the opportunity. The claimant's account which I accept is that she simply had no time in addition to all her other management duties to attend to QUILT.

19 Mrs Harrison admitted that her commitment to the pre-school necessarily declined during her pregnancy and then after the birth of her fourth child. He was born by caesarean section in July 2016 and gave her many sleepless nights. He was allergic to normal milk and dairy products. (Mrs Harrison had to breastfeed in the hearing room while conducting her own case. It has not been easy for her). The respondent and her husband struggled to cope with the additional childcare needs. This later became acute around Christmas 2016 when the respondent's daughter and the young baby fell down the stairs on Christmas Eve and the baby's leg was in a plaster cast.

20 The respondent's pregnancy and the birth was the period when the claimant's dissatisfaction peaked. On 2 June 2016 she wrote a formal letter of complaint to Mrs Harrison and emailed it to her. It was under 2 main headings a) insufficient staff and b) lack of staff training leading to poor quality of childcare at the pre-school. The claimant stated that as a result of these she was unwilling to continue as manager. She felt that she was unsupported by Mrs Harrison despite the fact that under her management the OFSTED rating had moved from "Inadequate", as it had been prior to her starting employment, to "Good" under her management. I have seen the evidence of that. The OFSTED grading is recorded in Thurrock's RAG forms.

21 The claimant's other main head of complaint was unrealistic working hours. The claimant had reported sick to her doctor with stress. The doctor had signed her off for 2 weeks. The claimant thought it unwise to start taking prescribed antidepressants. Then, despite being signed off the claimant in came back to work, otherwise the pre-school would have had to close.

22 She complained about lack of computer, internet access, Wi-Fi and that she had to use her own computer and mobile to access the internet.

23 She stated: "I am not prepared to take responsibility for any legal requirements or responsibilities pertaining to this post the worry of which is what is making me feel so ill".

24 She complained that there had been a breakdown in communication between

the two of them over the last 6 months, and she mentioned the respondent's pregnancy. The claimant stated:

"I am losing confidence in your loyalty to me and I do feel this is unfair considering the amount of loyalty, reliability and effort I have shown you which in my opinion goes above and beyond what most people would be willing to show you in the circumstances that I find myself in. I hope after reading this letter of complaint we may be able to work together to resolve the issues and problems ...

I do not want to resign at this present time unless forced under pressure to do so. I just need to lighten the responsibilities that are upon me."

25 Mrs Harrison responded saying that she would arrange a meeting according to the pre-school policy (for grievances). In these proceedings Mrs Harrison has disclosed short handwritten notes of a meeting which apparently took place on 8 June which the claimant says she does not recognise as a meeting she attended at that time. However, it was after that time that Charlene Miller was appointed as Deputy Manager. So clearly Mrs Harrison was taking the claimant seriously, and taking steps to improve matters

26 The respondent advertised for a new role, not Manager, but Senior Early Years Lead Practitioner at a rate of roughly what the claimant was earning - £8.30 per hour hourly, i.e. above national minimum rate.

27 It seems to the tribunal that the pre-school was caught in a vicious circle, failing to achieve critical mass of children to support a critical mass of staff. Numbers of both were always too low. This became acute towards the end of 2016 and the respondent decided that she would have to close the pre-school. She made an announcement to all the staff on 2 December 2016.

28 Subsequently, however, she entered negotiations which, initially, sounded hopeful, with a potential buyer called Felicia. Felicia now visited the pre-school and talked to staff. It seemed clear to the claimant (and I accept her evidence) that Felicia was intent on appointing Charlene Miller as the Manager, and the claimant as a Deputy Manager, if a manager at all. When Felicia was asked by some staff why this was her plan, she had explained she had obtained a poor impression of the claimant's competence from talking to Mrs Harrison. This is contrary to the respondent's generalised assertion that she always praised the claimant's capabilities, despite her reservations (of which she has made no secret in these proceedings). The respondent professing "I like this lady" did not come over convincingly to the tribunal, given the history and the claimant's evidence which she recalled in painstaking detail, thus commending the accuracy of her account.

29 Negotiations with Felicia did not end well. It culminated on Friday 30 December when Felicia apparently categorically informed the respondent that she was not interested. What she stated in the SMS text I was shown was that the pre-school had to come with the property i.e. the premises. She must have known that that was an impossible request because this was a church hall attached to a live church for which the respondent paid rent. It looked like a stipulation that Felicia knew was impossible of achievement, so it amounted to a refusal to take over the pre-school. That seems to

be how it was taken by the respondent, unsurprisingly.

30 There were further anxious texts around this time. The respondent exhibited many texts in the bundle without dates which was not helpful. Therefore the sequence of events was unclear. The claimant exhibited some other copies of some of these texts which included some dates which helped the tribunal to work it out. For instance there was one long text which was quite positive from the claimant but that was not in December at all. It was back in August 2016. It is a significant difference.

31 There was some controversy over Christmas pay because Mrs Harrison said she would pay the staff, who were normally paid at the end of the month, earlier, in order to get the money to them before Christmas. This did not turn out as expected. The respondent was not able to pay the final £300 owing to the claimant until the week after Christmas. She paid some £990 just before Christmas.

32 The claimant was concerned as she had been told the sale of the pre-school had fallen through. I accept the claimant's account that on 3 January 2017 the respondent telephoned her. There is no text or email to corroborate this. The respondent then informed the claimant that her employment was coming to an end and that the pre-school was definitely closing. I respect that it was a difficult decision for the respondent not least because she owed Thurrock Council some £6,000. Some of the free places were funded in advance by the Council. The respondent had therefore originally wanted to keep the pre-school open in order to repay that money. She currently has to pay it back out of her own money in agreed instalments.

33 This call on 3 January is the nub of the case for the tribunal's determination. In my view all the evidence points towards express dismissal in that call being the correct analysis on the facts. The claimant had originally identified the date of her express dismissal as 2 January. The respondent then produced her telephone bill for 2 January in the tribunal bundle, for that date and that date only. In fact the bill is heavily redacted, one cannot even see whose telephone bill it is, just entries on some phone bill for the date 2 January. There was no call from Mrs Harrison to the claimant.

34 Subsequently in these proceedings the claimant realised, piecing together the sequence of events, that the call must have been on 3 January. She therefore contacted Mrs Harrison who told her she could not get her records for 3 January and, anyway, it had been the claimant's responsibility to get the date correct. That was a most unhelpful answer. She has not produced any bill for 3 January at all. I do not accept that it was impossible for her to obtain the details of her phone bills for outgoing calls. She had to pay the bill for them. By contrast, I do accept the claimant's evidence that she was unable to retrieve details of her incoming calls that far back. An iPhone has a record of "Recents", in / out which only goes back about 3 months. That is on the phone itself. She tried in the O2 shop to obtain past records of incoming calls and was informed that such records could only be obtained if there was an ongoing criminal investigation and would have to be obtained by police, or an authorised lawyer. It seems to the tribunal that everyone has access to records for outgoing mobile calls at least for a year. That is their phone bill. Many networks go back a lot further. Incoming calls are different.

35 Both the claimant and the respondent are on the O2 network about which I do not know much, but I am prepared to accept the claimant's detailed evidence on this which sounds familiar and probable. The respondent made no attempt to challenge it.

36 It seems almost certain that Charlene Miller and Jodie Braun received the same telephone call from the respondent on 3 January. Both were quickly able to find other work. As it happens Charlene Miller had been previously employed by the same Felicia who had been the prospective buyer of the pre-school throughout December 2016. She went back to working for Felicia. Jodie Braun found other similar work. The claimant has not been so lucky.

37 The claimant has exhibited her Facebook page from the same evening, 3 January, to show she had filled out her first job application form to find new work. It was late. I do not consider that she would have done so if she thought there was some hope of staying on at A Stars Nursery Pre-School. She had in the past been reluctant to leave, despite her dissatisfaction.

38 On the same day she was texting Mrs Harrison saying: "Hi Ronke. Are you telling the parents or should I tell them? It's not fair to just not tell them. They need notice too, and I feel bad on them all." Later that night Mrs Harrison replied: "I feel the same I will call you tomorrow to decide on the way on moving forward". Quite what she meant by "moving forward" is anybody's guess. The phrasing of the claimant's text: "They need notice too [tribunal's emphasis]" strongly suggests that the claimant herself had just been given her notice by Mrs Harrison.

39 Staff turnover at the pre-school had been high and it is a fact that the claimant was the only employee there with 2 years' qualifying service at this time. In fact she had three years' continuous service. I consider that the claimant and her colleagues Jodie Braun and Charlene Miller considered that their employment at the pre-school had terminated. There has been no sign of a play group in the Baptist church since. Mrs Harrison had to carry on paying rent for another 3 months even though there was no play group there.

40 I have been shown texts between the claimant and Charlene Miller. On 4 January Charlene Miller said:

"Hi Hun. She phoned a little while ago but it was pointless still has no intention of re-opening so her call was pointless really lol. Think she is hinting at me making her an offer but I ain't offering her nothing like she wants so I'm gonna bother I'd rather look elsewhere."

The claimant stated: "When I asked her she said well that is what we said". The claimant referred to the respondent as a "bitch" for apparently turning the responsibility on to the claimant by saying that the claimant had agreed to the closure, when the claimant had not. The closure was very sudden and caught the claimant unprepared, and at a bad time.

41 The claimant later found out on 9 January that Mrs Harrison had actually advertised her job. There was an advertisement on the internet which the claimant

checked. It had been there since Saturday 7 January. The advertisement was For a Pre-School Manager (as well as a Practitioner) for A Stars Nursery & Pre-School.

42 The claimant and her mother have carried out a lot of internet research into the claimant's employment rights. The claimant sent Mrs Harrison a well-drafted letter dated 12 January 2017. It repeated the recent history in detail, with dates. The claimant claimed a statutory redundancy payment for her 3 years' employment and also payment in lieu of notice. Under her written contract the claimant was entitled to 2 months' notice. The letter recited the fact that Mrs Harrison had telephoned the claimant on 6 January, Friday, to state that she might re-open, contrary to what she had said on the 3 January.

43 As previously stated, Mrs Harrison had understandably been dithering and ambivalent, not least because of her £6,000 debt to Thurrock Council, and the rental payments on the hall. However if the respondent had meant to encourage the claimant to come back she set about it in an odd way. She told the claimant that the claimant needed to: "step up" to improve numbers and that a stronger more able Manager was needed to run the pre-school. That was hardly going to encourage the claimant to come back.

44 In any event, the tribunal's primary finding was that Mrs Harrison had given the claimant unequivocal express notice on 3 January and was not entitled to simply change her mind.

45 The claimant's letter of 12 January stated:

"Your freshly made claims and insinuations of your dissatisfaction with my work capabilities have upset and shocked me because it was the first time you'd ever conveyed this in the whole 3 years that I was employed by you."

She also complained that, if the respondent had had issues over her performance, these were not dealt with according to the ACAS code of practice and the pre-school's own disciplinary and grievance procedures. The letter also pointed out there had been no proper redundancy consultation (which was obviously true).

46 I have struggled to find the best analysis of the factual evidence. I have been forced to conclude that Mrs Harrison's purported plan to re-open the nursery was a ploy to attempt to put the blame for the closure of the nursery on to the claimant, and to deprive her of any termination claims she might have had for redundancy pay and pay in lieu of notice. I consider the plan was, and remained, that the pre-school would close because it was no longer economically viable. They had been struggling for some time now with staff shortages and low child numbers. Further, regardless of the plan, the respondent was not welcoming the claimant back in reality.

47 Following that letter the respondent wrote to the claimant apparently on 19 January though the claimant says that she did not receive such a letter. I consider that this letter was a tactic on Mrs Harrison's part. She stated:

"I am writing to inform you that your post at the Pre-School as Manager is still continuing and the



Pre-School is to be opened on Monday 23 January at 8:45. This is not a redundancy situation as the Pre-School is ongoing.”

48 Consistent with that allegation, as she had to be, Mrs Harrison had continued to pay the claimant her pay. It was not a particularly high risk tactic because ultimately she has been given for credit for that payment against the awards made by the tribunal. The payment into the claimant’s bank account was £524.80. Subsequently Mrs Harrison suggested, holding a grievance meeting with the claimant. The claimant was in principle willing to go along with this initially although subsequently by letter of 20 January (which was detailed and well-drafted letter), she stated she would like a “modified grievance procedure”.

49 This was the only piece of legal research the claimant and her mother did which was wrong. A modified grievance procedure is something that was part of the statutory grievance procedures which was enacted and brought into force in 2004 and wholly repealed in 2008. Unfortunately these, and several other provisions, remain on the internet after they have ceased to be law. The modified grievance procedure essentially meant that you are inviting the person with whom you raise a grievance to respond to it in writing, without the need for a grievance hearing. And that is what happened.

50 On 27 January Mrs Harrison wrote 2 letters although the claimant received them at very different times. The first was just stating that her post was continuing and that her continuing absence was unauthorised absence and that disciplinary action might be taken against the claimant. Again the tribunal finds that this was a tactic. There was no serious intention to restart the pre-school or to take the claimant back. Apparently none of the other employees, Charlene Miller or Jodie Braun, was approached in the same way.

51 In another letter dated 27 January and headed “Modified grievance response” Mrs Harrison gave a fuller response. If she had been meaning to encourage the claimant to come back she was about as discouraging as she could have been, consistent with that position. She was highly critical of the claimant’s performance and complained that she herself had been relied upon to support / encourage the claimant, which should not have been her task. She said the claimant had not asked the parents to make deposits, and that she had not sent out Christmas cards for December 2016, and even that: “...Your absence is at cost to the Pre-School as I am trying to employ new staff. I need to know you are still willing to come to work for the Pre-School as a Pre-School Manager”. That was hardly consistent with the fact she had advertised the claimant’s job on 7 January.

52 The whole response to the modified grievance was 6 pages long. In my view it does not help the respondent. After that, the claimant sent another email in response to the modified grievance response dated 27 January but received on 10 February 2017 (sic). The claimant here first mis-stated the date of her termination as 2 January 2017.

53 The claimant’s position is that, since the claimant’s email letter of 12 January, the respondent has employed tactics to pretend that the claimant was still employed then stopping her pay by reason of unauthorised absence. It was a bluff. The claimant

has been keeping a look out on the pre-school. She has observed that no Pre-School has opened in 2017 at all.

54 In the letter of 13 February the claimant there remarks about the payment of £524.80 into her bank account which she had originally thought that it was for arrears of pay and holiday pay and stated:

“I didn't receive the letter that you referred to dated 19 January 2017 which is why I thought it must have been an error in calculation of my December wages. I did not work for you in January. I am not employed by you. The Pre-School remains closed and it's now 13 February. My last working day of employment was 21 December 2016 so why would you do this? I hope this has clarified my position already made clear in my letters dated 12 January 17 and 20 January 17 with you once and for all.”

55 The claimant then mentioned talking to ACAS. This claim was referred for compulsory early ACAS conciliation on 7 February. The early conciliation certificate was issued on 7 March. I do not need to refer to any further texts or correspondence.

56 On a proper analysis I consider that the plan was and remained to close the pre-school and not re-open in January despite initial ambivalence which then merged into a tactical attempt to thwart the claimant's claims for redundancy and notice pay.

57 In the above judgment the award of notice pay has been reduced by £524.80 to give the respondent credit for the amount originally allegedly given for January pay.

58 The claimant's calculation of her redundancy pay has been accepted. It has been correctly calculated. The claimant is also claiming a basic award but statutorily an employee can only receive a basic award or a redundancy payment, not both. It could have been a basic award but the claimant may benefit from greater enforcement options for a redundancy payment in the event of non-payment by the respondent.

59 The stance of the respondent has paradoxically helped the respondent to defeat a claim for continuing loss of earnings. There was no consultation or fair procedure adopted therefore a finding of unfair dismissal is inevitable. However, under the principle in *Polkey* I am obliged to find what would have happened if the procedural defects had been cured. I am driven to conclude that in the case of the claimant and both her colleagues at the time would have been unequivocally dismissed as at 3/4 January 2017. There is no basis for awarding loss of continuing earnings, or even allowing a token time for consultation because it was a sudden event. The Pre-School closed totally, once for all. There was no way in which Mrs Harrison was going to carry on their employment despite her tactic in trying to frustrate and thwart the claimant's legitimate claims for redundancy pay and notice pay.

60 I consider the advertisement for job applications on 7 January was probably a last desperate, and ineffectual, attempt to re-open. Mrs Harrison's plan was never to re-employ the claimant.

61 It was only in these proceedings (as opposed to her attempts to negotiate with

the respondent in correspondence before proceedings), that the claimant is claiming continuing loss of earnings.

62 There is no basis for giving continuing loss of earnings there is no basis for awarding compensation for loss of statutory rights in the event that if the procedure had been correct those statutory rights would have been lost anyway because the pre-school was closing at once. That is why the judgment is limited to awarding contractual notice pay and statutory redundancy pay.

63 The rest of the claimant's claims succeed.

.....  
Employment Judge Prichard

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....  
.....  
FOR THE TRIBUNAL OFFICE