EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Diosa Bandiola	v	**1. Rainbow House (Herts) Limited** **2. Mrs Alanna Morrison**

Heard at: Watford **On**: 20 – 25 February 2017
6 March 2017

Before: Employment Judge Henry
Mrs Castro
Mr Bhatti

Appearances

For the Claimant: Mr Peter O'Brien Counsel (CAB)
For the Respondent: Mr Gareth Graham, Counsel

JUDGMENT

The unanimous decision of the tribunal, is:

1. The claimant has not been unfairly dismissed pursuant to s.99 of the Employment Rights Act 1996.

2. The claimant has not suffered discrimination on the protected characteristic of pregnancy.

3. On the claimant's claim for an unlawful deduction from wages having been withdrawn, the claim is dismissed.

4. On the claimant's claim for breach of contract in respect of notice having been agreed between the parties, in the sum of £2141.53, the tribunal awards the claimant the said sum in damages.

5. For the reasons stated, save for breach of contract for which damages are awarded, the claimant's claims are dismissed.

REASONS

1. The claimant by a claim form presented to the tribunal on 22 April 2016, presents complaints for discrimination on the protected characteristic of pregnancy, automatic unfair dismissal for reasons of pregnancy, a claim for breach of contract in respect of notice and an unlawful deduction from wages. The complaint for unlawful deduction from wages was withdrawn and the complaint for breach of contract regarding notice was agreed between the parties during the course of the hearing.

2. The claimant commenced employment with the respondent on 5 May 2015. The effective date of termination was 4 December 2015; the claimant then having been employed for seven months.

Issues

3. The issues for the tribunal's determination were determined at a preliminary hearing on 26 September 2016, as follows:

   Unfair dismissal

   3.1 What was the reason for dismissal? Was the reason or principal reason for the dismissal that the claimant was pregnant? (She relies upon regulation 20(1) and (3)(a))

   3.2 The claimant did not have two years service so the burden lies upon the claimant to prove the reason for the dismissal.

   3.3 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities, that the claimant actually committed the misconduct alleged. The conduct relied on is that because the claimant did not do the job efficiently she was putting an undue burden on other members of staff; she was slow to perform basic tasks and needed constant supervision from the beginning of September.

   3.4 Does the respondent prove that the claimant would have been fairly dismissed in any event? If so, what is the percentage chance of a fair dismissal and when?

   Direct discrimination on the grounds of pregnancy.

   3.5 Has the respondent subjected the claimant to the following treatment falling within s.39 of the Equality Act namely:

      3.5.1 From the end of September, the claimant was subjected to excessive criticism and observation by Mrs Morrison; the

claimant was told to speak to the children more and engage with them.

3.5.2 The claimant was forbidden by Mrs Morrison to sit when looking after the children.

3.5.3 In or about late November on several occasions the claimant was told by a staff member (an agency worker who had dark short hair but who the claimant cannot otherwise identify) that she should wait to go to the lavatory and not go when she needed to.

3.5.4 In late November [on a single occasion the claimant was told by Mrs Morrison to lift a heavy load (ie the children's damp bed clothes which had been washed, on a rack

3.5.5 The claimant was not helped to avoid lifting children by Mrs Morrison at least twice, at the end of November.

3.5.6 Mrs Morrison asked the claimant to carry out Level 3 care duties for which the claimant had not been trained, specifically, filling in children's observations forms.

3.5.7 In the beginning of November Mrs Morrison accused the claimant of not being cheerful, at least three times.

3.5.8 On 4 December Mrs Morrison dismissed the claimant.

3.6 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the unfavourable treatment was because of the pregnancy?

3.7 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Time – Jurisdiction.

3.8 The claim form was presented on 22 April 2016. The effect of the ruling extending time, is that the cut-off date (ie the date before which any act or omission must have taken place on, in order to be in time without the need to rely on 3.9 or 3.10) in relation to Mrs Morrison is 4 December 2015 and for the first respondent is 25 November 2015.

3.9 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

3.10 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

Remedy

3.11 If the claimant succeeds in whole or in part, the tribunal will be concerned with issues of remedy. The claimant seeks compensation.

3.12 There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

Evidence

4. The tribunal heard evidence from the claimant and from the following witnesses on behalf of the respondent:

- Mrs Alanna Gill (nee Morrison) – Manager of Rainbow House Nursery
- Robert Storrar – Owner and manager of Rainbow House Nursery
- Ms Catherine McElroy – Nursery practitioner
- Ms Gemma Bunting – Nursery manager

5. The witnesses gave their evidence in chief from written statements upon which they were then cross examined. The tribunal also received in evidence the written statement of Ms Shannon Hawe, Nursery practitioner, who did not attend to give evidence.

6. The tribunal had before it a bundle of documents, exhibit R1. From the documents seen and the evidence heard, the tribunal finds the following material facts.

Facts

7. The respondent is a nursery within the Education Early Years sector for children up to five years of age. The nursery is divided by age being babies up to 18 months, toddlers from 18 months to 3 years and pre-school for children of 3 years to 5 years of age. Each group has designated rooms.

8. The claimant commenced employment with the respondent on 5 May 2015, and was subject to a six-month probationary period.

9. The claimant was employed as a Child Care and Education Assistant within the Toddler Room, whose role it was to support qualified nursing practitioners in delivering the Early Years curriculum to toddlers (18 months to 3 years).

10. The claimant was required to; plan and observe the activities of an allocated key group of children, help with the day-to-day care of all children in the Toddler's Room, to include; nappy changing, feeding and supervisory play. The claimant was further required to provide feedback to parents each day

on their child's progress, interact with the children to aid their development and to ensure that the children's environment was safe.

11. In respect of the nursery, there is by law a stipulated ratio of children to practitioners and childcare assistants, which for toddlers was 1:4. It is not in dispute that when the claimant commenced employment in May 2015, this was a quiet period within the Toddler Room, having approximately 10 children per day, and that this progressively increased to approximately 17 children after August, and in instances had up to 21 children per day.

12. The Toddler Room was staffed by Ms Hawe, nursery practitioner, Ms McElroy, nursery practitioner, and the claimant as a Child Care and Education Assistant, together with agency staff being utilised as demand required. The room was further supervised by a room leader, Ms Chapman.

13. With regards agency staff, it is here noted, which is not in dispute, that as part of the agency's contract with the agency worker, the agency worker is not permitted to be left alone in any nursery room without a member of permanent staff being present.

14. It is also here noted that, the claimant prior to her permanent engagement with the respondent, having worked for them as an agency member of staff on approximately four occasions, had not before this period worked in a nursery setting, having worked as a nanny and childminder, for which she received very favourable references. In this respect, it was the claimant's evidence to the tribunal that her experiences were limited, to working with small groups of children and working in the nursery was a different environment and different work ethics.

15. It is also not in dispute that, there is no documentary evidence of complaints being made against the claimant or of issues being raised with the claimant in respect of her performance until 11 September 2015, for which the respondent has adduced a "Monitoring Verbal Communication Form" at R1 page 250, a document recording an observation of the claimant's interaction with the children, discussion had and comments made thereon. It is not however suggested that this was anything other than general management, and a practice which is carried out in respect of all members of staff.

16. Despite this, it is the respondent's evidence that the claimant had repeatedly been spoken to in respect of her performance informally, which is not challenged by the claimant, being in the form of guidance and instruction as opposed to criticism or challenge.

17. In this regard, the tribunal received evidence from Ms McElroy and Ms Hawe, as to their having raised issues with the room manager and further management, as to the claimant's performance; of inaction, a lack of engagement with children, and the need to be repeatedly instructed to undertake routine tasks.

18. In respect of this evidence, the claimant has submitted that these individual's evidence was in some way directed by the respondent. The tribunal has found no evidence to support such a conclusion having heard oral evidence from Ms McElroy, which was clear and un-impeached, in cross examination.

19. The tribunal accepts the respondent's evidence to be a true reflection of the then state of affairs that, complaints as to the claimant's performance had been raised about the claimant, albeit not then shared with the claimant.

20. In this respect, the tribunal accepts the respondent's evidence that, on the claimant being new to the nursery environment, there was a bedding-in period during the claimant's probation period, for which they did not seek to action the complaints received, preferring to address the issues by way of encouragement and instruction.

21. Towards the end of September 2015, the exact date of which is not known, the claimant informed the respondent that she was pregnant.

22. It is the claimant's claim that, having informed the respondent of her pregnancy, she was thereafter subject to unfavourable treatment, which the claimant identifies as:

    22.1 Subjected to excessive criticism and observation by Mrs Morrison:

    22.2 Being told to speak to the children more and engage more with them,

    22.3 Forbidden by Mrs Morrison to sit when looking after children,

    22.4 On several occasions being told by a staff member (an agency worker) that she should wait to go to the lavatory and no go when she needed to,

    22.5 On a single occasion, being told by Ms Morrison to lift a heavy load (children's damp bed clothes which had been washed on a rack)

    22.6 Was not helped to avoid lifting children by Ms Morrison, at least twice, at the end of November,

    22.7 Asked to carry out Level 3 care duties for which the claimant had not been trained, specifically, filling in children's observation forms,

    22.8 Accused of not being cheerful, at least three times, and

    22.9 Being dismissed from her employment on 4 December 2015.

23. The tribunal will return to address these complaints subsequently herein, when considering the claimant's specific complaints for discrimination. It is however here noted that by these complaints, the claimant, save as stated

as being in a particular month, has been unable to give further detail as to the chronology of the events.

24. On 2 November 2015, a "Pregnant Worker Risk Assessment" meeting was held with the claimant, the assessment document from which are at R1 page 48. The meeting addressed; the potential risk/hazard, who was at risk, the causation to harm, control measures, and whether the control measures were in place.

25. By the assessment document, the tribunal notes the following entry as to control measures;

> "Facilities:
>
> Adequate resting facilities available (requirement under the regulation for employers to provide a quiet rest area to put feet up and lie down if required in the future).
>
> Hygiene facilities:
>
> There are sufficient toilets and associated hygiene facilities available.
> Adequate on-site arrangements for nutrition and liquid refreshments. Also that she is able to take breaks as and when required.
>
> Mental/physical fatigue and working hours;
>
> Currently able to cope with her work load and working hours. This will be reviewed with pregnant employee and manager as pregnancy develops.
>
> No significant manual handling of leads to be undertaken for duration of pregnancy. Member of staff to request assistance/support available.
>
> Working alone:
> Provide adequate training and access to communications. Ensure support is available. If the risk cannot be significantly reduced offer alternative work.
>
> Adequate resting facilities available…."

26. And under the section of the document headed *"Additional Control Measures (to take account of local/individuals circumstances)",* it provides that the claimant was *"not to change display boards"*, which restriction was determined on the initiative of management; the board being a heavy item.

27. The assessment document further provided, being highlighted in bold text:

> **"As pregnancy is not a static condition and the nature and degree of risk will change as the pregnancy develops, risk assessment to be reviewed on a regular basis in agreement with the pregnant worker, or sooner if any significant change.**
> **Pregnant worker should inform line manager of any changes in their condition that may be relevant to their pregnancy and their safety at work".**

28. The assessment was then signed by the claimant and by Mrs Gill, who conducted the assessment, and a review date set for 4 January 2016.

29. The tribunal also here, makes reference to a note recording discussions had with the claimant around the risk assessment, and the claimant's work performance on 2 November, which is here set out in full as it gives context to the circumstances existing at the material time.

> "A discussion took place regarding Diosa's current health and pregnancy to determine what if any aspects of her role she was finding hard to carry out in the present situation. Diosa informed me she is at present 30 weeks pregnant and feels fine in herself just a little tired at the moment. When asked if she felt able to continue changing children's nappies as part of her daily routine, Diosa agreed she was able to fulfil this part of her job role along with lifting the younger children where necessary.
>
> Diosa said she felt emotionally stressed when the children become upset during the day and this impacted on her performance, it was explained to Diosa that during the course of the day children can become upset and at times although this can be a challenging task, it is unfair of Diosa to allow such events to impact significantly on her performance and that her colleagues are then having to step in and carry out her duties for her.
>
> It was clearly explained that snack time is a one person job not the role of two people as this has an impact on what else is happening within the room and has led to a higher increase in accidents due to the lack of adult deployment around the room.
> It was explained that Diosa needed to be more enthusiastic in the mornings when greeting parents and become a lot more engaged with the children throughout the day along with carrying out any other role asked of her by colleagues, Diosa agreed that this was something she could do and we agreed to monitor her performance and the points stated above."

30. The tribunal pauses here, to address an issue raised as to accidents, occasioned by children in the Toddler Room for which it is the respondent's submission that, on the claimant failing to perform to the required standards, she was placing additional responsibilities and pressure her co-workers, which contributed to an increase in the incidence of accidents. The claimant has taken significant objection to this contention on the premise that, there is no evidence before the tribunal on which such a correlation could be made.

31. The tribunal deals with this issue briefly, in that, on the evidence before the tribunal there is no suggestion that the claimant was the cause of any of the accidents referred to, neither is there evidence to support the respondent's submission that, the claimant's poor performance did contribute to any specific accident, albeit the point does exist that it could have. Despite this, for a determination of the issues before this tribunal, a determination as to the causation of accidents in the Toddler Room is not necessary. The tribunal accordingly does not consider this issue further.

32. On 12 November 2015, the claimant was off sick from work, informing Mrs Gill by text, "Hi Alanna. I am very sorry but not feeling well. I have bit fever and very swollen throat and tired to have paracetamol but threw it up because felt sick"

33. The claimant was ten off sick to 16 November 2015.

34. The tribunal here notes that, the claimant also had periods off sick, on 21 and 22 September, 5 and 28 October, however the tribunal has received no evidence as to the reasons for these absences, and the claimant has not alleged that any of these absences were pregnancy related, although for completeness, it is noted that on the claimant being asked as to her absence between 12 and 16 November 2015, she stated that she did not know if her sore throat had been caused by her pregnancy, but that it could have been. There is no medical evidence provided to support this position.

35. The tribunal further notes a text exchange between the claimant and Mrs Gill circa 23 November, in respect of nappy changing procedures, a copy of which procedure as revised in March 2015, is at R1 page 125. By the text exchange, the claimant asked:

> "… I was just wondering. We normally bring three or four children to get their nappies changed. Is it alright? Also, I know we have to wear gloves and an apron to change their nappies. Do we have to wear clean gloves and aprons for each child we change? I have been shown to change only per group, and I only change cloves if they were dirtied by very soiled nappies or when I had to put cream. I am asking because I read that"

36. Mrs Gill replied stating:

> "You must change gloves and aprons every child and only use the child's own pot of cream, you only take your ratio of children and never let them sit on the floor and wait ins (sic) not hygienic".

37. This is a task, which the respondent submits, was a routine task to be performed a minimum of three times per day for each child.

38. On 27 November 2015, the respondent was the subject of an Ofsted inspection, the report from which is at R1 page 53.

39. The report assessed the nursery as "Requires improvement" and identified the following, that:

> "There is no named deputy in place who is able to take charge in the absence of the manager to promote children's safety and wellbeing.
>
> Teaching is variable. Staff are not supported with regular supervision to improve their knowledge, understanding and practice. The quality of teaching is not effectively monitored to ensure that under performance is tackled swiftly.

> Ongoing observations and assessments are not used effectively to inform the planning of suitably challenging activities in the room for two year olds".

40. It is the respondent's evidence that, on receipt of the report for which they had received ongoing feedback throughout the day, they had been informed that the area of concern was mostly with the Toddler Room, and in respect of which, the respondent has taken the tribunal to the following entries in the report, that:

> "In the room for two year old teaching is not as sharply focussed as in the other rooms. While children are making progress some activities are not effectively planned. Some children lose interest because they are not engaged. Detailed observations are not always used to plan a range of more challenging activities that match children's interest, next steps and individual abilities"

41. And in respect of Outcomes for children, the report found:

> "… there are inconsistencies in the quality of teaching and care for children in the room for two year olds. This means that these children are not making such good progress, despite the levels of staff qualifications."

42. In respect of this report, it has been advanced on behalf of the claimant that, reference to "levels of staff qualification" necessarily excluded the claimant, in that she was an un-qualified member of staff and that any criticism levelled at the Toddler Room were in respect of the other members of the Toddler Rooms who were qualified members of staff. The tribunal does not accept such an interpretation. The reference to levels of staff qualification is a generic reference to person specific qualifications, be-it qualified or unqualified. The tribunal does not take this reference to be in respect of only such staff who held professional qualifications.

43. In respect of the Ofsted inspection, the tribunal was also referred to text correspondence between the claimant and Mrs Gill, the claimant advancing:

> "…I'll try to get as much info about what Ofsted looks for when inspecting and try to be ready for any questions. I'll do my best tomorrow."

Mrs Gill responding:

> "Just interact with the children, follow the routine and do as Shannon asks. Always consider the children's needs and work as a team."

44. This is the instruction that the respondent maintain they had always given the claimant, which the claimant does not dispute.

45. The tribunal here notes that the nursery's prior Ofsted inspection had rated the nursery as outstanding.

46. It is the respondent's evidence, which the tribunal accepts, that, on receiving the Ofsted report it was very concerning, and in particular, concerns were raised as to how they would explain to parents the drop in

performance; from outstanding to requires improvement, in circumstances where the respondent had recently taken over the ownership of the nursery in January 2015.

47. In this respect, Mr Storrar Informed the tribunal that he immediately sought to action the directions of Ofsted, which required the respondent to:

    - Ensure there was a named deputy in place to take charge of the nursery in the absence of the manager. Due date 27 December 2015.

    - Implement effective monitoring of staff to identify inconsistent practice and training needs and use this to provide a suitable programme of professional development that includes regular supervision. Due date 27 January 2016 and

    - Improve the use of assessments when tracking younger children's leaning and development; incorporate their individual next steps in learning in to the planning, in order to shape challenging learning experiences. Due date 27 January 2016.

48. Mr Storrar immediately secured a deputy, Ms Bunting, who took up the post on 7 December.

49. With regards the further issue of the Toddler Room, it is Mr Storrar's evidence that having had the issues raised as to the claimant's performance, he thereon considered her continued employment, for which he then took legal advice, being informed that the claimant did not have employment protection against unfair dismissal having been employed for less than two years, and that he was accordingly within the law to terminate the claimant's employment.

50. As a result of this advice, and because the claimant was showing no signs of improvement despite the respondent having had numerous discussions with her about her performance, Mr Storrar decided to dismiss the claimant, and on 4 December he informed Mrs Gill to terminate the claimant's employment accordingly.

51. On the instructions of Mr Storrar, Mrs Gill duly met with the claimant and informed her that her employment was being terminated with immediate effect, the following issues being discussed:

    - No feedback to parents.

    - Performance with children and staff.

    - Complaints from colleagues.

    - Being spoken to by Mrs Gill, Ms Chapman and Mrs Storrar on several occasions.

- That on 2 November it was agreed that there were no reasons why the claimant could not do her job.

- That there had been no improvement in performance

for which is noted that the claimant was thereon asked if she had any comments or response, the claimant offering none. The claimant's evidence is that she was in shock but accepts that the issues were raised.

52. The claimant was subsequently furnished a letter of the same date, stating:

> "Further to our discussion today I am writing to confirm that your employment with Rainbow House (Herts) terminated today."

53. On 11 December, the claimant wrote to the respondent stating:

> "I am very worried as I have lost my job with you so I have been for the advice of a barrister at the Citizen's Advice Bureau. He thinks a significant reason for my dismissal is because I was pregnant. He may be wrong but I would be grateful if you could get out in writing the reason for my dismissal so I can show it to the lawyer. Please reply as soon as possible or in any case within 14 days."

54. The claimant was subsequently written to on 16 December, being advised that further to her correspondence they were "puzzled as to what evidence a barrister has to believe that a "significant reason for your dismissal was that you were pregnant". The correspondence further provided:

> "Regrettably, the reason for your dismissal was solely to do with an inability to perform your role to the required standard, coupled with the fact that you showed little willingness to engage with either your colleagues, parents, or, most importantly, children."

55. The letter thereon set out instances where the claimant had failed to meet the required standard. The correspondence concluded, stating:

> "We have a significant and highly regulated duty of care to the children in our charge. We cannot allow this to be compromised by staff who are not motivated to provide the highest possible standards for these children.
>
> Finally, with regards to the contention that your dismissal was somehow as a result of your pregnancy, I would point out the following
>
> - I am pregnant myself. I have had nothing but support form the company and have not experienced the merest hint of any discrimination.
>
> - Another employee was appointed Room Leader and informed us two weeks later that she was pregnant. Once again, she has received our total support and will be rejoining us at the end of her pregnancy:
>
> - We have yet another employee (who I will not name for confidentiality reasons), who clearly stated BEFORE we employed her, that she was

> undergoing IVF treatment, the sole purpose of which is obviously to become pregnant.
>
> These are clearly not the actions of a company that has any issue whatever with its staff becoming pregnant…"

56. On 24 April 2016, the claimant presented her complaint to the tribunal.

57. The tribunal turns now to consider the specific allegations raised by the claimant.

From the end of September the claimant was subjected to excessive criticism or observation by Mrs Morrison (Gill) the claimant was told to speak to the children more and engage with them.

58. It is the respondent's evidence, which is not in dispute, that the claimant was repeatedly spoken to, to engage more and speak to children more, which the respondent maintain was addressed with the claimant by means of encouragement. The claimant accepts this, however states that she received excessive criticism and observation by Mrs Morrison following her informing the respondent of her being pregnant.

59. As above stated, the tribunal has not been presented with evidence of criticism being advanced against the claimant, save for the respondent having raised the issues which, as stated had been raised with the claimant prior to her notifying the respondent of her being pregnant, as is evident by the monitoring Verbal Communication Form of 11 September.

60. The tribunal is here conscious of the respondent's case that, prior to August the nursery was not busy, but that thereafter on the increase of children, the failings of the claimant became more apparent, and that the number of complaints became more frequent. The tribunal is also here conscious of the fact that the claimant has been unable to identify instances where criticism was levelled against her, save for her general statement that the respondent's criticism and observations were excessive.

61. In these circumstances, the tribunal finds that the claimant has not been able to establish facts from which the tribunal could find that the claimant was subjected "to excessive criticism and observation by Mrs Gill" from the end of September.

The claimant was forbidden by Mrs Morrison (Gill) to sit when looking after children.

62. It is the claimant's case that, on an occasion when she was supervising children playing on a climbing frame, she was observed by Mrs Gill to be seated, for which she was informed by Mrs Gill that she needed to be closer to the children in case they should fall, it being Mrs Gill's evidence, which is not challenged, that "the room has a two-tier climbing frame and has crash mats used by eight children and have two staff. Staff are told to be at the climbing frame or sitting by the frame. I would have asked the claimant to

move or sit by the climbing frame." The tribunal accepts the evidence of Mrs Gill.

63. In these circumstances, the tribunal finds no evidence to support the claimant's contention that she was, for reasons related to her pregnancy, or otherwise, forbidden by Mrs Gill to sit when looking after children.

<u>In or about late November on several occasions the claimant was told by a staff member (an agency worker) that she should wait to go to the lavatory and not go when she needed to.</u>

64. It is the claimant's evidence that, on one occasion when she had been in the Toddler Room with an agency worker and requested to go to the bathroom, the agency worker informed her that she had to wait. Exactly when in the day this took place the claimant was not certain, it being the respondent's case that, were it at a lunch break, staff would have to wait the return of a further member of staff to release them. In this respect, the evidence the tribunal received was that within the Toddler Room, there was a telephone which phone could be used to summon assistance. The claimant was aware of this phone but did not use the phone in this instance.

65. It is here not in dispute, as referred at paragraph 13 above, that the agency member of staff could not be left in the room on her own. It is also accepted that the claimant and the agency worker, at the material time, were the only ones then in the room.

66. It is also not advanced by the claimant, that she at any time informed the agency member of staff that she needed to use the bathroom because of her pregnancy or otherwise that it was imperative that she attend the bathroom. On the agency member of staff informing the claimant that she would have to wait, the claimant does not advance that she made any further efforts to attend the bathroom.

67. There is nothing presented to the tribunal that suggests the actions of the agency member of staff was in any way otherwise than giving effect to her contract with her agency, that she was not permitted to be left in a room with children without a permanent member of staff present. There is no evidence of the agency worker in informing the claimant that she could not go to the toilet and had to wait, was doing anything predicated on considerations of the claimant's pregnancy

68. In these circumstances, the tribunal can find no evidence to support the claimant's complaint, or otherwise draw an inference from, that on several occasions the claimant was told by a staff member (an agency worker) that she should wait to go to the lavatory and not go when she needed to, predicated on considerations of pregnancy.

<u>In late November, on a single occasion the claimant was told by Mrs Morrison (Gill) to lift a heavy load (ie children's damp bed clothes which had been washed on a rack).</u>

69. It is not in dispute that bedding used by the nursery, as pictured at R1 page 128, are washed and placed on an airer to dry, which dryer would then be placed outside or otherwise upstairs of the nursery, which the claimant alleges Mrs Morrison instructed her to move, but to move the airer fully laden with clothes.

70. It is the respondent's case that, it would be physically impossible to move the airer with clothes on, and that they would not have given such an instruction, and that were the claimant asked to take the airer upstairs it would have been on the basis that the clothes were first removed and then the airer taken upstairs.

71. From the tribunal's viewing of the airer, R1 page 128, it is evident that this item would not be manoeuvrable fully laden, and it would be physically impossible to be carried upstairs in that state.

72. It is he claimant's evidence that, on being instructed to take the airer fully laden upstairs, she had sought to remove the clothes being instructed that she was not to do so, but to carry the airer fully laden upstairs. The claimant states that she thereon did as she was instructed and took the airer fully laden with clothes up the stairs.

73. The tribunal does not accept that the claimant undertook the task as alleged, indeed, from the tribunal's viewing of the airer, it would be physically impossible so to do fully laden with clothes. The tribunal accepts the respondent's evidence on this issue, that the claimant was not instructed to take the airer upstairs fully laden with clothes.

<u>The claimant was not helped to avoid lifting children by Mrs Morrison (Gill) at least twice at the end of November</u>

74. The evidence presented to the tribunal is that, on an occasion of a parent having taken her child to the nursery, on the parent leaving, the child attempted to run after the parent for which Mrs Gill instructed the claimant to stop the child, the claimant thereon lifted the child. These facts are not in dispute.

75. It is Mrs Gill's evidence that, on instructing the claimant to stop the child she had not thereby instructed the claimant to pick up the child. It is the claimant's evidence that, on being instructed to stop the child by Mrs Gill she did not then know how to stop the child otherwise than picking the child up. Mrs Gill's evidence in this respect is that, there were numerous things that a member of staff could have done to have prevented the child running after the parent, such as; blocking the child's passage by their body, or

otherwise placing a hand in front of the child to block the child's passage and to distract the child by engaging them in some form of activity.

76. It is further here noted that, it is the respondent's policy to encourage the child to become independent and that the lifting of children was not encouraged.

77. On the evidence before the tribunal, the tribunal finds that the claimant was not instructed to lift the child as alleged, or otherwise were there circumstances in which the claimant required help to avoid lifting the child on this occasion.

78. The second occasion where the claimant maintains she was required to lift children, was when placing children on the changing table to change their nappies.

79. It is not in dispute that the respondent's changing table is presented with steps, by which the child is expected to climb and place themselves on the table, such that the child is not lifted. It is however accepted that, smaller children are lifted on to the table where they are unable to climb the stairs.

80. It is the claimant's case that, she was required to lift the children on to the mat. In this respect, it is the claimant's evidence that the respondent did provide changing mats, which mats could then be placed on the floor and the child's nappy changed thereon. The claimant here states that she did not like to use the mats, as placing the mats on the floor was unhygienic and that other children could then walk on the mats; the claimant stating that she preferred to change the children on the table.

81. With regards the claimant's aversion to changing children on the changing mats, there is no evidence that the claimant raised this issue with the respondent or otherwise that the respondent had instructed the claimant that she was not to use the changing mat, or that she had to use the changing table.

82. The tribunal can find no evidence of the claimant being instructed to lift children on to the changing table or otherwise circumstances where the claimant was not helped to avoid lifting children.

83. For completeness, the tribunal here addresses an issue raised of a child throwing a tantrum, whereby the claimant then, to manage the situation, maintains she picked up the child, and advances it to be a further incidence of her not being helped to avoid lifting children by Mrs Gill. In this respect, it is the respondent's evidence that they would not expect the claimant to lift a child but for the child to be distracted, reference being to engage the child in another activity; either playing with toys or a game, or otherwise being read a book. The respondent does not accept that the child should be lifted in such an instance.

84. The claimant does not challenge the evidence, stating that she was not aware of other ways to distract the child. It is the claimant's evidence that, she had been instructed to distract the child but that she did not know how, and therefore she had lifted the child. However, on being further questioned as to whether she was instructed so to do, the claimant stated that she had not been, but that she did not know what else to do.

85. Whilst this incident is not an issue for the tribunal's determination, the tribunal nevertheless here records that there is no merit in the contention.

86. For the above reasons, the tribunal finds no substance to the claimant's complaints of not being helped to avoid lifting children by Mrs Gill.

<u>The claimant asked to carry out Level 3 care duties for which the claimant had not been trained: specifically, filling in children's observations forms.</u>

87. It is the respondent's evidence, which is not challenged, that all staff are expected to complete observations forms. It is the claimant's claim however, that, she was not required to complete observations forms until after she had informed the respondent that she was pregnant.

88. In this respect, it is the respondent's evidence that new members of staff, within their first six months probation period, would be introduced to the Observation Sheets, and that until such time, other staff within the room would carry out the observations on a daily basis; it being the respondent's requirement that an observation is carried out on each child, each week. The observations are a snapshot of a practitioner observing the child, writing down what the child is doing and the language being used, which is then put in to the child's Learning Journal. With regards the observation notes, it was expressed as being "a Post It note" and that it was the staff's preference exactly how the note was made, but that it was "literally a Post It note".

89. On the claimant advancing that she was not qualified to perform observations, it is the respondent's evidence that, the completion of observations notes was not dependent on staff's qualifications and that with respect qualification of practitioners, this was relevant in respect of the more senior roles they could apply for, as opposed to the undertaking of the observation forms, which were to be completed by all members of staff.

90. The tribunal accepts the respondent's evidence that the completion of observations forms was a task to be performed by all staff and was not predicated on any qualifications.

91. On the evidence presented to the tribunal, the tribunal accepts that following the claimant's induction (probation) to the respondent, on her being required to perform child observations, which was required of all staff, this was nothing other than a routine task the claimant was required to perform as a member of staff in care of child in the nursery and as stated at paragraph 10 above, part of her role. There is no evidence to support the

claimant's contention that she was being so required to do, premised on her pregnancy.

92. The tribunal finds no substance to the claimants claims as alleged.

<u>In the beginning of November Mrs Morrison accused the claimant of not being cheerful at least three times</u>.

93. The evidence in respect of this claim is not clear. It is not disputed by the respondent that they repeatedly told the claimant to be cheerful and indeed in cross examination, the claimant accepts that in greeting parents on dropping off their children, the member of staff being the point of contact with the parents, that it was good [practice for the member of staff to be cheerful so that the parents were comforted in knowing that their children were attending a place of joy; it being Mrs Gill's evidence, that:

> "Parents would drop off their children for breakfast and would want to see a smiley, happy face from the staff so they could go to work happy and relaxed. The claimant would often have a face like thunder and sat at the table not even greeting the children when they came in. I recall receiving the odd complaint from the parents about this and one parent saying that they did not feel too comfortable leaving their child with the claimant as "she doesn't seem bothered". …"

94. As far as the tribunal can glean from the evidence it has heard, the instances of which the claimant complains are that; on 2 November, when at the risk assessment, Mrs Gill had explained to the claimant that she needed to be more enthusiastic in the mornings when greeting parents, and there being a general acknowledgment that the claimant had been spoken to of a morning on meeting parents. The tribunal has been taken to no other incidents.

95. With regards the claimant being cheerful, it was elicited from the claimant in cross examination, that her being cheerful was not predicated on her pregnancy and indeed there has been presented no medical evidence to suggest that a failure of the claimant to be cheerful was predicated on her pregnancy. It was however, presented generally on the claimant's behalf that, pregnant women were emotionally imbalanced and it could account for the lack of cheerfulness of the claimant; the tribunal being referred to an extract from the NHS official website that *"It is common to feel tired or even exhausted, during pregnancy especially in the first 12 weeks."* And that *"being tired and run down can make you feel low*'.

96. It is also here noted by the extract, that it provides, *"You can look forward to a bit of an energy boost in your second trimester, but expect the exhaustion to creep back as you enter the home stretch."*

97. The tribunal is not helped by these extracts which presents a possibility, however, it has not been advanced by the claimant that she was experiencing difficulty in being cheerful in being of low mood, but to the

contrary, in evidence to the tribunal the claimant has stated that her pregnancy had not been a barrier to her being cheerful.

98. In these circumstances, the tribunal can find no evidence upon which it can find, or otherwise infer, that the claimant, not being cheerful, could have predicated on her pregnancy. The tribunal can equally find no evidence of the respondent addressing the claimant's lack of cheerfulness on the basis of her being pregnant; the respondent's approaching to the claimant, being merely in order to portray a welcoming environ for the patents on their entrusting their children into the nursery's care.

Mrs Morrison (Gill) dismissing the claimant on 4 December 2015.

99. As above stated, Mrs Gill in dismissing the claimant, did so on the instructions of Mr Storrar. The tribunal accepts Mr Storrar's account that his actions were motivated by the Ofsted report, which on receiving legal advice that he was permitted to terminate the claimant's employment, duly did so. The tribunal can find no evidence on which to support the claimant's contention, or otherwise from which an inference could be drawn, that Mr Storrar was thereon acting for considerations of her pregnancy or otherwise reasons related to her pregnancy, there being nothing by the Ofsted report that was predicated on the claimant's pregnancy.

Relevant Law

100. The law relevant to the issues for the tribunal's determination can be found at sections 13 and 18 of the Equality Act 2010, Section 99 of the Employment Rights Act 1996 and regulation 20 of the Maternity and Paternity Leave Regulations 1999.

101. The tribunal was referred to the Equality and Human Rights Commission: Code of Practice on Employment (2011), chapters 3 and 8

102. The tribunal was also referred to the authorities of Smith v The Chairman and Other Councillors of Hayle Town Council [1978] IRLR 413, and Nunn v Royal Mail Group Limited 2011 ICR 162

Submissions

103. The parties presented oral submission to the tribunal. The submissions have been carefully considered by the tribunal in reaching its conclusions.

Conclusions

Direct discrimination on grounds of pregnancy.

104. For the reasons set out at paragraphs 58 - 99 above, the tribunal has found no basis upon which to support the claimant's contention that the acts alleged were predicated on considerations of her pregnancy.

105. The tribunal finds the claimant's claims unsubstantiated.

Unfair dismissal pursuant to s.99 of the Employment Rights Act 1996 and reg.20 of the Maternity and Paternity Leave Regulations 1999.

106. On the tribunal finding as set out at paragraph 99 above, that the decision to terminate the claimant's employment was predicated on the Ofsted report, whilst the tribunal may have reservations as to the fairness of Mr Storrar taking the course of action of terminating the claimant's employment, these are issues which the tribunal, under s.99 of the Employment Rights Act, is not charged to examine, the sole question being whether the claimant's employment was terminated for reasons related to her pregnancy.

107. On the findings that Mr Storrar acted in a knee-jerk reaction to the Ofsted report, no matter how unfair that may have been, the tribunal is satisfied that the claimant's pregnancy was not the main or principal reason for dismissal or otherwise "connected with" the claimant's pregnancy.

108. In these circumstances, the tribunal finds that the claimant' has not been unfairly dismissed pursuant to s99 of the Employments Rights Act or reg.20 of the Maternity and Paternity Leave Regulations 1999.

109. For the reasons above stated the tribunal finds that the claimant has not been unfairly dismissed pursuant to s.99 of the Employment Rights Act 1996 and has not suffered discrimination on the protected characteristic of pregnancy.

110. On the claimant's claim for an unlawful deduction from wages having been withdrawn, the tribunal dismiss that claim.

111. On the claimant's claim for breach of contract in respect of notice having been agreed between the parties, in the sum of £2141.53, the tribunal awards the claimant damages in the said sum.

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Employment Judge Henry

Date: …15 June 2017……………

Sent to the parties on: ....

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For the Tribunal Office