EMPLOYMENT TRIBUNALS

Claimant: **Miss L Bowery**

Respondent: **Cutting Edge Hair and Beauty Ltd**

Heard at: **Bristol** **On:** **5 April 2017**

Before: **Employment Judge Livesey**

Representation
Claimant: **Miss Bowery**
Respondent: **Mr G Lomas, Consultant**

JUDGMENT having been sent to the parties on 20 April 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. The Claim

1.1 By a claim form issued on 6 December 2016, the Claimant brought complaints of unfair dismissal, unpaid holiday pay and a failure to provide terms and conditions of employment.

2. The evidence

2.1 The Claimant gave evidence in support of her case and Mr Arnott did so on behalf of the Respondent.

2.2 I received a bundle of documents marked R1 and an additional sheet from the Claimant in relation to her holiday pay claim, C1.

3. The issues

3.1 The issues were discussed with the parties before any evidence was heard.

3.2 In relation to the unfair dismissal complaint, it was accepted that the key issue was whether or not the Claimant had resigned or had been

dismissed. If she had been dismissed, Mr Lomas accepted that there was no fair reason for dismissal, even though it had been suggested in the Response that the Respondent had dismissed for some other substantial reason if its case, that she had resigned, was rejected. The burden of proof rested with the Claimant to demonstrate that she had been dismissed.

3.3 In relation to unpaid holiday pay, when discussed in more detail with the parties, it was clear that this claim in fact concerned unlawful deductions from wages because, when the Claimant's employment had ended, a deduction had been made from her final salary in respect of excess holiday that she had taken over and above the entitlement that she had then accrued at that point in the holiday year when she had left.

3.4 The Claimant also complained that she had not been provided with terms and conditions of employment.

4.The facts

4.1 The following factual findings were made on the balance of probabilities. Findings were restricted to those matters which were relevant to a determination of the issues.

4.2 Page numbers within these Reasons are pages within the bundle R1 unless otherwise indicated and have been cited in square brackets.

4.3 The Respondent owns and runs a hair dressing business in Cinderford in Gloucestershire. Mr Arnott is the Director and had taken over the business some time after the Claimant's employment had already commenced. She had started working there on 1 February 2011. She initially worked as an apprentice and Mr Arnott explained that, from his perspective, the Respondent had been investing in her as a long term employee with the hope and expectation that she would have given good years of service to the business, having benefited from her initial training as an apprentice.

4.4 The Claimant claimed that she had received no contract of employment. The Respondent had lost her personnel file and a signed copy of her contract was never produced in evidence. Mr Arnott did produce a copy of the standard terms and conditions that the Respondent had a practice of issuing to all employees (for example [26-32]). More importantly, the Claimant had herself referred to the terms of her contract of employment in correspondence; she did so in an email on 24 October 2016 [49]. In cross examination, she ultimately accepted that she had in fact received and signed a contract in the same terms as that at pages 26 – 32 but that she had simply not retained one.

4.5 On 12 October 2016, a very important conversation took place between the parties. It was agreed that Mr Arnott had discovered that the Claimant was planning to leave his employment to go to work for a competitor, Sharon Groves, the Respondent's former Salon Manager who had left about six months earlier to set up on her own. The Claimant accepted that, at that stage, she had merely had an intention to explore other possibilities, but nothing had been set in stone.

4.6 There was a conversation between them that day which was prompted by Mr Arnott when he telephoned her at approximately 8.30 pm. The Claimant's account of the call was set out in her Claim Form and the Respondent's version was similarly set out in its Response. Considering the fact that those documents had been written much closer to the key events than the witness statements, in my judgment they were more likely to have contained a more accurate record of the events than any subsequent documents.

4.7 The Claimant's account in her Claim Form was that Mr Arnott had started the call by asking her if she had anything to tell him. He asked her what her plans were and accused her of waiting until pay day, which was 24 October, before she handed in her notice. She then said "*if you want me to hand in my notice I can tomorrow if you like*" to which you replied "*yes, we will stop your pay as of 20 October*". The Claimant maintained that she had not given verbal notice.

4.8 In her witness statement, a largely consistent account was set out within paragraph 3. She said that she had been thinking of leaving and had told Mr Arnott that nothing was set in stone and that her mind had not been one hundred percent made up. She said to Mr Arnott "*I am within my rights to look for other employment and will give you written notice if and when I decide to leave. With all the drama going on in work this week and given the fact I've just come off my holiday I haven't made up my mind for certain*". The final exchange between them was set out in her statement as follows:

> "'*It is none of your business what I was considering doing within* [sic] *my employment because to my knowledge I hadn't breached any form of misconduct and I am entitled to explore other career opportunities.' He responded 'I think you will find it is every part of my business as you are contacted* [sic] *to work for me! You are not required to work your notice and we will stop your pay as of the 20th October.' He then put the phone down. This to me, I found very upsetting as I hadn't given any clear indication I wanted to end my employment. I was just thinking of other opportunities*."

4.9 The Respondent's account was different. In the Response, Mr Arnott had said that the call had started in a very similar way, but that the Claimant had been coy and evasive about her plans. He then asked her whether she was planning to leave, to which she replied "*oh well yeah*" and that she had written her notice which she had with her but she had not had the chance to give it to him. Mr Arnott asked her if she was planning to go to work for Sharon Groves to which she replied "*no, definitely not*. *She has asked me but I said no*". That, as Mr Arnott later discovered, was untrue. He then asked her if she was planning to hand in her notice, to which she replied that she would do the next day.

4.10 Paragraph 6.2.8 of the Response read as follows;

> "*The telephone call concluded with David Arnott asking the Claimant if she did intend to hand in her written notice to the Respondent on the following morning, on 13 October 2016. The Claimant advised that she would hand in her notice on her next day*

> *at work, David Arnott confirmed that she would be paid up until the 20th October 2016 in line with her contract of employment and would not be required to work her notice period.*"

4.11 In Mr Arnott's witness statement, his account changed somewhat. Paragraph 10 was rather different. It read as follows;

> "*The conversation concluded with me accepting her resignation and asking the Claimant if she was to bring her written notice into the Salon in the morning (13 October 2016).*"

There had been no clear indication within paragraph 6.2.8 of the Response that the Claimant had actually resigned. During his evidence, Mr Arnott admitted that the Response was not clear in that it had not demonstrated that she had resigned, but he was clear in his own mind that she had. He said that that was what had happened 'one hundred percent'.

4.12 On 13 October, Mr Arnott called the salon, not expecting the Claimant to have been there. He left instructions for her appointments to have been rescheduled for others because he did not expect to work her notice. The Claimant, however, arrived later that morning and there was a phone call between them during which he asserted that she had handed in her resignation the night before which had been accepted. She asserted that she had not. The Claimant eventually left the salon when threats were made by Mr Arnott that the police would be called and the Claimant immediately contacted ACAS. Before she left, she left a letter with the salon [45]:

> "*In regards to our previous conversation last night, I did not state I will be resigning on Thursday 13th October 2016 with a week's notice to 20th October. In response to your questions I stated I was thinking of other employment options and I am within my right to do so. It is also within my right to hand in my notice as and when I chose. It is to my knowledge I am still contracted to you by employment and you stated on the 13th October at 12:43 you did not want me at work nor on the premises when I was willing to work. In theory I accept your Dismissal from the 13th October to the 20th October with full pay.*"

4.13 Mr Arnott had written a letter of his own, having contacted the National Hairdressers Federation and having given them information about what he thought had happened. He emailed the Claimant at 12.27 and she read it when she returned home from the salon [43-4]. The email purported to accept her resignation. Mr Arnott told me that the reference within it to the resignation having been "*of 13 October*" was simply an error.

4.14 There was further correspondence between the parties in which they restated their respective positions and, on 24 October, the Claimant was paid her final salary. The next day, she started new work; she did go to work for Sharon Groves but she stated that her job had not been secured until 18 October and that everything had been fluid prior to that.

4.15 In relation to the holiday pay claim, the dispute concerned the recovery of £318.50 from the Claimant in her final pay slip [88]. The Respondent's case was a very simple one; that it was entitled to make that deduction because of the contract of employment and it relied upon Clause 6.11 in that respect [28];

"*If you had taken more holiday than your accrued entitlement at the date your employment terminates, we shall be entitled to deduct from any payments due to you*".

5. Conclusions

Unfair dismissal

5.1 In relation to the question of whether the Claimant was dismissed or resigned, questions of that sort fell to be determined objectively in situations of ambiguity.

5.2 Having considered the evidence, it was my judgment that the Claimant was dismissed on 13 October as a result of the Respondent's conduct that day. Even on Mr Arnott's account, as set out most reliably in the Response, the Claimant did not actually resign on 12 October. It was accepted that she expressed an intention to do so, but she did not actually say 'I'm resigning now' or 'I resign' or words to that effect. Further, the Respondent's evidence about the 13 October had appeared inconsistent because he said that he had not expected her to have attended on 13 October but, according to his account of 12 October, he had expected her to attend to hand in her notice that day.

5.3 Prior to 13 October, it was clear that there was a misunderstanding between them. What seemed most probable was that the Claimant had indicated a future intention *to* resign and that had made Mr Arnott understandably upset because of the salon's investment in her. I accepted what Mr Arnott had said, namely that it had not been in his interests to have dismissed her, but his interests appeared to have changed substantially when she had given an indication that she was to have left at some future point. What then happened on 13 October amounted to a dismissal by him.

5.4 On that basis, and given that the Respondent put forward no reason under s. 98 for the dismissal, the Claimant was unfairly dismissed.

Holiday pay

5.5 There was no outstanding holiday entitlement and no claim to unpaid holiday pay under the Regulations as has been seen above. Rather, the issue turned upon whether the Respondent had been entitled to deduct the sum referred to in paragraph 4.11 above under Clause 6 (11) of the terms and conditions of employment since the Section 6 of the contract [27-8] constituted a relevant agreement for the purposes of regulation 14 of the Working Time Regulations [32].

5.6 The question therefore was whether the deduction made was more than the Respondents had been entitled to make under the contract.

Failure to provide terms and conditions

5.7 As to the additional claim the claimant was not provided with terms and conditions of employment that claim failed for the reasons already given.

6. Remedy

Unfair dismissal

6.1 It was agreed that the Claimant was entitled to a basic award in the sum of £645.

6.2 In relation to the compensatory award, it was also agreed that she was entitled to an award for loss of statutory rights in the sum of £258, being the agreed figure for a week's pay.

6.3 It was also agreed that the Claimant had lost two days earnings between her two employments which was £93.88 net. That was a compensatory award of £351.88 in total.

6.4 The other issue which fell to be determined was the extent to which the Claimant might have benefited from an uplift under s. 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. Whereas the increase might have been as much as 25%, the Respondent having failed to follow any procedure at the point of her dismissal, Mr Lomas suggested that the figure should only have been 5% because the Respondent had been genuinely mistaken in its belief that the Claimant had resigned.

6.5 It was not in a wholly dissimilar situation that a tribunal had found a dismissal to have been fair in *Ely-v-YKK Fasteners* [1994] ICR 164. Mr Lomas had been wise not have to have attempted to argue support from that case because it was, ultimately, a decision reached in different factual circumstances. Nevertheless, I had no doubt that the primary responsibility here lay with Mr Arnott to have been absolutely clear about what he was doing and what, in particular, his employee was intending to do. He had dismissed the Claimant, but there had been a certain amount of confusion. Mr Arnott appeared to have run a business that was devoid of formal process or procedure. In all of the circumstances of the case and because of the complete lack of any process adopted, an uplift of 20% was considered appropriate. In relation to unfair dismissal. The increase upon the compensatory award was therefore £70.38.

The holiday pay issue

6.6 Finally, there was the issue of unpaid holiday pay and the claw back that was being made from the Claimant's final salary of £318.50.

6.7 On her own calculations in C1, she had taken 213½ hours of holiday at the point that she had been dismissed. The effective date of termination was 13 October and it was agreed that she had then accrued 132½ hours of holiday at that point. She had therefore taken 81 hours in excess of her entitlement. The payment that was recovered from her of £318.50 fell short of 81 hours. She had exceeded the accrual by more than that figure and so she was not entitled to any claim on the basis that the contractual claw back was greater than the Respondent had been allowed. That claim failed and no award was made.

Employment Judge Livesey

Date: 14 June 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

15th June 2017

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FOR THE TRIBUNAL OFFICE