



EMPLOYMENT TRIBUNALS

Claimant: Miss C Chaves

Respondent: Ocean.com Ltd

Heard at: London South **On:** Thursday, 3 August 2017

Before: Regional Employment Judge Hildebrand

Representation

Claimant: Mr D Percival, CAB
Respondent: Mr A Harris, Counsel

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal fails and it is dismissed.
2. The Claimant's claim of breach of contract fails and it is dismissed.

REASONS

The Claim

1. By a claim presented to the Tribunal at London South on 8 March 2017 the Claimant made a claim of unfair dismissal and for notice pay. She said she had been dismissed from her employment with the Respondent which had commenced in September 2008 and terminated on 7 January 2017. At box 8.2 of the claim form she recorded increasing difficulties with the Respondent over the preceding 12 months. She said:-

“... finally on 7 December I had to leave work because I was too emotional to carry on.”

The Claimant said she went to see her doctor the following day and was signed off with stress. On expiry of her medical certificate on 6 January she returned to work on 7 January and the person in charge told her that she had no right to be there because she had resigned. She said she had tried to resolve matters through ACAS and 4 weeks pay had been sent to her bank account.

The Response

2. The claim was resisted by the Respondent. The grounds of resistance indicated the correct Respondent was Ocean.Com Ltd. The Respondent recorded an incident on 6 December 2016 when the Claimant became irate and contended that at approximately 3.30pm on 7 December 2016 the Claimant had started to switch off lights in the salon despite the fact that Mr Giarratano was still working there. She had packed up her equipment. She informed Mr Giarratano that she was leaving her employment at the end of the month. The conversation was witnessed by a customer. The following day the Respondent had sent a text message to the Claimant which informed her that her resignation had been accepted. The Respondent maintained that the Claimant had resigned from her employment. If the Tribunal decided that the Claimant was dismissed and that the dismissal was unfair the Respondent submitted that there should be a deduction under *Polkey* and that the Claimant had contributed to her dismissal.

The issues

3. The issues identified by the Respondent and accepted by the Claimant after discussion are:-
 - 3.1. Was the Respondent the Claimant's employer?
 - 3.2. Did the Claimant resign on 7 December 2016?
 - 3.3. If so, was it an ambiguous?
 - 3.4. If there was a resignation should time have been allowed for reconsideration?
 - 3.5. Was the resignation with the heat of the moment possibly taking into account the state of mind of the Claimant by reference to the case of Glasgow Health?
 - 3.6. In the alternative, if the Claimant's employment was terminated, was it for a fair reason (the Respondent contends it was conduct)?
 - 3.7. If the Claimant was dismissed was the dismissal fair in all the circumstances?

- 3.8. Has the Claimant taken reasonable steps to mitigate her loss (no evidence of mitigation produced)?
- 3.9. Did the Claimant contribute to her dismissal by her conduct so that any compensation should be reduced?
- 3.10. Would the Claimant have been dismissed / resigned in any event and so her compensation should be reduced: Polkey?

The Evidence

4. I heard oral testimony based on written witness statements from the Claimant, Mr Enzo Giarratano and Mrs Onelia Giarratano.
5. I also received statements which were typed versions of letters from Ms Emilia Lang, Ms Louise Remy, Ms Lauren Ferrari and Ms Annie Reid.
6. It is convenient to deal with these last four statements, that is: Lang, Remy, Ferrari and Reid together. None of these individuals witnessed the events which are the principal cause of dispute in this case. They generally corroborate the picture of the Claimant being well liked but that her standards may have deteriorated and she may have become stressed in the period between June and December 2016. It does not appear that their testimony is in any way determinative of the issues in the case.

The Findings of Fact

7. The Claimant began working for the Respondent as a junior hair stylist in September 2008. She had therefore been at this work for about 8 years in the period under consideration. She had no statement of employment particulars and that is the significant deficiency on the part of the Respondent. As time progressed an issue arose as to the level of pay of the Claimant. There was a direct dispute about the whether she was paid on occasions when the salon was closed for lack of customers. The Claimant states that when she was instructed to go home her pay was stopped. The Respondent denies that the salon was ever closed early and disputes that there was any consequent reduction to her pay. The Claimant has not made any unlawful deduction of wages claim, nor has she specified any dates on which she contends these deductions were made.
8. The Claimant had in the early part of her employment lived within a relatively short walking distance of the Respondent's salon. In June 2016 she purchased a flat which was approximately half an hour's train journey away. The Respondent contends, but the Claimant does not accept, that the purchase of this flat placed strains on the Claimant both financially and as is often the case emotionally with her partner. On balance I prefer the Respondent's assertion as it gives some context and underlines the

Claimant's concerns about her level of income with the Respondent which was the background to the disputes culminating in the her departure from the salon on 7 December 2016.

9. Mrs Giarratano, whose evidence I accept, describes a change in the Claimant's appearance in August 2016. The Claimant was tired and stressed as she had been starting an evening job cleaning two offices with her fiancé. She was not getting home until midnight and was feeling the strain. She left work early at 12pm on 17 September but thought better of her action subsequently and returned to the salon. On 9 November she left early without coming back again which created problems for both the management of the salon and the clients. On 15 November she told Mrs Giarratano that she was stressed and tight with money. She had begun to attend work after the start time from September 2016 and Mrs Giarratano said she had 6 text messages recording lateness through November and into early December 2016.
10. Matters came to a head in early December 2016. On 3 December, a Saturday, the Claimant telephoned to say she was going to be late. She had telephoned to say she had woken up late thinking that the salon opened at 10 am which was the weekday start time but it was 9 am on Saturdays. Mrs Giarratano asked her to be at the salon as soon as possible and suggested she should take a taxi. The Claimant said if she took a taxi most of her daily wage would be gone and she would rather not come at all. The employer considered this showed little consideration of the effect this absence would have on the team and clients. Mrs Giarratano explained that it was her responsibility to come in on time and since the Claimant was at fault she had to pay for the consequences. Mrs Giarratano said that when the Claimant arrived she apologised. She was sent home 20 minutes early that day because she looked tired and had no further clients.
11. The following Monday, 5 December 2016 Mr Giarratano reported to his wife that the Claimant's fiancé had broken her phone and she was disturbed by the extra expense involved in replacing it. Mr Giarratano said the Claimant could not focus on work and was smoking outside the salon and talking on her phone all day.
12. On Tuesday 6 December 2016 the Claimant and Mrs Giarratano worked together. Mrs Giarratano said the Claimant looked stressed. The Claimant's own evidence is that she was depressed at this time and dreaded going in to work. The Claimant suggested that Mr and Mrs Giarratano did not appreciate her and Mr Giarratano's approach to her swung from critical to friendly.
13. The Claimant agrees that she spoke to Mrs Giarratano on 6 December and expressed her concern that she was still on the minimum wage despite the fact that she was doing extra work. She said she thought she might be better off if she was self employed. Mrs Giarratano's evidence, which I

accept, was that the Claimant had dropped a bowl of bleach on the floor. Later in the day after the Claimant had coloured the receptionist's hair the Claimant told Mrs Giarratano that the receptionist had offered her a £10 tip which she had refused, thinking that the receptionist was poorly paid. There was then a discussion between Mrs Giarratano and the Claimant about wage levels and it appears that the Claimant became irate when she realised that the receptionist was paid at the same level as her. She began to make comparisons between herself and other members of staff and Mrs Giarratano said that the Claimant complained about a colleague who was self-employed saying: "She didn't even fucking speak English". Mrs Giarratano said that when she became upset at the way the Claimant spoke to her, and changed her tone the Claimant told her not to speak to her in that way, as if she had not just disrespected Mrs Giarratano at all.

14. During this discussion Mrs Giarratano calculated the wage the Claimant would have received the previous month if she had been working on commission and found that it was just over half of what she actually earned. The Claimant said that if she had been paid on commission she would have been more motivated. Mrs Giarratano said that they agreed to leave that day at 6 pm instead of 7 pm as they often did on a Tuesday. During the day, apart from what Mrs Giarratano described as endless cigarette breaks taken by the Claimant, the Claimant took 20 minutes for lunch so that she could leave early. The Claimant denied creating a disturbance at work but said that she was asked to leave the salon key with the receptionist that night and it was not subsequently returned to her. The Respondent contends that it was left for her to collect the following day.

The Disputed Resignation

15. The key dispute in this case centres on the events of the afternoon of 7 December 2016. The material available includes the witness statement of the Claimant, the witness statement of Mr Giarratano, their oral testimony, a sworn declaration from Mr Nicolo Mascitti who was also present in the salon, some exchanges of text messages, some CCTV footage which does not record sound, and the statements in the claim form and the response.

The Claimant's Witness Statement

16. The Claimant's witness statement suggests that the Claimant said that at about 4:30 pm she could not cope and said she was going home sick. There were no clients waiting to be seen. The Claimant picked up her tools and started to leave but Mr Giarratano told her she could not and she became upset. She denied switching any lights off and said she had no reason to do so. She received a text from Mrs Giarratano shortly thereafter saying she had resigned and she had a similar text the next day.

The CCTV

17. There was, as stated above, CCTV of the events in the salon but this did not have any sound and consequently it is not possible to establish what was said. It is clear that the Claimant was walking around the salon in her coat, bringing in a sign from outside the shop, and switching off lights at a time when Mr Giarratano was cutting the hair of his customer, Mr Mascitti.

The Claimant's Claim Form and Cross-examination

18. The Claimant's claim form stated that she had to leave work because she was too emotional to carry on. When asked in cross examination if the Claimant had started to close up the salon she responded that Mr Giarratano said he was closing early as his last client was his friend. She said she waited until his last client finished and left. The Claimant was unable to explain why her witness statement did not deal with the fact that she left three hours early or suggest that it was Mr Giarratano who had told her that the shop was to close. The Claimant recalled in cross-examination Mr Giarratano saying that they would close when he finished with Mr Mascitti. The Claimant could not explain why the arrangements for early closing were not referred to in her claim form. The Claimant denied telling Mr Giarratano that she was leaving the Respondent at the end of the month. The Claimant accepted that she saw the grounds of resistance filed by the Respondent before preparing her witness statement and that it would have been logical to put in her witness statement that she took her tools home because she was cutting her sister's hair that evening and not because she was leaving the Respondent for good. The Claimant accepted that Mrs Giarratano had sent a text to her at 16.45 that evening to say that she had resigned and expressing concern about covering her clients' appointments in the days to come. The Claimant accepts that she did not reply until 24 hours later. The Claimant accepted that she left at 4pm approximately. The Respondent again sent a text at 11.55 the following day to say that the Claimant had resigned. The Claimant did not respond until 5 hours after this second text. The Claimant said she was not well and had been to her doctor.

Mr Giarratano's Evidence and Cross-examination

19. Mr Giarratano's evidence recorded the Claimant being late on 3 December, and looking distraught on Monday, 5 December, having had a fight with her fiancé over the fact that he had broken his phone. That day she had often left the salon to smoke and talk on the phone. He was informed about the dispute with his wife on the 6 December which led to the Claimant shouting and swearing at her. He recorded that at 3.30 on 7 December one of his clients, Mr Mascitti, came in for a hair cut. He said the Claimant started going through the salon muttering under her breath and preparing for closing. She brought in the advertisement board from the pavement, the

towels from the back of the salon and went around switching lights off at the work stations. When she got to the station next to his he asked her why she was doing this and she said it was because she was leaving. He informed her he had clients until 8:30 pm that evening. She sat at the desk and he tried to ask her what was wrong. She took her carrier bag and went to her work station and started collecting her tools and told him that she would be leaving the Respondent at the end of the month. Mr Giarratano said this was very embarrassing in front of his client. After the client left he asked the Claimant for an explanation but she would not talk. She went to the back of the salon and left. He called his wife to explain what had happened and went to the back of the salon himself and saw the Claimant sitting outside smoking. He tried to talk to her but she said she would be leaving at the end of the month.

Mr Mascitti's Declaration

20. Mr Mascitti records that he could see the Claimant acting irrationally while he was having his hair cut. She gathered up her tools from a cabinet and clearly and loudly said to Mr Giarratano that she was leaving her job at the end of the month. Mr Mascitti said he was extremely embarrassed by the situation and felt very uncomfortable with her actions and words.

The Response ET3

21. The response records the Claimant starting to switch of the lights at 3:30 on 7 December and packing up her equipment. She then informed Mr Giarratano that she was leaving her employment at the end of the month.

The Contemporary Text Messages

22. At 16:45 on 7 December Mrs Giarratano sent a text to the Claimant:

“Claudia, Enzo said you are leaving at the end of the month. Please confirm this and a specific date. I need to know if you are coming back this week or not.”

In the absence of any response Mrs Garriatano wrote at 11:55 on 8 December 2016:

“Claudia yesterday the 7th December 2016 upon leaving the salon you gave Enzo a verbal notice that you would leave your employment with Ocean at the end of this month. You are expected at work for the rest of the month and you will only be paid the days you work. At the end of the month you will be paid what is owed to you for the days you work this month plus the 6 days left from non taken holiday. You can pick up the official letter at the salon.”

The Claimant eventually responded at 16:56:-

“Dear Onelia and Enzo,
In response to your text message.
I did not give a verbal resignation to Enzo. I told him I was leaving work as I was feeling unwell. There has been no resignation.
As you are aware I have been unwell for a while majorly due to the stress I’ve been put under at work, the long hours, extra responsibilities (outside of my job description) and on many occasions not being able to have a break during the work day have taken its toll on my health.
This being said I am requesting my remaining 6 days holiday from Friday 9th December and will return to work on Saturday 17th December. I feel this would be best for both parties rather than me taking time off sick.”

The Respondents replied at 18:43 that the Claimant had given formal verbal notice which the Respondent had decided to accept. The Respondent did not accept that the Claimant left because she was not feeling well. They state that she would not have taken her tools with her as they always stay at the salon and she would not have left her copy of the salon keys with the Respondents. She was not allowed to take holiday with less than one days notice. Mrs Giarratano said that since her last day was the 31 December the Claimant was expected at work as normal from the following day at 10am. The Claimant would receive what she was owed on 31 December. The Respondents said that the Claimant had been extremely disrespectful to Mrs Onelia Giarratano on Tuesday raising her voice and swearing in the salon.

23. The Claimant responded at 20:31 to say that she had not resigned. The keys had never been returned to her. She said she was unwell. She said even though her job title was a junior position she had been filling a managerial role for the last 8 years. She would not be at work due to sickness.

The Subsequent History

24. The Claimant was not due to attend work on the 8th December. The Claimant saw her medical practitioner on 9 December and obtained a certificate indicating that she was not fit to work until 23 December 2016. A further certificate was provided by the practitioner from 22 December to 6 January 2017.
25. The Claimant took the certificate to the salon and Mrs Giarratano did not engage in discussion but received the certificate. The Claimant obtained another certificate to run to the 6th January. She handed it in and again no comment was made. Mrs Giarratano sent a text at 12:46 on 22 December 2016 stating that the Claimant had clearly resigned in front of a witness and

said that she was leaving at the end of the month. The Claimant had earlier sent a text to say she had not resigned and her case was that it was a fabricated story in order for the Respondents not to pay redundancy pay after 8 years of service because they were trying to sell the business.

26. The Claimant asked for a copy of her employment contract and the breakdown of her holiday allowance for the year at 12.37 and 1435 on 23 December 2016. The Respondents indicated by letter dated 28 December 2016 that the Claimant would receive a payment at the end of December for work to the last day she worked in the salon and for sick pay. She would also receive one in January for sick pay and 6 days holiday. The Respondent then stated that the Claimant would be entitled to notice pay. The Respondent made clear on 7 December that the Claimant no longer worked for them and the letter dated 28 December 2016 stated that the Claimant's verbal notice given on 7 December was accepted. It was said the Claimant had walked out of the salon while she should have been working taking all of her tools with her. The letter then set out a number of acts of unreasonable behaviour. The payments were explained again in a text dated 12 January 2017 after a payment had failed to go through at the end of December. The question of failure to pay the correct wages has not been raised in this tribunal.

Those are relevant findings of fact.

The Respondent's Submissions

27. The Respondent's submissions were as follows. There were two versions of events. The Respondent said that the Claimant was disgruntled and unhappy with her work. She was earning the same amount of money as she was when she started. She said she was leaving and went. She did not respond to the text in next 12 hours. The correct explanation was that she was recorded in the Respondent messages as having resigned and that was correct. There was a coherent explanation for her actions. It was unlikely that she would not look at her telephone for that length of time. She suggested she was too ill but attended to handover her certificate on the 9th December. The Respondent's version was supported by the evidence given. The Claimant was unhappy because of money.
28. The only explanation put forward by the Claimant is that the Respondent wished to sell the business with no redundancy payment. If the business had been sold the employees would have transferred with it. The more logical explanation was that the Claimant was unhappy with work and walked out on 7 December. The Claimant had no reason to pack up unless she was making a flamboyant statement and leaving. The authority of ***Kwik-Fit (GB) Limited v Lineham UKEAT 250/1991*** dealt with resigning in a heat of the moment and the obligation on employers to allow a cooling off period. There is no suggestion of that here. It was not suggested by the Claimant that any ambiguous words were used. Either she said I am

leaving at the end of the month or she did not say it at all. She waited 24 hours before contacting the Respondent. This was long enough for the Respondent to wait.

The Claimant's Submission

29. The Claimant's submission was that the Claimant had given her interpretation of events in her evidence. Much had been made of what was not in the witness statement and the claim form. She gave her interpretation of events. She said why she had switched the lights off. The points which she had brought up in cross-examination arose from her questioning. She intended to go off sick and what she said only arose in response to questioning. She said she was leaving three times. She was stressed. There could be a misunderstanding on the terms of her resignation. She was said to have said "I am leaving" three times and "I am leaving at the end of the month". She did not look at text messages because of stress caused by the employer. It was not surprising that she responded later.
30. The Respondent should have taken in account of her stress. In ***Ali v Birmingham City Council UKEAT 0313/2008*** a cooling off period was offered and accepted. This was said to be good practice. The Respondent says it understood the Claimant had resigned. It was proper to give a period of reconsideration. In ***Kwik-Fit (GB) Limited v Lineham [1992]*** the EAT said one or two days should be allowed. A reasonable amount of time should be allowed to elapse. This was ignored at the employer's risk. If the Respondent genuinely believed the Claimant had resigned and within 24 hours the Claimant said she did not wish to resign it was wise to make further enquiry.
31. The employer had now raised a whole string of things the Claimant was said to have done wrong. Instead of taking action at the time these matters were put on one side. Although Mr Giarratano said he regarded the Claimant as his daughter it was not fair not to put these allegations at the time they occurred and later on put them as done recently. It appears the Respondent found the Claimant's behaviour undesirable and wanted to get rid off her. That was easier than disciplinary action.
32. The Representative referred to ***Glasgow v McKay 742/1987***. The Claimant's resignation had become a dismissal. The Claimant did not believe she resigned. She was just going home. If she had resigned she was suffering from stress.

The Law

33. The jurisdiction of the Employment Tribunal in relation to unfair dismissal is based on identifying the circumstances in which an employee is dismissed.

Section 95 of the Employment Rights Act 1996 provides that for the purposes of this part of the statute an employee is dismissed by his employer if (a) the contract under which he is employed is terminated by the employer (whether with or without notice) ... or (c) the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. In the present case there was no suggestion on the part of the Claimant to whom I specifically addressed the question that this is a claim of constructive unfair dismissal based on an unreasonable conduct of the Respondent. The issue is whether the employer dismissed the Claimant by refusing to allow her to return to work when her medical certificate expired on 7 January 2017 or whether the Claimant resigned her employment in the conversation with Mr Giarratano on 7 December 2016.

34. In *Kwik-Fit (GB) Limited v Lineham [1992] IRLR 156* it was held by the EAT that whilst that there was no general duty on an employer to ensure that an employee using apparently unambiguous words of resignation intended to resign, nevertheless in special circumstances it might be unreasonable for words to be construed at face value. This includes where words are given in the heat of the moment, or in temper, or under extreme pressure. In those circumstances the employer should allow reasonable time to elapse (usually a day or two) to see if the employee actually intended what he said.

Conclusion

35. Applying those principles and the authorities identified by the parties to the circumstances of this case, the first undertaking is to assess what words were used. In terms of relative credit to be given to the Claimant and Mr Giarratano the Claimant has great difficulty explaining the circumstances in which material which should have appeared in her claim form and witness statement surfaced for the first time in her answers to cross-examination. Those answers cast a completely different light on her departure from the written material produced before the hearing and indeed the conversations and circumstances which led up to the events of 7 December.
36. It cannot be said from the video evidence which I saw or from the acknowledged circumstances of the salon on the day in question that there was any particular pressure on the Claimant other than a financial pressure which must sadly have been a present part of her daily life. The Claimant's actions on the afternoon of 7 December demonstrate a calm self-control and methodical approach to the task of closing the Respondent's business. This was undertaken notwithstanding the fact that Mr Giarratano was at the time engaged in cutting a client's hair. Another stylist was at the back of the salon resting awaiting further trade. In those circumstances the Claimant, at the time when on her own written case she indicated she was unwell and wished to go home, began to close the whole operation.

37. Against that inconsistency and those inexplicable aspects of the Claimant's conduct I place the evidence of Mr Giarratano which supports what was said in the grounds of resistance, is corroborated by the evidence of Mr Mascitti, and further corroborated by the text sent by Mrs Giarratano shortly after the Claimant left the salon.
38. The total of that evidence is that the Claimant resigned her employment indicating that she intended to leave at the end of the month. The statement that she intended to leave at the end of the month is of course relatively unusual in resignations borne out of a sense that the employer has taken advantage. Many such resignations are with immediate effect. There is inconsistency in the Claimant's actions in that it appears from her removal of her tools that she did not hold any intention to return in the near future. Events bear out that conclusion.
39. Against the difficulties the Claimant faces in giving a coherent account of her actions and her interactions with Mr Giarratano on that day and subsequently I place the fact that the Claimant was clearly unhappy. She had been so for some time despite what she has sought to put forward in this case. She did not appear to wish to continue to work for the Respondent. She wished to bring her employment to an end. When the Respondent recorded her resignation as an unambiguous conclusion from their perspective the Claimant did not indicate resistance to that record of what had happened until some 24 hours later. She did not indicate that she had acted in the heat of the moment and she did not express a desire to withdraw her resignation. She put forward her case that she had not resigned.
40. In the midst of this conflicting testimony I find it straight forward to accept the Respondent's testimony from the evidence of Mr Giarratano in his statement unshaken in cross-examination, corroborated by Mr Mascitti and given added strength by a contemporaneous text message no later than 45 minutes after the Claimant had left the premises.
41. I therefore conclude that the Claimant resigned in this case. She resigned unambiguously and indicated she intended to leave at the end of the month. She did not resign in the heat of the moment. The Respondent was under no obligation to offer her a cooling off period. Such an exercise must be dependent on acceptance by the employee that there has been a resignation.
42. She has not therefore left open to herself any claim under the jurisdiction of unfair dismissal. She has not suggested that in alternative if she is found to have resigned the Respondent was in fundamental breach of contract. Her case is quite clear. It is that there was no resignation.
43. On the facts I find that case impossible to accept.

44. Turning to the question of the Claimant's claim of wrongful dismissal since the Claimant resigned there is no breach of contract on the part of the Respondent. There is no evidence that the Respondent did not pay the Claimant during her notice pay. The statutory entitlement to notice in the event of a resignation by the employee is by Section 86(2) one week. the Respondent paid her during her period of notice her notice pay in accordance with statute notwithstanding her inability to attend work I do not find that the Respondent dismissed the Claimant nor do I find that the Respondent defaulted in some way in relation to the amount of notice which it understood the Claimant had intended to give and in respect of the payment to be made for that period.
45. Having resolved issues 3.1 to 3.5 above the other issues do not fall for consideration.
46. Accordingly, the Claimant's claims of unfair dismissal and wrongful dismissal fail and they are dismissed.

Regional Employment Judge Hildebrand

Date 25 September 2017