EMPLOYMENT TRIBUNALS

Claimant: Miss M Brookes

Respondent: Leeds Hair & Beauty Ltd

HELD AT: Leeds **ON:** 3 January 2018

BEFORE: Employment Judge T R Smith (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Miss C Brown, Director

JUDGMENT

1. The Claimant's complaint of wrongful dismissal is well founded and the Respondent is ordered to pay the Claimant the sum of £226.34.
2. The Claimant's complaint of unfair deduction from wages is not well founded and is dismissed.

REASONS

Evidence

1. I heard all evidence from Miss Brookes, and from Miss C Brown on behalf of the Respondent.
2. I also had before me a paginated bundle of documents to which I had full regard.
3. Initially from Miss Brookes' claim form there were a number of complaints.
4. Miss Brookes complained of unfair dismissal. However pursuant to section 108 of the Employment Rights Act 1996 in order to bring such a claim she must have

been employed for a period of not less than two years ending with the effective date of termination. Miss Brookes was employed from 21 February 2017 until 27 June 2017. She did not therefore have continuity of service. As a result her unfair dismissal claim was struck out by Employment Judge Rogerson on 18 September 2017.

5. The remaining complaints were as follows:-

   5.1. Was the Claimant wrongfully dismissed. The Claimant alleged she was entitled to one weeks' notice pay whereas the Respondent asserted the Claimant was dismissed for gross misconduct. The burden of proof is on the balance of probabilities on a Respondent to establish gross misconduct. It was agreed that if I found for the Claimant the sum due was £226.34.

   5.2. Unlawful deduction from wages. The Claimant asserted she had to work two weeks relying on pay and when dismissed she was not paid for those two weeks and the non payment in such circumstances contravened her right not to suffer an unlawful deduction from wages under section 13 of the Employment Rights Act 1996. It was agreed if I found for the Claimant the sum due was in the sum of £452.68.

6. There had been a complaint as regards holiday pay but that had been resolved by the time the matter reached the Tribunal.

7. There was also in the claim form a complaint as regards damage to equipment belonging to Miss Brookes. I indicated to Miss Brookes at the start of the hearing that I did not have jurisdiction to deal with that matter.

My findings

8. Miss Brookes, the Claimant, started work with the Respondent on 21 February 2017.

9. She was employed by the Respondent as a hair stylist.

10. I am satisfied that on average she was contracted to work 30 hours per week (bundle page 2B).

11. The Claimant earned £240 gross, £226.34 per week net.

12. The Claimant was paid fortnightly in arrears by means of credit transfer.

13. The Respondents are Leeds Hair & Beauty Ltd who trade from 132 Burley Road, Leeds.

14. Although the Respondent is a limited company in effect there are two "owners" namely Miss Claire Brown and Mr Kwane Owusu.

15. The 5 May 2017 was the Claimant's last working day as the following day, the 6 May 2017 she unfortunately broke her foot in two places.

16. The Claimant required hospital treatment.

17. I accept that a stylist could not be expected to engage in work with a broken foot particularly given that the majority of a stylist's time would be spent on their feet.

18. On 6 May 2017 the Claimant informed the Respondent that she had broken her foot.

19. On 8 May 2017 the Claimant attended the fracture clinic and a plaster cast was applied. She was given a fit note due to expire on 12 June 2017. The Claimant was told that she'd be advised when her plaster cast would be removed. The

Claimant assumed, and I think reasonably, that the plaster cast would be removed prior to 12 June 2017.

20. The Respondents were provided with a copy of the fit note.

21. On 12 June 2017 the Claimant remained in a plaster cast. Not unnaturally the Respondents were concerned. The Respondents contacted the Claimant as her sick note was due to expire that day and wanted to know as to her condition. Not unnaturally the Respondents needed to understand when the Claimant would return to work as it impacted upon the shift rota.

22. On the same day, 12 June 2017 the Claimant contacted Mr Owusu by WhatsApp. A copy of her text appears at document 13A in the bundle. The gist of the text was that the Claimant was aware that her fit note finished that day. Her plaster cast had been changed and she had a further appointment on 26 June. She indicated she would contact her GP to obtain another fit note but the earliest appointment available was for 21 June. She said she had been told by her GP that the fit note would be backdated. She said she could not indicate when she was able to work until she had seen the doctor. The earliest likely return to work date was 26 June.

23. In the interim the Claimant had a telephone consultation with her GP on 21 June 2017. The GP signed the Claimant off by means of a fit note. The GP backdated the fit note until 12 June. The fit note was due to expire on 12 July 2017.

24. On 23 June 2017 the Claimant contacted Mr Owusu again by WhatsApp. She informed him that she had a fit note but was waiting for a friend to post it and that would be either today or tomorrow. Mr Owusu responded that same day stating "ok no worries".

25. Miss Brown sought to convene a sickness review meeting. This was a small business and clearly the absence of a stylist was having an effect upon the business. I do not criticise the Respondent seeking to better understand the Claimant's position. It would be, in my judgment, fair to say that there was some tension as regards arranging the meeting. Ms Brookes could not attend the meeting due to her injury and mobility problems. She cheekily asked the Respondent to pay for a taxi. I accept Miss Brown's evidence that Miss Brookes put the telephone down on her in a disrespectful manner. There was no bad language.

26. That said the Respondents arranged a review meeting which was held in the Claimant's absence on 27 June 2017. The result of the meeting was confirmed by means of a letter of the same date. A copy of that letter is found in the bundle at page 11A. The letter is relatively lengthy. There are however a number of factors that I think are significant which I set out below:-

    26.1. The Claimant was advised that her employment was being terminated with immediate effect due to gross misconduct.

    26.2. The general thrust of the letter related to the Claimant's sickness.

    26.3. There are two extracts which are of some relevance which I quote below:-

    "With the job role that you had with us, you were the full time stylist in salon and you have now been absent for a period of over 7 weeks which is unsatisfactory and although we initially chose to attempt to await your return and work with you, we now feel that you are not working with us in

arranging a back to work plan by your failure to attend a mandatory absence meeting on Tuesday 27 June 2017".

"We called you on Monday 12 June 2017 as you had not contacted us and your sick note expired that day, you stated you were meant to be given a sick note on 21st which would backdate until the 12th. We called again on 21 June as you had not called us to inform (sic) of the outcome of the doctor's meeting which you had told us you would receive a sick note on this date, backdated to the 12th but you did not answer. We called again to chase the sick note but it is now 27 June 2017 and we are not in receipt of a valid sick note."

27. Whilst I do note the Respondent has referred to previous matters involving the Claimant's conduct I discounted them because no disciplinary action was taken.

28. It is clear from the letter of dismissal that it was the Claimant's sickness and perceived lack of co-operation that led to her dismissal for gross misconduct.

29. Gross misconduct occurs where the employee's breach of contract is repudiatory. It has to be sufficiently serious to justify dismissal. These cases are fact sensitive as set out in **Wilson** v **Racher** [1974] IRLR 114. On the evidence before me the Respondent has not satisfied me on the balance of probabilities that this was a case of gross misconduct and thus the Claimant is entitled to one weeks' contractual notice in the sum of £226.24. My reasoning can be summarised relatively briefly. Gross misconduct is reserved for the most serious of cases such as theft and fraud. Here the Claimant, whilst on occasions she had to be chased about her fit notes had advised the Respondents of her medical condition although I accept she had not complied fully with the terms of her handbook. This was not, however, a case of an employee who had completely ignored the employer. Further the fact the Claimant failed to attend the absence management hearing was not in itself an act of gross misconduct. Of course an employer who fails to attend such a meeting may well face dismissal but that is their choice. In this particular case the Respondent was entitled to proceed in the Claimant's absence. What I do not find however is that the failure to attend the meeting in itself was an act of gross misconduct. The Claimant was still injured and had mobility problems.

30. It is for the above reasons that I make the award as set out above.

31. I now turn to the issue of unlawful deduction from wages.

32. As I have already indicated the Claimant was paid in arrears. In other words she worked for four weeks but was paid for two weeks.

33. A chart was placed before me which appears in the bundle, page 15A. I have sympathy with the Claimant when she said it would have been better if the wage slips had been placed before me. Equally I can understand that the Respondent tried to summarise matters. The chart at page 15A is confusing although that is not a reflection upon the Respondents. I took some time to study the document because at first blush I had considerable sympathy with the Claimant's position. Having looked at the chart carefully I am satisfied that the Claimant worked 323 hours. She was entitled to £8 per hour. She has been paid for those hours. She received £2,584 gross. It follows therefore that whilst I understand the Claimant's argument having looked at the hours worked and the sums paid I do not find there has been an unlawful deduction from wages and that the Claimant has been paid her contractual entitlement. It follows therefore that the claim of

unlawful deduction from wages under section 13 of the Employment Rights Act 1996 is not made out and that claim therefore is dismissed.

Employment Judge Smith

Date: 16 January 2018