



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Gabriel

**Respondent:** Lvmh Fragrance Brands UK Limited

**Heard at:** Leicester

**Heard On:** Monday 6 November 2017

**Reserved Judgment:** 8 December 2017

**Before:** Employment Judge Hutchinson (sitting alone)

## Representatives

**Claimant:** Ms Scarborough of Counsel

**Respondent:** Ms Hicks of Counsel

# RESERVED JUDGMENT

The Employment Judge gave judgment as follows:-

1. The claim of unfair dismissal fails and is dismissed.
2. The claim for breach of contract in respect of notice pay fails and is dismissed.
3. The claim for non payment of holiday pay is withdrawn and dismissed.
4. The hearing listed for 7 March 2018 is cancelled

# REASONS

## Background

1. The Claimant presented her claim to the Tribunal on 13 July 2017. She had worked for the Respondents at the Debenhams store in the High Cross Shopping Centre in Leicester. She worked there as a Sales Assistant and had resigned on 22 May 2017. Her claims originally were of:-

- Constructive unfair dismissal
- Wrongful dismissal-Failure to pay notice pay
- Holiday pay

2. The Claimant had named Debenhams Plc as second Respondent but they were dismissed from the proceedings because they did not employ the Claimant.
3. In her claim form she described problems and issues that she had with Christian Glover an employee of Debenhams who was working for them as a Supervisor.
4. The Claimant described a number of incidents which occurred between January 2017 and her resignation on 14 May 2017.
5. She also complained about Steven Smithers a Senior Sales Manager for Debenhams. She described his behaviour on 13 May 2017 as being the “final straw”.
6. The Claimant’s Area Manager and the person she reported to was Sharon Macfarlane. She complained that the Respondents were vicariously liable for the actions of Debenhams’ employees and that the Respondents had failed to assist and support her despite having knowledge of the misconduct taking place. That she was entitled to resign as a result of a breach of the implied term of mutual trust and confidence. That she resigned because of this and she had not affirmed the contract by delaying too long.
7. She said that if she was entitled to claim constructive unfair dismissal as a result of a fundamental breach of her contract of employment, she was also entitled to damages for breach of contract in respect of her notice pay.
8. Her claim form, which had been prepared by solicitors, referred to the case of **Lister v Hesley Hall Limited** [2001] UK HL22 and **Malik v BCCI** [1997] IRLR 462.
9. The Respondent’s filed their response on 14 August 2017. They denied the allegations made by the Claimant. They pointed out that on 11 May 2017 the Claimant had been invited to attend a formal disciplinary meeting relating to allegations of:-
  - Frequent lateness
  - Taking extended breaks from the counter and leaving the counter outside of break times
  - Spending time at the Estee Lauder counter during working hours
10. The Claimant had resigned three days later on 14 May and had requested that her final day of employment be 20 May 2017.
11. They say that it was only after the Claimant resigned i.e. on 14 May 2017 that she raised issues of harassment and that although they had offered to investigate those complaints the Claimant had declined to participate
12. They say that the Claimant was not constructively unfairly dismissed. That they had not breached any term of the Claimant’s contract whether implied or express. If they had committed breaches they were insufficiently serious to justify resignation. They say that if there had been a breach the Claimant had waived the breach and that she had not resigned in response to the breach in any event.

13. In respect of the wrongful dismissal claim they say the Claimant was not wrongfully dismissed and was not entitled to resign. That it was the Claimant who had asked to be able to leave less than one week after giving notice of termination.

14. After the responses were filed by both Respondents the Claimant withdrew the claims against the second Respondent and they were dismissed. At the commencement of the hearing the Claimant withdrew the claim of non payment of holiday pay and I dismissed that claim.

### **Amendment of claim**

15. At the start of the proceedings on 6 November the Claimant asked to amend her claim. She alleged that the failure to render reasonable support to ensure that the Claimant could carry out her duties without harassment from fellow workers and specifically those from Debenhams amounted to an amendment of her claim. Ms Hicks objected to this application but I was satisfied that the matter did not require amendment. It was not a new claim. That it was part of the original claim made. No new evidence was required and there was no prejudice to the Respondents.

### **The issues**

16. We then went on to agree the issues in the case which were as follows:-

16.1 Constructive unfair dismissal claim:-

16.1.1 Did the Claimant terminate the contract in circumstances in which she was entitled to terminate it by reason of the employer's conduct? In particular the Claimant relied on the fact that the Respondent had conducted itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between itself and the Claimant. In support of that contention the Claimant relied on the following acts:-

(a) On 10 January 2017 Christian Glover informed the Claimant that he had asked for the security log to monitor the Claimant's times (in case she lied) and that she was 10 minutes late.

(b) On 17 January 2017 the timesheet was removed by the Duty Manager, Claire Spencer, on behalf of Christian Glover.

(c) On 22 January 2017 the Claimant was called via tannoy. When she returned to her counter she found the store's security standing there.

(d) On 7 February 2017 at 7:25 pm the Claimant requested help from Christian Glover whilst she was cashing up. When she went to speak to the Duty Manager of women's wear she was asked "you used to be a manager, why can't you cope?"

(e) Also on 7 February 2017 at 7:50 pm Christian Glover told the Claimant not to speak in Arabic as it was “very rude”. Christian Glover told her that she was not allowed to speak any language other than English whilst at the store.

(f) On 5 May 2017 the Claimant was subject to an investigation meeting without warning.

(g) On 5 May 2017 the Claimant was forced to watch CCTV footage which zoomed in to record the Claimant removing a facial hair.

(h) On 9 May 2017 Christian Glover instructed the store security to monitor the Claimant to see if she did in fact go to the bathroom when she said she was. The security woman also laughed at the Claimant.

(i) On 13 May 2017 Christian Glover accused the Claimant (behind her back) of making a mistake when signing in and later told the Claimant he was not picking on her. When she challenged him he had no explanation, simply replying, “Well, you’re in my vision and I saw you there”.

(j) The Claimant complained to Steven Smithers that Christian Glover was singling her out. Steven Smithers told the Claimant “Look, Asma, he is only doing what he has been told to”. The Claimant says that this was the “final straw”.

16.1.2 Did the Respondent fail to offer reasonable support to ensure that the Claimant could carry out her duties without harassment and disruption from fellow workers? The Claimant relies on the above acts.

16.1.3 Did the Respondent commit these acts? Was it vicariously liable?

16.1.4 Did any proven conduct on the Respondent’s part amount to a series of unreasonable acts, such that, cumulatively, they amounted to a fundamental breach of the employment contract?

16.1.5 If so did the Claimant resign in response to those breaches?

16.1.6 Had the Claimant waived any breaches by the time of her resignation on 15 May 2017?

16.1.7 By giving notice to the Claimant affirm the contract of employment?

16.1.8 If I find that the Claimant was dismissed are the Respondent’s able to establish a potentially fair reason for the dismissal? In this case the Respondent will rely on conduct.

16.1.9 If the Respondent's establish a potentially fair reason was the dismissal fair in all the circumstances as per Section 98(4) Employment Rights Act 1996 (ERA)?

16.2 Wrongful dismissal claim:-

16.2.1 Was the Claimant entitled to resign her employment as a result of a fundamental breach of the terms of her contract whether express or implied?

16.2.2 If so what notice pay is she entitled to?

## **Evidence**

17. I heard evidence from:-

- The Claimant
- Laura Wise, Retail Manager of the Respondent
- Sharon Macfarlane, Area Manager for the Respondent

18. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

19. Where there was a conflict in the evidence I preferred the evidence of the Respondent's witnesses. They gave consistent evidence to me which was credible. The Claimant's evidence was not credible at times. In particular she complained about a number of events that occurred between her and Christian Glover which she did not raise with the Respondents until after her resignation. She must have been aware that she could have raised a grievance but did not do so. Even when she resigned she did not say why she had decided to resign and by that stage she was subject to disciplinary proceedings in respect of her own behaviour. The letter of resignation simply said that she had decided to resign (page 114). As evidenced by the e-mail from Claire Spencer, Cosmetics Sales Manager at Debenhams (page 115-6) the Claimant had said to her on handing her resignation letter in:-

"It had been a hard decision to make, she had enjoyed her time within the store, there were no hard feelings with anyone, but it was time for a change.

She mentioned that she had been offered two positions elsewhere or that she may open up her own small jewellery business."

20. It was only after she had been asked to elaborate on her reasons for resignation did she say in her e-mail of 14 May 2017 to Laura Wise (page 111) that she had been experiencing "a level of harassment". She said that she had tried to resolve this without involving Givenchy and reported it to the Store Manager and the Floor Manager with no result. There was in fact no evidence that she had raised issues of harassment with any one including with the staff at Debenhams.

21. She accused Sharon Macfarlane in that e-mail of trying to build a case to dismiss her. There is no evidence to support that contention.

## The Facts

22. The Respondent is a fragrance, skin care and cosmetics brand. It employs Beauty Consultants who operate within various stores throughout the country.

23. The Claimant commenced her employment with the Respondents on 10 October 2009 as an Account Manager. Her contract is at page 51. On 7 November 2016 her role changed to Beauty Consultant (page 67).

24. The Claimant worked exclusively out of the Debenhams store in High Cross Shopping Centre, Leicester. Sharon Macfarlane was the Area Manager who was responsible for her and for 8 other stores in the area where they engage their own Beauty Consultants. There are also 30 or so “non consultant” stores which are stores where their brands are stocked but they do not have their own employees. These are places such as Perfume shops, John Lewis and Boots.

25. Whilst Beauty Consultants such as the Claimant are employed by the Respondent 50% of the salary costs are then recharged to the store. This means that although the Respondent is the employer the store has an interest in the employees of the Respondent’s as they contribute to the payment of their salaries.

26. The Respondent’s employees are serving the store’s customers and so the stores have an interest in the Respondent’s employees exhibiting positive behaviours, arriving to work on time and working their contracted hours without taking extended breaks. If one of the Respondent’s employees is late for work this has a knock on impact on the store’s takings and can detrimentally impact the expected service levels for both the store and the brand.

27. If the store has concerns about an employee such as for being late or absent they inform the Respondent about this and the Respondent will investigate any issue that is brought to their attention by the store.

28. There is a handbook which is called “People Guide”. The document is at pages 119 to 147. It contains the following relevant provisions:-

### “Your Attendance and Timekeeping

You are expected to arrive for work before the start of your working day so that you are ready to start on time as per your contracted hours.

For Team Members Working on Counter

Breaks are to be taken in accordance with the company guidelines (pages 134 5).

The company has a disciplinary policy and a grievance policy which is set out at page 136.

There is an Employee, Dignity, Equal Opportunities and Harassment

policy which is at page 137. That makes clear that if a person feels that they have been discriminated against, subjected to harassment or victimisation “they are encouraged to raise the matter using the grievance procedure.”

29. The disciplinary procedure is then further detailed at pages 142-145. Examples of misconduct are given namely:-

- Poor timekeeping and attendances
- Unreasonable or unexplained absences
- Minor breach of company rules or failure to observe company procedures

30. The grievance procedure is set out at page 146-7. The Claimant says that she had never been in receipt of the “People Guide”, or been given access to one. I do not accept her evidence that she was not aware of the guide or that she had reported any concerns to her line manager, Sharon MacFarlane. She had regular “catch ups” with Sharon MacFarlane over coffee and never said she was experiencing difficulties about her new supervisor. They had an open relationship and I am satisfied she would have told Sharon if there had been any problems.

31. Beauty Consultants are expected to be at their counter and ready to serve customers at the start of their rostered shift. To clock in they have to sign on to their till. At the end of the shift they sign out.

32. Employees are entitled to a one hour unpaid lunchbreak and a half hour paid break during the day. Employees do not have to sign in or out when they are taking breaks. The system operates on trust. At Debenhams, Leicester there was a central chart for any colleagues working on counters where they worked alone to sign to indicate when they went on their break.

33. The Claimant was highly thought of and I am satisfied that Sharon Macfarlane had had to speak to her on a number of occasions about lateness and taking extended breaks. On one occasion Laura Wise who was Ms Macfarlane’s Line Manager joined in on such a conversation in or around September 2015. The problem though never resulted in any disciplinary action being taken against her.

34. Christian Glover started in his new role as a Supervisor working for Debenhams in early 2017. I am satisfied that at no stage until after her notice of resignation did the Claimant complain about the conduct of Christian Glover to Sharon Macfarlane or to Claire Spencer as she alleges. Ms Macfarlane saw Mrs Gabriel on a number of occasions and she had plenty of opportunities of telling her if she did have any such issues. I am not satisfied that Mr Glover accused her of lying on 10 January 2017 or that he was singling her out for unreasonable treatment. I am not satisfied that any incident occurred on the 17 January 2017 when she says the time sheet was removed and taken to show the duty manager. I am also satisfied that the specific incidents she complains of on 22 January 2017 and 7 February 2017 did not happen in the way the Claimant described. There had been an incident when she had been overheard speaking to another consultant in Arabic and this had been questioned by a Debenhams employee but no issue was ever raised by the Claimant in respect of this until after her resignation.

35. There were repeated problems though caused by the Claimant being late and taking extended breaks. On one of her regular visits to the store on 20 March 2017 Ms Macfarlane was told by Claire Spencer the Debenhams Cosmetic Sales Manager that they were experiencing some issues again with the Claimant involving her being late and taking extended breaks. Ms Macfarlane said that she was happy to look into this matter further but she needed evidence of the issues such as copies of relevant times and attendance records.

36. On 20 April 2017 Ms Macfarlane agreed to speak with Claire Spencer about the issues with regard to the Claimant on her visit on 27 April. Sharon Macfarlane met Claire Spencer on 27 April and they went through the time and attendance records in question. Ms Macfarlane was shown CCTV footage of the Claimant taking extended breaks and an incident on the Estee Lauder counter where the Claimant was using their mirror to pluck hairs from her chin. Some mention was made about the Claimant speaking in Arabic to another consultant and Ms Spencer asked Ms Macfarlane about whether the company had a policy on this. Ms Macfarlane said that they were very supportive of employees talking in other languages and that it was beneficial to have other language skills.

37. After the meeting Ms Macfarlane received an e-mail from Ms Spencer on 4 May 2017 (pages 81-2). The e-mail said that the Claimant had had to be called via the tannoy to return to the counter on both Sunday and Monday of that week. During the incident on Monday a customer was looking on the counter whilst the Claimant was having a break. She had signed herself out at 11:15 am for a 30 minute break and it was then 11:55 am.

38. Having obtained this information Ms Macfarlane decided to hold an investigation meeting with the Claimant. She was next due in the store on 5 May 2017. The meeting was also attended by Rebecca Wilcock, Account Manager for the Respondent who took notes. The notes are at pages 86-101. The notes were signed by the Claimant at the end of the meeting to confirm they were an accurate and fair reflection of what was discussed.

39. Ms Macfarlane explained at the beginning of the meeting the nature of it; that it was investigatory. She explained that it had come to her attention there were a number of dates she was late on her shift or left her shift early. These were for a period between 29 March 2017 and 29 April 2017.

40. The Claimant was asked why she had been late for work and she was unable to provide a satisfactory explanation. She simply complained that her bus was often late and that she didn't want to get the earlier bus as it was too early. She was asked whether she had notified the store if she was going to be late and she said that she did not if it was just going to be for a few minutes.

41. They also discussed the allegation that she had been taking extended breaks and they discussed an incident on 1 May 2017 described above when she had signed out for a 30 minute break at 11:15 and had to be called back via tannoy at 11:55 am.

42. The Claimant said that she was upset at these issues being raised with her as no one else signed the sheets for breaks. She did not appreciate that the issue was the fact that she had appeared to take longer breaks than she was entitled to.



43. They also discussed her extended holiday at the end of March. She was asked to provide evidence of her originally booked flights and she was told that she should have spoken to Ms Macfarlane.

44. They then returned to discussing the extended breaks that the Claimant had taken on a number of occasions and she was shown CCTV footage which confirmed the position about her extended breaks.

45. They then finally looked at the footage of her grooming herself on the Estee Lauder counter. She was shown to be plucking hair from her chin in full view of customers and the Claimant admitted that she was "very wrong" to have done this.

46. The Claimant had agreed to look at the footage and I am satisfied that she was not "forced" to watch it as she had agreed to it.

47. At the end of the meeting the Claimant was asked if there was anything she wanted to add. She said that she had worked hard for the company for 8 years and admitted making mistakes. She said that she felt humiliated and questioned why Claire had not come directly to her. She also said that she had problems with her personal life and that from now on she would stick to the rules and wouldn't be staying a minute past 6.30. She referred to things "going on for months on floor" meaning the management had been monitoring breaks closely and in her opinion not raising issues with other consultants.

48. Ms Macfarlane, at the end of the meeting, adjourned for a short while. She spoke to HR for advice and reconvened the meeting. She then said that she had decided that the matter should progress to a formal disciplinary hearing. She was conscious that she had tried to tackle issues of lateness through informal means previously but without success. It was appropriate to take the matter through to a disciplinary hearing now.

49. On 11 May 2017 Ms Macfarlane wrote to the Claimant to confirm that she would like to invite her to a disciplinary hearing on 18 May 2017 (pages 84-5). The matters to be dealt with were:-

49.1 Frequent lateness.

49.2 Taking extended breaks from her counter and leaving her counter outside break times; and

49.3 Spending time at the Estee Lauder counter during working hours.

The letter also enclosed:-

- A copy of the investigation meeting notes
- Claimant's attendance forms

50. The letter confirmed that the Claimant had the right to be accompanied at the disciplinary meeting and that it could amount to an act of gross misconduct which could result in her summary dismissal.

51. On 14 May 2017 Ms Spencer wrote to Ms Macfarlane about some further matters which had occurred during the week commencing 7 May 2017 (page 106-7). This related to further incidents of the Claimant's lateness and

taking extended breaks. It can be seen that two days after her meeting with Ms Macfarlane she had arrived for work 13 minutes late and taken 20 minutes extra for her tea break and then 20 minutes extra for her lunchbreak.

52. I am not satisfied that the incidents that the Claimant alleges took place on 9 and 13 May 2017 took place in the way she describes them. She was being monitored because she continued to be late and take extended breaks despite being subject to disciplinary action in respect of these matters. On 15 May 2017 the Claimant handed in her resignation letter. It is at page 114. It gives no reason for her resignation and says:

“Although I am required to work 4 weeks’ notice I would appreciate it if I could take Saturday 20 May 2017 as my last day with the business. I am unable to work my full notice period. I apologise for the short notice and any inconvenience this may cause.”

53. The resignation came without warning and was unexpected. On receiving this Laura Wise wrote to the Claimant (page 112) saying:

“I am sorry to hear this. Would you be able to elaborate any further on your reason? As you know I have been only half in the business recently!”

54. The Claimant replied at 19:42 on 14 May (page 111). She said:

“Over the past months I have been experiencing a level of harassment, at time bordering on racism, from certain individuals of the store, which has made me very uncomfortable. The most concerning incident was when one of the supervisors told me, 5 minutes before the store was due to close that I was not allowed to speak Arabic on the shop floor. I found this strange as most of my customers from the Middle East feel comfortable that I am able to communicate in their language as do my Italian customers. I tried to resolve this without involving Givenchy, and reported it to the Store Manager and the Floor Manager with no result. It came to a head after an incident this Saturday during which it became apparent that the treatment I was experiencing was sanctioned.

Prior, on Friday 5 May I was under the impression that Sharon was coming to the store to carry out my annual appraisal, but instead I was told that it was a disciplinary meeting, which came as a hock given my record of my contribution to the counter. During the meeting I was humiliated and informed that the store cameras had been filming me. I was then taken to view footage of this film. When I told Sharon that this was not proper and asked why I was being singled out she dismissed my concerns and told me that it was not her problem.

With all due respect to you and Givenchy, I will not be treated in this manner, especially when you consider the supposed reason(s) for the disciplinary: they were comical. When I spoke to my husband about it he told me that it appears Sharon and Debenhams are trying to build a case to dismiss me, so my husband and I decided that it would be for the best that I leave, as the atmosphere in the store was affecting me.

Thank you for your concern Laura. I truly appreciate it.

Asma Gabriel.”

55. Ms Wise replied to this on the same day (pages 110-1) it says:

“With regards to the disciplinary meeting, I can one hundred per cent guarantee you this absolutely did not come from Sharon. I am aware the store had raised some concerns to her, and I had asked her to investigate, which of course she did. I am happy to look into this further for you if you wish?

In terms of the harassment you have felt you have been on the revolving end of, have you by any chance got any of it documented? As a brand we would absolutely support you in looking into this in trying to resolve it.

I feel it is a shame you feel you need to leave, when there could be some way to resolve some of the issues you are facing. We have all come a long way in Leicester, of course with some challenges along the way.

I do absolutely respect your decision however if that is final.”

56. Mrs Gabriel replied that her decision was final. She said that she had kept records of the incidents that had occurred since they began although she never produced any such records. The Claimant did not produce them to me either.

57. Although the Claimant was required to give 7 weeks’ notice under her contract of employment they agreed to Mrs Gabriel’s request that her final day of her employment could be 20 May 2017.

58. Before Mrs Gabriel left the store Ms Macfarlane visited with a card and flowers for her to wish her well and to thank her for her hard work in the past. They had worked together successfully for a number of years and Ms Macfarlane was sad to see her go.

59. She told Mrs Gabriel she was willing to investigate the issues she had mentioned but she said that she had decided to go and it was time for a change. She said that she had some issues in her personal life and had talked about potentially setting up a jewellery business. She left her employment on 20 May 2017.

## **The Law**

60. At the hearing I only had time to hear the evidence and there was insufficient time to hear submissions from the two able advocates who represented the parties. It was agreed between us that they would provide written submissions and I would consider my decision at a reserved hearing and a provisional date was set for remedy on 7 March 2018 if the Claimant was successful. Prior to this reserved judgment I have received those written submissions and their respective comments on their submissions.

61. The claim of unfair dismissal is made under Section 94 ERA. The burden is on the Claimant to establish that she was dismissed.

62. Section 95(1) (c) ERA provides that a Claimant will be taken to have been dismissed if:

“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.”

63. Ms Hicks referred me to a number of cases namely:-

- **Savoia v Chiltern Herb Farms Limited** [1982] IRLR 166
- **Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462
- **Sharfugeen v TJ Morris Limited** UK EAT/0272/16
- **Omilaju v Waltham Forest London Borough Council** [2005] IRLR 3/35
- **IBM UK Holding Limited v Dagleish** [2017] EWCA civ 1212
- **Norwest Holst Group Administration Limited v Harrison** [1984] IRLR 419
- **Baldwin v Brighton and Hove City Council** [2007] IRLR 232
- **Cochram v Air Products Ltd**[2014] IRLR 672
  
- **Lister v Hesley Hall Limited** [2001] 1AC 215
- **Catholic Child Welfare Society and Others v Various Claimants** [2013] IRLR 219
- **Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Limited** [2005] IRLR 983”

64. In her submissions Ms Scarborough also referred me to:-

- **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221
- **Woods v WM Car Services (Peterborough) Limited** [1981] ICR 666
- **Wigan Council v Davis** [1979] ICR 411
- **Wright and North Ayrshire Council** [2014] ICR 77

65. In her supplementary submissions by way of reply Ms Hicks referred me also to:-

- **Nimo v Alexander Cohen and Sons Limited** [1968] AC 107
- **Tunnel Holdings Limited v Wolf** [1976] ICR 387
- **Willetts v Jennifer Trust for Spinal Muscular Dystrophy** UK EAT/0282/11

66. As Ms Scarborough described in her own submissions the test for constructive dismissal is that set out in the case of **Western Excavating v Sharp**. The Claimant must satisfy me that the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment. She must satisfy me that she resigned because of that breach and that she did not delay too long and therefore affirm the contract.

67. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.

68. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

69. The test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must as was described by Lord Nichols in **Mahmud v Bank of Credit and Commerce International SA** [1997] ICR 606:

“Impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have from his employer.”

70. The Claimant in this case relies on a cumulative course of events. She relies particularly on the law set out in the **Omilaju** case. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. That last straw act does not have to be of similar character or even blameworthy. It must “contribute, however slightly, to the breach of the implied term of trust and confidence”.

71. The Claimant in this case relies on the implied term referred to in the **Wigan Council v Davis** case that the employer should render reasonable support to an employee to ensure that the employee can carry out the duties of his job without harassment and disruption by fellow workers.

72. Much has been said about vicarious liability. It is agreed that employers can be vicariously liable for the actions of their employees but that is not the situation here. The Claimant’s contention is that the Respondent’s should be liable vicariously for the actions of employees of a different employer. Ultimately in this case I am satisfied that it makes no difference so the point is irrelevant.

73. So far as the wrongful dismissal claim is concerned it is not in dispute that the Respondents did not dismiss the Claimant. The Claimant therefore is only entitled to her notice pay if she was entitled to resign. She must therefore establish that the Respondents were in fundamental breach of her contract of employment which entitled her to resign without notice.

## **Conclusions**

74. In this case the Claimant bases much of her complaint about the actions of people who were not employees of the Respondents. In particular she complains about:-

- Claire Spencer, Debenhams Cosmetic Sales Manager
- Christian Glover, Supervisor for Debenhams
- Steven Smithers, Senior Sales Manager of Debenhams
- The Debenhams’ Security Team

75. Her complaint is that the Respondents are vicariously liable for the actions of the employees of another organisation. It has already been accepted by the Claimant that despite the fact that Debenhams contributed to the payment of her wages (not directly) she is not an employee and never has been of Debenhams.

76. I am satisfied that none of the so called perpetrators of unreasonable acts upon the Claimant work on behalf of the Respondent company. They are

employed solely by the store and have nothing to do with the Respondent's business. The nature of the relationship between the Respondents and Debenhams is that they sell their fragrances, skin care and cosmetics within the Debenhams' store. They employ Beauty Consultants such as the Claimant who operate within the store.

77. As part of that arrangement the employees of the Respondent are expected to conduct themselves in accordance with the requirements of the store. The store has certain opening hours and it expects the like of the Respondent's business to operate within those opening hours and within the store's own expectations of how they should conduct business. If matters are not being dealt with in accordance with the store's requirements they are perfectly entitled to speak to the employees of such as the Respondents and remind them of the requirements. That does not make the Respondents vicariously liable for Debenhams' employees.

78. I am satisfied that this arises out of necessity. The Beauty Consultants are managed by someone who is not present in the store on a daily basis. Sharon Macfarlane, the Area Manager who was responsible for the Claimant had a total of 9 stores that she was responsible for and her job was to make sure that the Beauty Consultants who were under her control did their job properly.

79. Debenhams could not discipline or take any direct action against the employees of the Respondents. All they could do was to take matters up with the management of the Respondent's business and ensure that the way that the Respondent's business was operated in their store was to their satisfaction. That is exactly what happened in this case and it did not mean that in some way the Respondents were vicariously liable for the conduct of Debenhams' employees.

80. I am satisfied in this case that there were problems over the Claimant's behaviour and this was a problem over a number of years.

81. Whilst she was an excellent Beauty Consultant with many assets she had to be spoken to on numerous occasions by Sharon Macfarlane about her lateness and about taking extended breaks. Ms Macfarlane had spoken to her in one such conversation in September 2015. I am satisfied as Ms Macfarlane described to me:

“Asma would always give excuses and didn't really ever seem to take ownership of the problem.”

82. In view of the requirements of the store they increasingly became frustrated about the behaviour of the Claimant. Debenhams were entitled to monitor the Claimant's activities and they were reasonable to be concerned about the Claimant's lateness and her behaviour in taking extended breaks away from the counter she was responsible for. I am not satisfied that the Claimant

- Was called a liar on 10 January 2017
- Had her time sheet removed on 17 January 2017
- Was called via tannoy unreasonably on 22 January 2017
- Was subjected to unreasonable treatment by Mr Glover on 7 February 2017.

In any event they had nothing to do with her decision to resign.

83. I am satisfied that Claire Spencer the Debenhams Cosmetic Sales Manager raised issues with Sharon Macfarlane on 20 March about the Claimant

again being late and taking extended breaks. In that discussion it was agreed that Ms Macfarlane would investigate these issues and that is what she did. This amounted to obtaining records of her attendance and breaks and looking at some CCTV footage that Debenhams were able to provide to her as part of their complaint about the Claimant.

84. As part of this investigation Ms Macfarlane met with Ms Spencer to discuss matters on 27 April 2017.

85. Ms Macfarlane held an investigatory meeting with the Claimant on 5 May 2017 to discuss her conduct. The Claimant was not entitled to any prior warning of the meeting. This did not amount to unreasonable conduct. This meeting was conducted in accordance with the Respondent's disciplinary procedure.

86. Until this time at no stage in any of the meetings with the Claimant had she raised any issue about the conduct of any of Debenhams employees towards her.

87. As can be seen from my findings of fact the Claimant was shown evidence of her lateness on a number of occasions between 29 March 2017 and 29 April 2017. She had also failed to follow the correct procedures in terms of signing in. The Claimant was unable to provide any satisfactory explanation for her behaviour.

88. She was also told about the evidence relating to taking extended breaks. This included showing her the CCTV footage. Most of the footage related to her taking extended breaks. She was not "forced" to watch this. It was part of the case against her and she acknowledged that her behaviour shown (plucking hairs from her chin in front of customers) was "very wrong".

89. Whilst I am satisfied that the Claimant felt humiliated about being questioned relating to these matters she did so because there was no excuse for her behaviour. She was a senior Beauty Consultant who had been employed by the Respondents for 8 years and should have not behaved in the way that she did. Being on time and remaining on duty is a fundamental aspect of the requirements of employees by employers. The Respondents were perfectly entitled to raise these matters with the Claimant when she clearly had so little regard for those requirements.

90. Ms Macfarlane understandably decided to progress the matter to a disciplinary hearing and she wrote to the Claimant on 11 May 2017 inviting her to one.

91. Even after the meeting on 5 May 2017 the Claimant continued with her behaviour of being late and taking extended breaks. Debenhams monitoring of that behaviour was reasonable and I am not satisfied she was being "accused" or that they "were picking on her" as she describes. In view of her behaviour they were entitled to monitor her which they did. I am not satisfied that the security woman laughed at the Claimant on 9 May 2017 or that the Claimant had the conversations with Mr Glover and Mr Smithers that she alleges took place on 13 May 2017. She did not refer to these discussions in her email to Ms Wise on 14 May 2017, the day after. I am satisfied they did not happen. It was the Claimant's own decision to resign on 14 May 2017 shortly after receiving the invitation to attend the disciplinary hearing. That was why she resigned.

92. I am satisfied that the Claimant had not complained about the behaviour of Ms Macfarlane or indeed any of the employees of Debenhams. The Claimant could have raised a grievance or indeed could have complained in some way about her treatment. I am satisfied that the reason that she did not complain was that she had no reason to complain. I am therefore also satisfied that there was no failure to render her reasonable support to ensure she could carry out her duties without harassment.

93. Her resignation letter gives no reason for her resignation and it was only afterwards that she complained about her treatment. She was given an opportunity to reconsider her position and to discuss her complaints but decided not to take that opportunity.

94. It was entirely her own decision to resign and it was also her own decision that she wanted to leave without serving the appropriate notice.

95. I am satisfied that the Claimant was not constructively dismissed. The Respondent's behaviour did not amount to a fundamental breach of her contract of employment. All Ms Macfarlane wanted was for the Claimant to perform her job in the manner that they reasonably required. That is not harassment and bullying. The Claimant's claim therefore for constructive unfair dismissal fails because she was not dismissed in accordance with the provisions of Section 95(c) of the Employment Rights Act 1996.

96. In view of my findings the parties will not be surprised that I have also found that the claim for wrongful dismissal which is the balance of her notice period also fails. The Claimant has not established that the Respondents have been in fundamental breach of her contract of employment and that she was entitled to terminate her contract without notice or give short notice. That claim also fails and is dismissed.

97. The remedy hearing set for 7 March 2018 is therefore cancelled.

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Employment Judge Hutchinson

Date: 14 February 2018

JUDGMENT SENT TO THE PARTIES ON

19 February 2018

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FOR THE TRIBUNAL OFFICE