



EMPLOYMENT TRIBUNALS

Claimant

Faye Atkins

v

Respondent

Paula Mason trading as Lawrence
Paul Hair and Beauty

Heard at: Bury St Edmunds

On: 16 & 17 April 2018
5 July 2018 (in chambers)

Before: Employment Judge K J Palmer

Members: Mrs L Gaywood
Ms J Schiebler

Appearances:

For the Claimant: Mr N Ashley (Counsel)
For the Respondent: Mr B Handley (Consultant)

RESERVED JUDGMENT

It is the Tribunal's unanimous Judgment as follows:

WRONGFUL DISMISSAL/BREACH OF CONTRACT

1. The Claimant's claim in wrongful dismissal succeeds. The Tribunal awards her one week's notice in the sum of £310.00. This is payable by the Respondent to the Claimant.

ANY UNLAWFUL DEDUCTION FROM WAGES

2. The Claimant's claim for unlawful deduction of wages succeeds and the Tribunal makes a declaration to this effect. The Claimant is awarded the sum of £626.70 to be paid by the Respondent.

AGE DISCRIMINATION AND HARASSMENT RELATED TO AGE

3. The Claimant's claims in age discrimination and harassment fail and are dismissed.

In summary the total award to be paid forthwith by the Respondent to the Claimant is £936.70.

REASONS

1. This matter came before the Tribunal in a two day hearing on 16 and 17 April. Unfortunately there was insufficient time to hear submissions on the second day and an Order was given for submissions to be given in writing and exchanged and the opportunity for replies to those submissions was ordered.
2. The Tribunal could not meet in order to deliberate and discuss this case until July but then were able to do so.
3. Both parties were represented, the Claimant by Mr Neil Ashley of Counsel and the Respondent by Mr B Handley, Consultant.
4. The Tribunal heard evidence from the Claimant and for the Respondent from six witnesses: Mr Erin Clackson, a hairdresser; Miss Alice Robeson, a hairdresser; Mrs Theodora Charismoglou-Bandoula, former employee; Miss Megan, a hairdresser; Mrs Paula Mason, the Respondent and Mr Lawrence Garnett, hairdresser and partner of the Respondent and the subject of the majority of the Claimant's discrimination claims.
5. The Tribunal has before it an agreed bundle.
6. There was a further witness statement from Ms Jo Aldridge who was not present to be tested on that evidence. The Tribunal read that statement but gave appropriate weight to it in light of the witness' unavailability to be tested on that evidence.

ISSUES

7. The issues before the Tribunal were:
 1. A claim for wrongful dismissal or breach of contract. The Claimant's claims she was dismissed without notice.
 2. A claim for unlawful deduction of wages in that the Claimant says that her final salary was reduced and a deduction was made of £626.70. The Respondent argues this was a legitimate deduction based on an agreement that the Claimant would repay a percentage of training fees in the event of termination of her employment.

3. Claims for direct age discrimination and harassment on the basis of the protected characteristic of age. These were broken down into 11 separate allegations and largely concerned the Claimant's alleged treatment at the hands of Mr Garnett.

FINDINGS OF FACT

8. The Claimant commenced employment with the Respondent on 1 February 2017 and was employed as a beauty salon manager in the Respondent's Long Stratton salon. On 5 February the Claimant signed an offer letter by way of acknowledgement of the terms and conditions attached and she also signed a document entitled "Training Agreement". This related to an electrical training course which the Respondent required the Claimant to attend with Penny Turby on 8 March 2017 followed by an initial training course at Guinot-Mary Cohr UK Limited in Ascot from 13 to 17 March. That document which is relevant to the issues before the Tribunal specified that Lawrence Paul the trading name of the Respondent would pay the cost of both training courses at £966.
9. It goes on to say that if the Claimant's employment should terminate for any reason within 12 months after completing the course then the Claimant agrees to repay full or part of the cost on a sliding scale depending on how long she had been employed, as set out. The final paragraph of the letter also indicates that any such sum that might become repayable can be deducted from the Claimant's wages.
10. The Claimant then signed a statement of principle terms of employment on 17 May referring back to the commencement of her employment on 1 February. This set out amongst other things the Claimant's notice period which mirrors the statutory minimum notice under the Employment Rights Act 1996.
11. The Claimant's employment terminated as a result of an exchange of correspondence between the Claimant and the Respondent in July of 2017.
12. The Claimant sent to the Respondent an email on 13 July which stated as follows:

"I am afraid I am not going to be in tomorrow until further notice. I suspect I am suffering with work related stress which has built up along with stress from our wedding. Sorry for any inconvenience Paula. Regards Faye"
13. This followed a brief exchange where the Claimant and the Respondent had agreed to meet.

14. The Respondent replied to the email set out above in a handwritten letter dated 13 July as follows:

"Dear Faye

We acknowledge receipt of your email dated 13 July 2017 which we will take as your resignation with immediate effect.

Your salary up to 13 July 2017 plus any accrued holiday pay will be paid at the end of this month and your P45 will be posted to your home address.

Yours sincerely"

15. It was on the basis of this letter from the Respondent that the Claimant's employment was terminated. It is common ground that the Claimant was not paid any monies in lieu of notice and it is that which forms her wrongful dismissal and breach of contract claim. In essence that claim is for one week's net pay as set out in her contract of employment.
16. Interestingly when giving evidence the Respondent was unclear as to why she had written to the Claimant in these terms other than she indicated she sought legal advice and was advised to do so. At the commencement of her employment and pursuant to signing the training agreement referred to above the Claimant attend the training course in Ascot in March of 2017.
17. It is common ground from the evidence the Tribunal heard that there was a deduction made from the Claimant's final salary purportedly pursuant to the training agreement. Even on her own evidence the Respondent's approach to this process was muddled. It appears that the Respondent expected the Claimant to attend the training course at her own expense purporting to deduct salary from the Claimant for the time spent on the course or offering her the alternative of taking holiday to attend the course. In cross-examination the Respondent said she thought it was reasonable to send employees unpaid or for them to use their holiday to attend work related training courses. However in an aside she did at a later stage concede that asking employees to take holiday for this purpose may not be appropriate.
18. The meat of the Claimant's claim in this matter surrounds her claims in discrimination.
19. As pointed out by Claimant's counsel these are encapsulated in 11 claims some relating to specific incidents and some more general.
20. These are set out in the evidence but I am grateful to Claimant's counsel for clarifying them in his submissions. They are as follows:

1. May/June 2017 - Mr Garnett generally sending the Claimant "to Coventry" (Claimant's witness statement, paragraph 9).
2. May/June 2017 - Mr Garnett calling the Claimant "an old hag" (Claimant's witness statement, paragraph 10).
3. May/June 2017 - Mr Garnett called the Claimant "an old bat" (Claimant's witness statement, paragraph 10).
4. June 2017 - Mr Garnett saying "I want to see your stockings - old people have stockings" (Claimant's witness statement, paragraph 11).
5. 6 July 2017 - Mr Garnett being hostile towards the Claimant at the Bury salon (Claimant's witness statement, paragraph 12).
6. 6 July 2017 - Mr Garnett telling the Claimant "You can't do this as you're old" (Claimant's witness statement, paragraph 13).
7. 6 July 2017 - Mr Garnett telling the Claimant "You are too old for cuddles".
8. 7 July 2017 - Mr Garnett being "livid" with the Claimant without proper cause (Claimant's witness statement, paragraph 18).
9. Week commencing 10 July 2017 - Mr Garnett blocking the Claimant's passage in a hostile and an intimidating way at the Long Stratton salon (Claimant's witness statement, paragraph 19).
10. Week commencing 10 July 2017 - Mr Garnett continuing to make comments and send the Claimant to Coventry at the Long Stratton salon (Claimant's witness statement, paragraph 20).
11. 13 July 2017 - Ms Mason (the Respondent) dismissing the Claimant (Claimant's witness statement, paragraph 21).
21. As will be seen from the above all but one of these allegations is ranged against Mr Garnett who is the Respondent's partner and works with the Respondent in the Respondent's business, Lawrence Paul Hair & Beauty.
22. Before dealing with these allegations separately the Tribunal is bound to say that it found the Claimant to be rather vague and unspecific in her evidence when questioned about the specific and more general incidents.
23. We are also bound to say that there is some variance between the Claimant's story as set out in her ET1 and the allegations put forward in her evidence before this Tribunal. As pointed out by the Respondent's representative in submissions "old, old hag, old lady" becomes "old hag" and "old bat". There is no mention of the allegation

regarding stockings in the ET1. The Claimant was very unspecific about some of the more general allegations.

24. The Claimant in her witness statement alleges that all members of staff at the Respondent's two businesses with the exception of Mr Garnett and the Respondent herself were under the age of 23. This is patently untrue.
25. The Claimant's assertions that Mr Garnett attended the Long Stratton salon where the Claimant worked regularly were not supported when in cross-examination more definitive and less frequently attendances of Mr Garnett were suggested. It appeared as if the Claimant was unable to support in her evidence the suggestion that she had much more contact with Mr Garnett than the Respondent suggested.
26. She agreed initially that she had little to do with Mr Garnett and then asserted that things began to change around May/June of 2017.
27. With respect to the allegations of "old hag" and "old bat" the Tribunal found the Claimant very uncertain in her evidence. She failed to satisfy the Tribunal as to the reason for the difference between the ET1 and her witness statement.
28. On a further general note much is made by Claimant's counsel and many attempts were made during the course of the hearing to undermine the Respondent's many witnesses by suggesting that there had been collusion, coaching and that their witness statements had been written for them. As a general point the Tribunal is bound to say that it found the Respondent's witnesses to be entirely believable and truthful. We do not accept Claimant counsel's assertions about Mr Clackson being too polished and too rehearsed. In cross-examination we consider he performed well. We saw nothing untoward in his evidence. The same can be said of Alice Robeson, who the Tribunal found to be entirely credible. However not a great deal turned on her evidence. With respect of Theodora Charismoglou-Bandoula, her evidence was in the Tribunal's view entirely believable. A little headway was made by the Claimant's counsel on cross-examination but the meat of her evidence in our view was given entirely honesty.
29. With respect to Paula Mason we found her evidence to be honesty given. There is no doubt that she was very uncertain about the position relating to the apparent resignation and the training agreement but in terms of her evidence on the details of the allegations in discrimination, insofar as she could give such evidence, we found her credible.
30. Of course the most critical evidence with respect of the Claimant's discrimination claims came from Mr Garnett. As a general comment the Tribunal were impressed with the way in which Mr Garnett gave his evidence. His demeanour and his

performance under the scrutiny of Claimant counsel's formidable and skilful cross-examination. He was also unrattled.

31. We found him credible in response to the "livid" allegation (allegation no. 8 above) and find it entirely credible that he might have been upset about the complaint concerning a particular treatment carried out by the Claimant in respect of which the customer complained but that such very action was entirely normal.
32. The allegations made about Mr Garnett do not square with any of the other evidence the Tribunal has heard. Naturally the Tribunal does have to take into account that the evidence from those witnesses produced by the Respondent is more likely to be favourable to the Respondent but we do not consider that any of the evidence we have heard from the Respondent has been unduly tainted or coached and all has the ring of credibility about it.
33. Interestingly we found Mr Garnett's evidence to be entirely believable in respect of the reprimand featured at paragraph 12 in the Claimant's witness statement. It would have been very easy for him to deny that incident as indeed he has many of the allegations. He did not. He accepted that there was an incident. He said that he did reprimand the Claimant for chewing gum and leaning against the wall in a slovenly manner when he was with a client. He explained the Claimant butted in when he was talking to a client. He told her staff were not allowed to chew gum in the salon and asked her not to slouch. He said she just puffed and stormed off. It would have been very easy for him to deny this entirely. His version of events was also supported in other evidence we heard. His denial of the various alleged comments made to him specifically those ranged at number 2, 3, 4, 5, 6, 7, 9 and 10 we found to be believable. What we did not consider believable was the Claimant's general assertion that there was a pattern of Mr Garnett making comments such as "old hag" and "old bat".
34. We were also impressed by Mr Garnett's evidence with respect to the allegation that he embraces staff. His response that he does not but they sometimes embrace him seemed to us to be entirely credible.
35. We are therefore not persuaded by Mr Ashley's critique of the Respondent's evidence and in particular his critique of the Respondent's key witness, Mr Garnett.
36. In short therefore with respect to allegations 1 to 10 where there is a dispute on the evidence we prefer the evidence of the Respondent and the Respondent's witnesses.
37. We will deal with allegation 11 in conclusions.

SUBMISSIONS

38. The Tribunal is most grateful to both representatives for their careful considered and well put submissions given in accordance with directions of the Tribunal pursuant to

the end of the second day's hearing. There was insufficient time for submissions to be given orally and in due course written submissions were given and the opportunity for replies to written submissions.

THE LAW

Wrongful Dismissal

39. The Claimant has a written contract of employment clearly specifying the notice to which she is entitled in respect of termination of that contract. Her contract mirrors the statutory notice set out in the Employment Rights Act 1996 at Section 86. In essence because the Claimant was only employed between February and July 2017 she was entitled to notice of termination of employment of one week. She now seeks one week's net pay by way of damages in respect of her allegation that the Respondent breached her contract of employment by dismissing her on 13 July without notice.

The Unlawful Deduction of Wages Claim

40. This is a claim pursued under Section 13 of the Employment Rights Act 1996 and Section 23. Essentially the claim is in respect of the deduction made from final salary paid to the Claimant at termination of her employment, such deduction made by the Respondent in respect of training fees incurred and in light of the repayment provisions set out in the training agreement dated 5 February.
41. The relevant section for the Tribunal to consider is Section 13 of the Employment Rights Act 1996 which is "Right not to suffer unauthorised deductions".
42. Whilst it was not specifically put in the Respondent's submissions it is clear that the Respondent relies on Section 13(1)(b) which specifies:
- (1) An employer shall not make a deduction from wages of a worker employed by him unless -
 - (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.
43. In the Claimant's written submissions counsel for the Claimant has ventilated some arguments with respect to the training agreement and its efficacy in permitting the Respondent to make the deductions they did under Section 13(1)(b).
44. Firstly he argues that the agreement is unenforceable by reason of it being a penalty. He says the detriment to the Claimant was out of all proportion to any legitimate interest of the Respondent in the enforcement of the primary obligation especially given that the detriment included repayment of wages earned.

45. He goes on to say that it was also an unlawful restraint of trade. He says had the Claimant not been dismissed by the Respondent the agreement would have unfairly inhibited the Claimant from exercising her right to leave by giving one week's notice. In this respect he refers us to the case of **Electronic Data Systems Limited v Hubble** [1987] IBS Brief 363. He also ventures the argument that given that it is the Claimant's case that she was dismissed in breach of contract that breach is repudiatory and that the obligation to repay under the terms of the training agreement falls away under the principles set out in **General Bill Posting Company Limited v Atkinson** HL [1909] A.C. 118. Essentially as a corollary to that principle he goes on to say that it cannot possibly have been in the contemplation of the parties that the Respondent would be permitted to rely upon the training agreement in the event that it unlawfully dismissed the Claimant.

The Discrimination Claims

46. Though not specifically set out the Claimant's claims in discrimination arise out of Sections 13 and 26 of the Equality Act 2010. Essentially the Claimant claims direct discrimination because of a protected characteristic. That protected characteristic being age. It is worth remembering that under 13(2) even where age discrimination is found under 13(1) is it potentially justifiable if the Respondent can show that their treatment of the Claimant was a proportionate means of achieving a legitimate aim.
47. More particularly perhaps the Claimant's claim is phrased to fall under Section 26 of the Equality Act 2010 that entitled "Harassment".
48. It is key here that there has to be unwanted conduct related to a relevant protected characteristic and the conduct has to have the purpose or effective of, violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offence environment for the Claimant.
49. Harassment also occurs if a Respondent or employer engages in unwanted conduct of a sexual nature.
50. We are not specifically addressed in submissions on these details nor are we specifically addressed on the issue of the reversal of the burden of proof in discrimination cases. It is safe to say that the Tribunal is well aware of these provisions under Section 136 of the Equality Act 2010 and the authorities surrounding Section 136.

CONCLUSIONS

WRONGFUL DISMISSAL

51. The Tribunal unanimously concludes that the manuscript letter from the Respondent to the Claimant dated 13 July purporting to accept the Claimant's email indicating she was absent sick, as a resignation amounted to an unequivocal dismissal of the Claimant by the Respondent without notice.
52. In the absence of any justification for such dismissal without notice and there was no evidence in this respect before us, we draw the inevitable conclusion that the dismissal was a dismissal in breach of contract entitling the Claimant to damages. Those damages are assessed by the Tribunal as being the notice period to which the Claimant was entitled under her contract of employment and that is one week's net pay. She is awarded the sum of £310.00.

UNLAWFUL DEDUCTION OF WAGES

53. We conclude that there was an unlawful deduction of wages in the Claimant's final salary in the sum claimed of £626.70. We make a declaration to that effect.
54. Our reasoning is that although the Claimant clearly entered into the training agreement on 5 February the dismissal of her without notice amounted to a repudiatory breach of her contract of employment disentitling the Respondent to rely on any post termination obligations which would otherwise have survived the termination. These including any obligation under the training agreement fall away under the well-known principle in **General Bill Posting Company Limited v Atkinson** HL [1909] A.C. 118.
55. Therefore the repudiatory breach of the Claimant's contract of employment by the Respondent disentitles the Respondent from relying on the terms of the training agreement dated 5 February 2017. The deduction is therefore unlawful.
56. We also take a very dim view off the Respondent's suggestion that it is appropriate and/or fair to deduct wages from an employee who is attending a training course during the course of their employment or indeed require an employee to take paid holiday to cover the period they are attending such training course. Both courses of action are unlawful and would be subject to sanctions.
57. Pursuant to the declaration made above we award the sum claim of £626.10.

THE CLAIMS IN DISCRIMINATION

58. The claims in discrimination under Section 13 and Section 26 arise out of the same allegations.

59. Allegations 1 to 10 essentially feature Mr Garnett.
60. For the reasons set out in our findings of fact we conclude that the Claimant's evidence is not to be preferred against the evidence of Mr Garnett. He is supported in part in the evidence of the other Respondent's witnesses.
61. It is often difficult for a Tribunal to determine whose evidence to prefer where there is a conflict on the evidence. Naturally in circumstances of discrimination there usually is a direct conflict in evidence.
62. The Tribunal must decide on the balance of probability whose evidence it prefers.
63. For the reasons already set out we do not prefer the evidence of the Claimant in respect of any of the allegations raised in numbers 1 to 10. The variance between her ET1 and her witness statement and her vague and uncertain approach to the giving of evidence concerning specific and general allegations was not impressive.
64. Her talk of there being a pattern of making comments about her age such as "old hag" and "old bat" did not convince the Tribunal.
65. On the other hand we found the evidence of Mr Garnett reasonable and credible and in respect of the allegations against Mr Garnett 1 to 10 where others were able to give evidence we found their accounts reasonable and credible.
66. For the avoidance of doubt therefore we prefer the evidence of the Respondent and we do not find that the Claimant has sufficiently advanced a prima facie case to reverse the burden of proof under Section 136. The Claimant's case in respect of claims 1 to 10 in direct sex discrimination and harassment fall at the first hurdle. They fail and are dismissed.
67. We are duty bound to deal with allegation 11 that the dismissal of the Claimant also amounted to age discrimination and/or harassment. We heard no direct evidence from anyone as to this allegation and there is certainly nothing in any of the evidence we have heard that could possibly advance a credible prima facie case that the dismissal undertaken by Ms Mason was in any way motivated by the Claimant's age. Insofar as a valid claim exists in this respect it fails and is dismissed.
68. In summary therefore the Claimant has succeeded in her claim for breach of contract and/or wrongful dismissal. She has succeeded in her claim for unlawful deduction of wages. In this respect she is awarded the total of £936.10.
69. All her claims in discrimination be they direct discrimination under Section 13 or harassment under Section 26 fail and are dismissed.

Employment Judge K J Palmer

Date: 24 August 2018

4 September 2018

Sent to the parties on:

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For the Tribunal Office