Case No: 1805425/2018
1805427/2018

EMPLOYMENT TRIBUNALS

Claimant: Mrs R Pawsey

Respondent: Kathryn Ellison t/a Susan's Hairstylists

HELD AT: **Leeds** **ON: 17 September 2018**

BEFORE: Employment Judge J M Wade

REPRESENTATION:

Claimant: In person
Respondent: Mr R Tayler (solicitor)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 17 September 2018, the written record of which was sent to the parties on 18 September 2018. A request for written reasons was received from the claimant on 21 September 2018. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 17 September 2018 are repeated below:

JUDGMENT

1 The claimant's complaint of constructive unfair dismissal is not well founded and is dismissed.

2 The claimant's claim for a redundancy payment is dismissed.

3 The claimant's complaint of a deduction of wages for unpaid holiday pay on the termination of her employment succeeds. The respondent shall pay to the claimant £419.15, a gross sum for which the claimant shall account to HMRC for any tax and national insurance due.

4 I exercise my discretion to award a further four weeks' pay for a failure to

provide a statement of employment particulars (£763.60). The grand total payable to the claimant within 28 days is therefore £1182.75.

REASONS

Introduction, issues and evidence

1. There were three complaints presented in Mrs Pawsey's claim form: constructive unfair dismissal, a complaint in relation to holiday pay and deductions from wages, and entitlement to a redundancy payment. The questions I was to determine, announced at the beginning of the hearing were:

a. Did the respondent breach the claimant's contract of employment as to holiday pay?

b. Did the respondent engage in conduct, without reasonable and proper cause, calculated or likely to destroy or seriously damage trust and confidence?

c. Did the claimant resign at least in part in response to such breaches or conduct, or was this the termination of employment by ordinary resignation?

d. Was any dismissal found by reason of redundancy?

e. Were there any deductions from wages or holiday pay?

2. I heard evidence today from Mrs Pawsey herself and from Mrs Ellison, the owner and Mrs Clayton a colleague at Susan's Hairstylist salon at the time. I had a number of relevant documents including copies of electronic messages.

3. I consider the most reliable evidence to be the contemporaneous messages, in preference to the parties' recollections after the event.

Findings of fact

4. The respondent operated a hairdressing business for 44 years. She traded on her own account, and she completed her books manually. That is not unusual in this sector. She had previously been employed herself, and had presented a complaint about not having the right holiday pay when she left that employment and had sorted that out through ACAS at the time. She well understood about employment rights.

5. The respondent was and is registered as an employer for PAYE with the Inland Revenue. She employed two stylists, that is the claimant, and Mrs Clayton. The claimant was on 23 hours a week and Mrs Clayton on 21. All three colleagues overlapped on Saturdays.

6. The claimant had worked at the salon since 3 June 1992. In or around 2008 or more likely 2009, the claimant had queried her terms as to holiday pay and the respondent and the claimant and indeed Mrs Clayton all agreed that the holiday pay allowance would be 15 days for each of them, pro rating what was then a 24 day statutory minimum. The holiday year at the salon was 1 April to 31 March. In 2018,

when the claimant came to leave her employment, it was at the beginning of both the holiday and tax years.

7. When the statutory minimum holiday went up to 28 days, in which employers can include bank holidays, there was no change to the arrangement that was agreed with Mrs Clayton and the claimant. As to pay and salary generally the claimant was employed for 23 hours. She was paid £8.30 an hour by 2018. She was paid in cash on a Saturday, when she was working, and the respondent typically prepared wages on a Friday for that week's work. There was no section 1 statement updating any changes to the terms of employment as they arose.

8. The respondent did not provide pay slips weekly, with statements of national insurance or tax deductions. If she was asked for mortgage purposes or any other purpose for earnings details, then she would provide the same on an ad hoc basis, but otherwise she did not do so.

9. The earnings of the claimant were such as to be below the limit for paying income tax. As to employee national insurance deductions, that may or may not be the case and I make no finding about it.

10. The claimant and Mrs Clayton and indeed Mrs Ellison wore, and/or were required to wear, embroidered overalls with capped sleeves in the winter of 17/18, which was severe, particularly in March 2018. Mrs Ellison had said that she did not want cardigans worn over the overalls because it hid the salon logo. On occasions the claimant was cold. I accept that an instruction was given by Mrs Ellison to wear cardigans over overalls.

11. In or around the middle of March 2018 the claimant was discussing her son with the respondent. That was in the context of being estranged from him at that time, albeit that is no longer the case. The respondent referred to the claimant's son as "a knobhead". At that time there was no immediate protest from the claimant or other exchange of difficult words between them because the claimant and the respondent were friends, and had been for a number of years, in addition to the employment relationship between them.

12. On a second occasion towards the end of March, the claimant was pleased because her son had become a police officer. When she told the respondent that new, the respondent replied with words to the effect: "he will fit right in as all police officers are knobheads". The claimant did take exception to that and made her feelings clear because by this stage her relationship with her son had improved, and she did not want him being talked about in that way.

13. The salon is next to a second hand clothes shop, or somewhere where clothes are bought to be sold on. A member of staff there was in the habit of selling items to the claimant, who then sold them on through Ebay making a profit. That came to be discussed at the salon on Saturday 7 April 2018, when all three colleagues were working. Mrs Ellison was asking a client about the tax consequences of that sort of "side line", and was generally talking about the claimant's activities to customers that day. The claimant had overheard the comments She had asked Mrs Ellison not to talk about these matters. She

overheard it happening again when she and Mrs Clayton were in a back room at around lunch time, and before the salon had closed.

14. The claimant was embarrassed about those activities and she asked Mrs Ellison not to talk about it, both because of the potential for the next door shop worker to find herself in trouble, but also because the claimant might herself be in trouble if there indeed a tax issue.

15. Mrs Ellison had run her business, as I have indicated as a sole trader for 44 years. She understood very well personal income tax and national insurance and how that works. In my judgment she was mischief making and gossiping with clients about the claimant, albeit she considered it idle chatter.

16. The claimant went home understandably very unhappy, but she did not say anything to Mrs Ellison at the time. She was also told by Mrs Clayton that Mrs Ellison had said to Mrs Clayton that the claimant might be buying the business, if she were to retire. That was a discussion that Mrs Ellison had not had, at any time, with the claimant.

17. On the following Monday (9 April) it was the claimant's birthday. Mrs Ellison sent her a birthday text. Given their relationship that was entirely to be expected. The claimant texted later on in the afternoon to say that she had spoken to someone about tax. That was in relation to the Ebay issue, and "he had cost her a few hundred quid". She made accusations about Mrs Ellison not paying into the stakeholder pension arrangement despite employing people, or words to that effect.

18. This was "tit for tat" conduct of the "don't throw stones at me when you live in a glass house" kind. The claimant went on: "in future don't embarrass me I'm not clever enough to know about all the tax questions".

19. The claimant did not have a reply to that text and later that day or earlier the next day, she spoke to ACAS. Whether holiday pay came to be discussed with ACAS I cannot know, but the prospect of the claimant leaving the respondent's employment was clearly in her mind and the prospect of there being potential holiday sums owing was in all likelihood discussed with ACAS. The claimant said in a text to Mrs Ellison: "I don't really know why started this bullying", which I consider and find to be a reference to the Ebay embarrassment issue on the previous Saturday.

20. The claimant sent that text at around 10 o'clock in the morning and then went on to the salon to see Mrs Clayton. There is also an unfinished text sent that same day. I consider that she was either upset, or had been drinking, and probably both on that morning, which was the gist of Mrs Clayton's evidence.

21. The claimant did not hear anything from Mrs Ellison. She did not turn in for work on Wednesday 11 April but she rang her early client, who was used to coming in for an 8 o'clock appointment, to say that she would not be at work. She then left her set of keys for the premises in a nearby shop, and wrote her resignation letter and provided that to the salon the same day.

22. In her resignation letter the claimant said this:

"Mrs Ellison I hereby hand in my resignation without regret. I feel I have been left with no choice and take this as a constructive dismissal. I am considering legal action".

She sent that having had, as I have indicated, discussions with ACAS.

Discussion and conclusions

23. Section 95 of the Employment Rights Act 1996 sets out, in short, that a dismissal can be a common law constructive dismissal (that is a resignation in response to a repudiatory breach of contract).

24. On my findings there was a contract of employment which provided for payment of 15 days holiday pay a year. At the point that these events unfolded, that is late March and early April 2018 there had been no breach of that contractual provision in my judgment. If there was any calculation errors in previous years the claimant did not resign even "at least in part" in response to those matters.

25. As to the other matters relied upon (prevented from wearing a cardigan, name calling of the claimant's son, and the events on 7 April,) I consider that the son name calling and cardigan issue are certainly not matters which can be said, objectively to breach trust and confidence. We can always stop ourselves being cold in such circumstances. I say that with some sympathy for the claimant's tendency to cold, but we all have to take responsibility for our own health and safety. This was not bullying at all. It was setting a standard. Clearly if it had not been sensible to be cold, the claimant was at liberty to put on another layer, on any particularly snowy day. It is inconceivable that the respondent would have objected in those circumstances. This is an innocuous matter and it does not even fall to be added to the comments about the claimant's son.

26. In context, given the source of discussions between the protagonists about the claimant's son, (mother/son relations were at a low ebb) and the long friendship between them, the respondent's comments cannot be said to be likely to seriously damage trust and confidence, of themselves.

27. The real issue in my judgment and the issue that the claimant identified in her live texts at the time, was embarrassment caused to her on 7 April, and how she felt about that. I have indicated I considered that was mischief making and without reasonable and proper cause: gossip of that kind always is. But was it of a calibre to destroy or seriously damage the trust and confidence in an employment relationship which had lasted 26 years.

28. I have to distinguish between two relationships, albeit they are intertwined. There is a friendship, and there is an employment contract. Over some 26 years there have not been a raft of allegations of breaches of an employment contract, including its implied terms. Examples are when staff are not paid on time, when they are not permitted to take paid holidays, when they are called names, when they are shouted at, and so on and so forth. Those circumstances do not apply in this case.

29. In this case there is an employee mortified on a Saturday about a discussion of her conduct, and being worried for her own position and the position of the colleague next door. She felt a real sense of disloyalty from her friend, but in my

judgment, applying an objective test in context, that one off exercise in gossip, was insufficient to amount to a breach of the implied term of trust and confidence in an employment contract. An employment contract is different to a friendship. We are all entitled to walk away from both, but choosing to end your employment because of unhappiness with a friend does not always amount to a dismissal. I apply an objective test. For those reasons the unfair dismissal complaint fails.

30. As for the claim for a redundancy payment, it follows that as I have found that there was no dismissal, there is no entitlement to a statutory redundancy payment pursuant to the Employment Rights Act 1996.

31. Even if I had found that there was a dismissal, in my judgment there is nothing in the accounts of this business (and I have had a much longer look at them when settling my judgment than will have been apparent to the parties during the evidence) to indicate that this was a business which was having a diminishing need for employees as at 7 April 2018. The claimant's resignation was a bolt from the blue. The accounts record more or less the same level of business throughout, and that Mrs Ellison was taking out £250 in cash every week by way of drawings. She is accounting for her own tax and national insurance, which are not huge sums. There is nothing to indicate that this was a business that was either closing or going to make redundancies. For all these reasons, the redundancy complaint also fails.

32. As to the claim for holiday pay, this is not a complaint about the contract of employment. This is a complaint under the Employment Rights Act Part II, relying upon the Working Time Regulations requirement for minimum holiday. Regulation 14 relevantly provides that on the termination of employment, payment needs to be made in respect of untaken minimum holiday.

33. In this case employment came to an end at the beginning of a new holiday year. It was accepted by the respondent that there were sums owing for statutory minimum holiday in respect of unpaid holiday pay for the two previous tax years. Those sums were £385.95 (and were tendered). The parties have not recognised that the claimant worked the first week of the new holiday year on Wednesday, Friday and Saturday. She was contracted to work for £8.30 per hour for 23 hours a week. She had accrued an additional half day's holiday pay at the point of her resignation on the 11th. In my judgment and she was entitled to be paid for that. It was £33.20 on the basis of an 8 hour day.

34. Her total entitlement to holiday pay under Regulation 14 at the point that she resigned was for £419.15. A cheque for the lesser sum was tendered by cheque, but the cheque has not been cashed. A stop can be put on it or it can otherwise be disposed.

35. My judgment is say that a sum of £419.15 is owing by virtual of a failure to pay Regulation 14 holiday pay and must be paid and as a gross sum. The claimant left the employment of the respondent on 11 April. She is now self-employed. If she earns sufficient to need to pay tax in this tax year, then she will have to account for that sum on her tax return, but it is a gross sum that needs to be paid within the period to be specified (which is 28 days).

36. As far as there are any sums that have been lodged with HMRC on the basis of advice given to the respondent, or a calculation that was done at the time, I simply note page 180 and 181, which sets out the claimant's tax record with Mrs Ellison over the previous tax years. As at 14 June when that letter was produced there had not been any payment on account of tax for the tax year ended 5 April 2018. It is for Mrs Ellison to reclaim any sum wrongly paid to the revenue in respect of tax and NI on the holiday payment that was tendered, albeit not cashed.

37. I then come to the exercise of my discretion in this case because the claimant's schedule of loss includes she has not had a written statement of terms and conditions and she has not had pay slips over the years.

38. I appreciate that Mrs Ellison's explanation for that was simply that if she had been asked she would have provided them, and did, on occasions, confirm earnings. She diligently completed her paper books in order that she could complete her own returns to the revenue, but in this day and age it is very problematic for individuals not to be provided with either a short statement of their key terms and conditions, and even more importantly weekly payslips setting out what sums have been paid, and what has been deducted and paid to the Inland Revenue. I say that because Mrs Ellison's working presumption that someone earning £190 or thereabouts per week is not going to be liable for tax, and therefore I do not need to provide payslips, is of no use when it comes to national insurance records.

39. For these reasons I do exercise my discretion to award the claimant a four week uplift to my award for holiday pay, because I consider and I take into account the absence of both statement of terms and conditions and payslips, making life very difficult when things go wrong.

40. The parties have parted ways in an unfortunate way and these proceedings have been very regrettable. The result has been the airing of a number of circumstances which are irrelevant, have not appeared in my judgment and were there entirely to prejudice matters. My short judgment will record that the redundancy payment claim does not succeed; the constructive unfair dismissal does not succeed; the holiday pay complaint does succeed and there is an uplift of four week's pay. These reasons will only be typed if the parties request it.

Employment Judge JM Wade

Dated: 29 November 2018