EMPLOYMENT TRIBUNALS

Claimant: **Miss N Walton**

Respondent: **Medispa (Yorks) Ltd T/A Medispa S10**

HELD AT: **Sheffield** **ON:** **28 September 2018 and 6 November 2018**

BEFORE: Employment Judge Rostant

REPRESENTATION:

Claimant: **Mr Smith of Counsel**
Respondent: **Mr Wood of Counsel**

JUDGMENT having been sent to the parties on 14 November 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented on 12 April 2018 the claimant brought a claim before the Employment Tribunal complaining that she had been constructively dismissed. The claim was defended and the case was set down for a hearing lasting one day at Sheffield on 28 September. On that day the parties attended and I heard evidence from the claimant in accordance with a witness statement exchanged pursuant to case management orders. On that occasion as on the subsequent occasions I had the benefit of an agreed file of documents running to some 210 pages to which reference will be made as I give my reasons. The claimant's case was concluded on the first day of hearing but there was insufficient time to hear the respondent's witnesses and the case was adjourned part-heard for a further day.

2. On 6 November, I heard evidence from Ms Juliette Laws and Mrs Emma Idowu, directors of the respondent business, and Miss H Gray an employee of the business. I heard submissions from both counsel and having deliberated gave judgment.

The issues

3. The issue in this case was whether or not the claimant could satisfy the Tribunal that she had been dismissed, in accordance with the provisions of section 95(1)(c) Employment Rights Act 1996 (ERA) by showing that her contract of employment had been fundamentally breached. The claimant relied on the term of mutual trust and confidence. The respondent denied that the claimant had been dismissed but did not, in the alternative, rely on any argument that if there had been a dismissal the dismissal was fair. It accordingly followed that were I to have found that the claimant had been dismissed then, relying on the provisions of section 98(1) ERA the dismissal was bound to be unfair. The only question that I had to determine was whether or not the respondent had acted in such a manner as to fundamentally breach the claimant's contract of employment.

The law

4. S 94 ERA provides the right to employees who have been dismissed to bring a claim of unfair dismissal. S95 ERA provides that an employee may be treated as having been dismissed if she terminates her contract by resignation "in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct". Case law has established that the conduct here referred to must be conduct which is in breach of a fundamental term of the contract. The implied term of mutual trust and confidence is one such term. S98 ERA deals with fairness and provides that the burden rests upon a dismissing employer to show a reason, which is a fair reason as defined, for any dismissal.

The findings of fact

5. The claimant was employed by the respondent organisation which is a small company employing some six or so employees in total.

6. The claimant has a history of anxiety.

7. On or around 13 October 2017 the claimant was present when Ms Laws read out a part of a text that she had received from Mrs Idowu. The part of the text read out referred to the fact that Mrs Idowu and her partner had had an argument over a piece of toast and the incident was jokingly referred to as "toast gate".

8. On 15 October the claimant was amongst a group of members of staff which included Mrs Laws and Mrs Idowu at a staff night out at Nonna's restaurant on Ecclesall Road, Sheffield.

9. During the course of the evening the claimant approached Mrs Idowu to ask her if she was alright. That request was repeated and Mrs Idowu then asked the claimant why it was that she might feel that she was not alright. At that point the claimant indicated that she had had read to her the "toast gate" text which Ms Laws had sent to Mrs Idowu.

10. The text that Mrs Idowu had sent contained a great deal more about her relationship difficulties than the toast gate comment and Mrs Idowu wrongly, but understandably, thought that the claimant had heard the full details of the contents of the text.

11. Mrs Idowu then went to Mrs Laws to seek an explanation. Ms Laws was initially confused but later explained that she had read only the toast gate comment and then suggested that she should speak to the claimant about the matter. Mrs Idowu agreed.

12. There then followed a conversation between Ms Laws and the claimant which is disputed and which is central to the issues in this case.

13. The claimant then came back inside and some while later went to the lavatories shortly to be followed one of her colleagues. In the presence of that colleague the claimant deliberately cut herself on the side of the hand.

14. The colleague was distressed and came out and Miss Gray went in to speak to the claimant. The claimant was upset and said that she feared that she was going to be dismissed. The claimant then was taken out by Miss Gray and they were later joined by Mrs Idowu and Ms Laws who all engaged in reassuring the claimant that there was nothing to worry about.

15. At a later point in the evening the claimant went home. The next day the claimant texted Mrs Idowu (see page 58) to say that because of the events of last night, but not just because of them, she thought it was best for everyone if she "call it a day at Medispa".

16. In a later text she said that she was upset about the previous night but did not wish to leave on a bad note and then later on that day sent the following text:

> "just to let you know Emma how mortified I am by this whole thing and I just want to get it resolved soon as, as I said I do think it is time for me to move on but I don't want to leave on a bad note at all. Would be a shame to waste 3 and a half years of what I considered friendship rather than employer and employee."

17. Independent of that conversation, Ms Laws, because of her concern about the claimant, decided to contact the claimant's partner Mr Simpson-Lyons and the correspondence, which was conducted through Facebook Messenger is set out at page 56 and 57 of the file.

18. The claimant never did return to work and following a protracted correspondence that involved Mr Simpson-Lyons, the claimant direct, Ms Laws, Mrs Idowu and the respondent's solicitors Keeble Hawson, the claimant eventually resigned by letter of 29 November 2017.

Tribunal's conclusions

19. In a complaint of constructive dismissal the important start point is what is it that caused the claimant to resign. Unless the claimant can show that her resignation was caused by behaviour on the part of the respondent that meets the test of a breach of the contract (in this case the term of mutual trust and confidence), the claimant cannot hope to succeed in the complaint of constructive dismissal. I have therefore begun my considerations by examining the letter of resignation. In fact, the letter of resignation sets out a large number of reasons as to why the claimant resigned. It is certainly the case that she resigned in part because of the events of 15 October. That much is made plain on the first page. However there appear to be a number of other matters complained of. They are:-

    a. The failure by the respondents to supply, in writing to Mr Simpson-Lyons, Ms Laws' version of events of 15 October.

b. The employing of a solicitor to engage in correspondence with Mr Simpson-Lyons.

c. The fact that the respondent did not, contrary to what it claimed, appear to consider the events of 15 October closed.

d. The unfair characterisation of the claimant's conduct on the night of 15 October as "inappropriate".

e. Repeatedly telling the claimant that her behaviour on the night of the 15th was wrong without having conducted any formal process to allow the claimant an opportunity to put her side of the story properly.

f. An accusation that the claimant self-harmed on the relevant night only in order to draw attention to herself.

g. A refusal by the respondents to supply CCTV footage of the incident on 13 October when the claimant overhead the reading of the text.

h. The fact that the events of 15 October appear to highlight a general view of the claimant held the respondent, which the subsequent correspondence had done nothing to dispel.

20. What is not complained of in that letter, although something which did feature in the correspondence and in the cross-examination in this case, was the fact that during the course of the correspondence Ms Laws referred to the mental health problems of someone close to her and the fact that that person had made an attempt on their life on a previous occasion. I am satisfied that that is a matter that, although canvassed during the correspondence and described as inappropriate and unhelpful, was not a matter which was at the forefront of the claimant's mind when she resigned and I am therefore not disposed to go into the matter any further and certainly not to make a finding as to whether or not it was reasonable or a fundamental breach of the claimant's contract on the part of Ms Laws to mention the matter.

21. With those issues in mind I turn now to the disputed evidence as to the night of the 15th.

22. Both parties are entirely clear that I must make up my own mind as to which version of the conversation between the claimant and Ms Laws on 15 October I prefer.

23. The claimant's version is of an aggressive angry exchange in which Ms Laws was accusatory at the outset and started on the assumption that the claimant had deliberately made Ms Laws' life difficult by being somewhat disingenuous in her dealings with Mrs Idowu and her questioning of whether or not Mrs Idowu was feeling fine by reference to the text exchange. It was the claimant's assertion that this amounted to a public dressing down. That is to be contrasted with the respondent's version. Although there are some similarities between the two versions, for example Ms Laws accepting that she did use the word "sly" during the course of the conversation, the nature and tone of the conversation are significantly different. Ms Laws asserts that she went into the conversation with an open mind although the claimant's unsatisfactory answers as to how it was that she came to be speaking to Mrs Idowu eventually led her to believe that the claimant had indeed approached Mrs Idowu inappropriately in a way calculated to wreck a social night out.

24. I am prepared to say at the outset that were I to have preferred the claimant's version I would have concluded that that behaviour on the part of Ms Laws on its own amounts to a fundamental breach of the contract of employment. It is calculated to breach the term of mutual trust and confidence for an employer to subject an employee to a public dressing down and here the use of the word "public" encompasses in the presence of colleagues, let alone people who have no association with the respondent. It is certainly inappropriate for such conversations or enquiries to be conducted in an angry, aggressive or hectoring tone, all of which are part of the claimant's case against Ms Laws. I would have been satisfied that that incident alone was sufficient to found a fundamental breach of the claimant's contract of employment. I have views as to the effect of what actually did take place will be set out shortly.

25. Counsel for the claimant urged me, unsurprisingly, to prefer his client's version of events. He pointed to the fact that Ms Laws' version is contradicted, at least to some extent, by the version given in the response to the claim. He also observes that unless the claimant's version is correct there is really nothing to explain the claimant's evident distress immediately following her conversation. It is common ground that the claimant had been crying and that she self-harmed and that she said to Miss Gray and others that she believed she was going to be sacked. That, says Mr Smith, can really only be explained by being on the receiving end of a dressing down which left the claimant feeling that her job was in jeopardy. For the respondent, my attention has been drawn to the file of documents at pages 50 and 58 which contains communications on the night and immediately afterwards and which Mr Wood says give lie to the suggestion that the claimant felt that she had been on the receiving end of inappropriate and unfair criticism.

26. I have been much assisted by Miss Gray's evidence. Although Miss Gray is employed by the respondent, she strikes me as the nearest we have to an independent witness in this case. She is someone whom the claimant described as supportive of the claimant on the night in question despite the fact that they did not know each other well. Miss Gray did not corroborate the claimant's version of the peripheral events. Certainly she did not accept the suggestion that Ms Laws was so angry after her conversation with Mrs Idowu that she slammed her handbag on the table. In fact, Miss Gray gave rather colourful explanations to why that was unlikely and referred to the number of glasses already on the table and the likely consequences of a handbag being slammed down amongst them. Nor did Miss Gray corroborate the claimant's suggestion that, following the conversation with the claimant, Ms Laws repeatedly asked the claimant in the presence of other employees why she, the claimant, had ruined the evening. That is a matter which is part of the claimant's witness statement. Ms Gray was prepared to accept that the claimant did say that she was going to be dismissed but, importantly, she confirmed that the claimant gave no explanation as to why she believed that to be the case. Of all of the witnesses I heard from, I found that Miss Gray was the one with the least personal connection to this case and one upon whose evidence felt I could rely, particularly as it was not suggested to her by counsel for the claimant that she was being disingenuous in the evidence that she gave and there was no evidence to suggest that she was.

27. I turn now to the Facebook conversations between the claimant and her partner on the night in question. They are set out at page 50 and more importantly on the

text exchanges which I have already included in the Judgment and which are at page 58.

28. The claimant's behaviour on the night in question was not entirely consistent. Although she was evidently distressed immediately following her discussion with Ms Laws, later on in the evening, as is evidenced by Facebook posts, she appears to have been enjoying a pleasant evening with her colleagues. Although the claimant now says that she was just trying to make the best of matters, that is not really consistent with the claimant feeling that Ms Laws had behaved in an appalling manner to her. Nor is there any suggestion of a criticism of Ms Laws in the contemporaneous exchanges she had with her partner on the night out, going no further than saying "ok its fine it's just an argument I've been brought into xxxx". Furthermore, I agree with Mr Wood that the text exchanges in the immediate aftermath seem to me to point to the fact that the claimant believed that she was to some extent at any rate the author of her own misfortunes on the previous night. She uses the words "mortified". This does not appear to me to suggest somebody who believed that she has been unjustly treated, and indeed those texts contain no criticism at all of Ms Laws. The first time there is any suggestion that Ms Laws is to blame for anything on that night is from Mr Simpson-Lyons in the Facebook exchanges when, despite the fact that he accepts that he has not had the opportunity of speaking to his partner properly about the night, he described Ms Laws as having engaged in accusation and criticism which caused the incident.

29. On balance, I conclude that the conversation from the respondent's part, although it did raise a concern and certainly included the suggestion that the claimant had been disingenuous in her approach to Mrs Idowu, was not aggressive and did not amount to a public dressing down. Indeed, here Miss Gray's evidence is again helpful. Miss Gray confirmed that in fact the claimant and Ms Laws were not in sight of the members of staff, given the table that they had chosen to sit at, and she gave evidence as to the geography of the situation which I found persuasive.

30. Ms Laws could reasonably have reached the conclusion that the claimant had been inappropriate in her approach to Mrs Idowu. Mrs Idowu gave evidence, which was not seriously challenged, that she and the claimant did not enjoy a close personal relationship, although it was professionally cordial. She said that she found the claimant's approaches to her, asking in what appeared to her to be an intrusive manner about whether or not she was alright in the context of her relationship with her husband, inappropriate. It is unsurprising that Mrs Idowu raised the matter with Ms Laws and it is unsurprising in the circumstances that Ms Laws raised the matter with the claimant, particularly when she came to understand that what seemed to be an inappropriate approach to Mrs Idowu was founded on no more than what Ms Laws regarded as the reading out of a joking reference by Mrs Idowu to toast gate.

31. In the circumstances Mrs Laws conversation with the claimant at Nonna's was an informal discussion, which is a normal feature of a close working relationship, particularly in small employers. Ms Laws was raising a concern and inviting the claimant to explain herself. It might have been better if it had been left to the following day but in the nature of this sort of employment it is not completely out of the way for the matter to be dealt with there and then lest it spoilt a night out. Since it lacks the feature of aggression, accusation or public dressing down relied on by the claimant, I do not consider that the conversation was conduct on the

part of Mrs Laws which was calculated to breach the term of mutual trust and confidence.

32. I move now to matters as they developed after the night of the 15th. Rather than deal with every single item of what was a protracted correspondence I make the following general findings of fact. The correspondence could be characterised by the following observations:-

    a. It contained an increasingly belligerent and legalistic approach to the matter by Mr Simpson-Lyons. That approach included suggestions that claimant's anxiety issues were caused by work. On the evidence before me, those suggestions were entirely unwarranted and were calculated to cause the respondent anxiety that the matters on the 15th were about to be blown up into something rather more than they merited.

    b. To some extent fire was then met with fire by the respondent's solicitor's letters which, in general, contain a refusal to accept any criticism levelled at the respondent by Mr Simpson-Lyons.

    c. Correspondence from the respondent's directors themselves and then later by the solicitors containing repeated assurances that "to the extent that there was a disciplinary matter" it had been dealt with informally on the night of the 15th and was done with.

    d. A reputed refusal on the part of Mr Simpson-Lyons to take that at face value.

    e. A repeated offer on the part of the respondent's directors, personally and through their solicitors, to meet with the claimant to discuss her concerns about the night of the 15th and to seek to resolve them in the light of the claimant's expressed intention to resign.

    f. A repeated rejection of that offer by Mr Simpson-Lyons unless and until Ms Laws was prepared to set down in writing her version of events.

    g. A thoroughly sensible decision by the respondents not to engage in further loyally correspondence as exemplified by the email of 16 November sent by Ms Laws to all concerned, at page 137 and 138 of the file of documents.

33. For reasons which were really not explained by the claimant, that last email seems to have been the correspondence that finally ended what remaining trust and confidence she had in the employment relationship. I have therefore spent time examining that email in detail. It starts with an assertion that Keeble Hawson were no longer instructed to engage in correspondence with the claimant. The claimant, in evidence, took no exception to that or indeed to any part of the email apart from the final paragraph, to which I shall return. The next paragraph says that the respondent's position had been set out unambiguously in correspondence and that the lengthy exchanges were not moving the matter forward. That strikes me as a sensible and accurate assessment of the position. The correspondence had already been characterised by what might best be described as a mutual refusal to find common ground, but I do take the view that the principal blame for that must rest with Mr Simpson-Lyons, writing on behalf of the claimant. The obviously sensible thing to do was to take the respondent at face value in the offer to have a meeting and to discuss the whole thing at that point. Instead of that, the correspondence from Mr Simpson-Lyons got increasingly heated and includes, for example, the email of 6 November (see

page 121). That email runs to some four pages in length and includes within it a threat of litigation for defamation; an accusation that the respondent was harassing the claimant by deliberately contacting her directly despite the fact that it had been explained in a text immediately thereafter that there was nothing deliberate and that the matter had been inadvertent; an accusation that the respondent was being disingenuous or in fact positively fraudulent about whether or not the claimant had signed for her copy of the respondent's policies; an assertion that the respondent had said that the claimant had been disciplined at Nonna's despite the fact that no such assertion had been made, as a fair reading of the correspondence would show; a detailed criticism of the respondent's policies and procedures; and a refusal to accept that the respondent had no useful CCTV footage, despite the fact that that matter had been repeated by the respondent's own solicitors and Mr Simpson-Lyons really had no evidence to the contrary.

34. In the light of the nature of that correspondence, I take the view that the approach set out in the 16 November email was a sensible one. It called for a halt to the war by correspondence. It asserted that Mr Simpson-Lyons' version of events was not agreed with and ended with a repeated offer "we look forward to meeting with her (the claimant) when she is fit for work but in the meantime, please pass on our best wishes to her for a speedy recovery". I do not accept the claimant's criticism of that last line which was the only criticism that she levelled at that letter. The claimant was asserting that that was in some way deliberately provocative. I take the view that it was of a piece with the respondent's general approach to the correspondence which was emollient as far as possible.

35. There is one exception to that general point however, and that is contained in the letter at page 116, a letter written on the respondent's instructions by their solicitor on 3 November. In paragraph one it contains a reference to the claimant self-harming by describing it as the "self-harm" incident and goes on to say "photographic evidence is available showing that Nicola was not upset after the incident (a reference to the Facebook post) which my clients believe was merely "drawing attention to herself", and other witnesses to the events share this view. In evidence, Mrs Idowu and Ms Laws now do not appear to adhere to the view that the claimant's self-harm was merely attention seeking behaviour and not a genuine expression of her distress on the evening. If that is their view, it was entirely wrong of them to allow their solicitor to repeat that view in correspondence. It was not calculated in any way to improve the situation as between the parties. It is however understandable in the light of the fact that at this point the respondents believed that Mr Simpson-Lyons might have been setting them up for a personal injury claim by the assertion that the claimant's anxiety problems were related to work. This is, however, my only real criticism of the respondent in the whole sorry saga and the question is whether or not I consider it a fundamental breach on its own, justifying the claimant's resignation and claiming constructive dismissal.

36. First, I it is apparent that it by itself did not prompt the resignation. It is one of only eight matters referred to in the letter of resignation. The test is, however, whether or not it had a material effect. Secondly, I consider that in the particular context of this case, that suggestion, which was not later repeated, does not amount to a fundamental breach of the claimant's contract of employment. It was unwise and perhaps even unfair but not striking at the root of the contract of employment

given the manner in which it was expressed and the context in which it was written. Not every fall from the ideal of the perfect employer will amount to a breach of the term of trust and confidence. In this case and objective view requires a consideration of the context in which that remark was made. That was one where a threat of potential litigation had been raised and in which the suggestion of attention seeking was essentially a defensive response. In any case the tone and content of the letters from Mr Simpson-Lyons prior to that are strongly suggestive that the relationship was already irredeemably fractured and that this accusation was unlikely to be a material contribution to the claimant's view, first expressed as early as 15 October, that she should resign her employment.

37. For all of those reasons I find that the claimant's claim fails and is dismissed.

Employment Judge Rostant

Date 1 February 2019