EMPLOYMENT TRIBUNALS

Claimant: Miss A Nelsey

Respondent: Laura Hodgson trading as Celsuis Hair

Heard at: Leicester

On: Monday 18 and Tuesday 19 February 2019

Before: Employment Judge Brewer
Members: Mrs J Morrish
Mrs L Woodward

Representation
Claimant: Ms A Chute of Counsel
Respondent: Mr M Howson, Consultant

JUDGMENT having been sent to the parties on 16 March 2019 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

Introduction

1. In this case, we heard from both the Claimant and the Respondent in person. Each had a written witness statement which they relied on as their evidence-in-chief. Both were cross-examined and the representatives made, and we have considered, submissions. We also had an agreed bundle of documents running to some 99 pages and we have taken account of relevant documents in reaching our unanimous decision.

2. It is noted that as a preliminary issue, the parties agreed that the correct name for the Respondent is as listed above.

Issues

3. In essence, this case raises a short point which was reduced to one issue, which is what was the reason for the Claimant's dismissal. The Claimant

says she was dismissed because she was pregnant. If she is correct, then her dismissal would be automatically unfair. The Respondent says that the Claimant was not dismissed because she was pregnant. If that is the case, the claim will fail.

4. The same point arises whether under section 99 Employment Rights Act 1996 or section 18 Equality Act 2010. That is because the detriment under section 18 is the dismissal.

The law

5. As indicated above, the law is as set out in section 99 Employment Rights Act 1996 and section 18 Equality Act 2010.

6. Under section 99 ERA 1996, the dismissal would be unfair if the reason or principal reason for the dismissal is, in this case, the Claimant's pregnancy.

7. Under section 18 Equality Act 2010, the Claimant will succeed if the dismissal, being unfavourable treatment, was "because of" the pregnancy.

8. We remind ourselves of section 136 Equality Act 2010 which is to the effect that the Claimant has the burden of proving facts from which we could decide, in the absence of any other explanation, that the Respondent contravened section 18 and if that is the case, then we must hold that the contravention occurred. That of course is subject to the Respondent being able to show that it did not contravene section 18.

Findings of fact

9. We make the following findings of fact. References below to page numbers are to pages in the agreed bundle.

10. On 8 February 2017, the Claimant sent a message to her colleague, Amy, saying that she felt that the Respondent was "*definitely trying to get rid of me*". Amy forwarded this message to the Respondent who in turn responded to Amy saying that the Respondent was going to talk to the Claimant later that day and that "*all I'm going to say is, clients have told me she's got another job*" (page 53).

11. As around 6:30 pm on 8 February 2017, the Respondent met with the Claimant. We will come to the content of that meeting in our decision below. The meeting lasted between 15 and 30 minutes.

12. At 7:39 pm on 8 February 2017, the Claimant sent a text message to the Respondent and the Respondent responded at 7:44 pm. The content of these texts are set out at page 54 of the bundle. In essence, the Claimant said:

> "*Can I call you when I get home tonight as I need to tell you something important, that will make you understand why this has all happened and then hopefully you can support me".* The

Respondent said: *"I'm going to football, otherwise of course. Give me a call tomorrow or you're more than welcome to WhatsApp me, I'll reply when I can. Just have a think about things*".

13. The Claimant then sent a long text message which appears at pages 56 and 57 of the bundle. For our purposes, the material part of that is where the Claimant says:

> "*The reason me and Mitch are both working the hours that we doing is and obviously I did not want this to be public knowledge as my parents do not even know yet but I am pregnant as obviously with being pregnant we need the extra cash so hence while the trial happened because I need extra days work*" (sic). (see page 56).

This text was read by the Respondent at 10:14 pm (see page 57).

14. At 9:38 pm on 8 February 2017, the Claimant exchanged a number of texts with Amy. These appear at page 58 of the bundle. The material parts of this are as follows. That Claimant says:

> "*Think she's going to get rid of me am*". The Claimant says: "*Basically someone told her that I was looking for another job and that I had hidden all my posts from her on FB*" (the reference to "FB" is to Facebook). The Claimant then says: "*She said anything to you. I'm hoping what I've said will change her mind"*.

15. On 9 February 2017, the Respondent arrived at the salon where the Claimant worked at around 2:20 pm. The Respondent overheard the Claimant use the word "*Paki*" which it was agreed was a racial derogatory comment. Following a discussion, the Respondent terminated the Claimant's contract with immediate effect.

16. On 15 February 2017, the Respondent sent the letter of dismissal which appears at page 83 of the bundle. This states that the Claimant had been given one week's notice of dismissal on 8 February for using Facebook as a method to solicit clients from the Respondent's business, for informing customers that she was leaving the Respondent's business and had been offered another job and that the Claimant had begun to look for work with local competitors and had been advertising on social media for models required for her to attend so called 'trials'.

17. Essentially, the Respondent said that the Claimant was attempting to solicit the Respondent's customers for the Claimant's own business or for another business for whom she was proposing to work.

18. The letter than deals with what the Respondent says happened on 9 February and states:

> "*As discussed, you are entitled to one week's notice of termination which we agreed you would work, however the incident that occurred on the 9th February 2017, in which unprofessional and*

> *racist comments were made by yourself in front of a client, you will be paid for your outstanding notice in lieu and therefore your final date of employment will be confirmed to be Thursday 9th February 2017."*

The letter of dismissal offered the Claimant the right of appeal, which she did not exercise.

19. Those then are the material facts in this case. We turn now to our analysis of what took place in relation to the law.

Discussion and conclusion

20. We wish to deal first with the question of credibility. The tribunal found that neither the Claimant nor the Respondent to be wholly credible. Parts of their accounts tarried with each other's evidence and with the contemporaneous documents but parts did not. We have compared their accounts to the available documentary evidence in seeking to determine what in essence took place.

21. The first question is whether the Claimant was dismissed on 8 February 2017. We find that she was not. On our analysis it seems to us that the available evidence shows that all that the Respondent was going to do on 8 February 2017 when she met with the Claimant was to raise with her what she had been told about the Claimant proposing to leave her business. That is entirely clear from the exchanges which appear on page 53 of the bundle.

22. There is no evidence that the Claimant was invited to a disciplinary hearing on 8 February 2017, no evidence that specific allegations were being levelled against her and, more importantly, we have the exchanges which appear at page 54. If the Claimant had understood that she had been dismissed by the Respondent, why does she say to the Respondent:

> "*Can I call you when I get home tonight as I need to tell you something important, that will make you understand why this has all happened and hopefully you can support me*"

23. Moreover, if the Claimant had been dismissed by the Respondent, then that would make the Respondent's response - "*I'm going to football … just have a think about things*" - very odd. We think it much more likely, and we find, that had there been clear words of dismissal, the Claimant would have responded as in fact she did respond on 9 February 2017 when she was dismissed by, for example, asking for it to be put in writing.

24. Further, we consider that had the Respondent dismissed the Claimant she would not have said anything like "*just have a think about things*". There would in essence have been nothing to think about.

25. We do not accept the Respondent's evidence that the "*things*" she asked the Claimant to think about was what she said was the offer she made to

the Claimant for her to rent a seat in the Respondent's salon instead of remaining as an employee. It is the Respondent's case that she dismissed the Claimant for in effect dishonesty and trying to damage the Respondent's business by soliciting the Respondent's clients for herself and we consider in that context it highly unlikely that an employer who had dismissed an employee would immediately have then had her back in the same place renting a chair as a self-employed person.

26. We therefore find that on 8 February 2017, the Respondent raised some concerns with the Claimant, she asked the Claimant to be honest about what she was proposing to do, and she had every intention of speaking to the Claimant further. This is consistent with the contemporaneous evidence.

27. In having accepted that the Claimant was dismissed on 9 February 2017 and we have therefore asked ourselves what the reason for that dismissal was. That is of course central to this case.

28. The witness evidence, such as it is, is set out at paragraph 63 in the Claimant's statement and paragraphs 36 – 41 in the Respondent's statement. We pause to note that the Claimant was not cross-examined on paragraph 23 of her statement. However, the Respondent was also not cross-examined on paragraph 40 of her statement and those remain as unchallenged evidence. The accounts differ to some degree, and we have had to determine which account is more likely than not to be the correct one.

29. We find in fact that in relation to the incident on 9 February 2017, the evidence of the Respondent and Claimant is not significantly different. The Claimant accepted that she used the word "*Paki*" but she says she did so in the context of the comment made by a client. In other words, the Claimant says she was really repeating something that a client had said. She was not calling anyone that name. The Respondent says she overheard the Claimant's comment and believed that the Claimant was talking about a client who had not long left the salon. Both of those beliefs, in the circumstances, are perfectly reasonable.

30. We also note paragraphs 18 and 19 of the Claimant's witness statement in which she says, the Respondent had just come into the salon and sacked her, and this was "*no surprise*".

31. Taking all of this into account, we find that the sequence of events evidenced by the text messages, the WhatsApp messages and the uncontested or the accepted witness testimony is as follows. The Respondent had genuine concerns about the Claimant's activities and raised them with her on 8 February 2017. She continued to have those concerns on 9 February 2017 and having overheard the Claimant use a racially offensive word, in effect decided that "*enough is enough*" and sacked the Claimant with immediate effect.

32. In relation to the letter of dismissal at page 83, we find that that was drafted on legal advice and is in essence an ex post facto and somewhat self-serving document and is of no assistance to us in determining what really happened in this case.

33. We do find it noteworthy that despite clear instructions in the letter of dismissal on how to appeal, the Claimant chose not to. Further, in her message at page 74 of the bundle, sent following her dismissal, the Claimant says:

> "*Could I please have it in writing that I've been sacked, also I told you that I was pregnant in confidence and that you discussing it with Amy is not what wanted. As I was upset today and told Amy that I really don't want anyone to know. So please could you keep this to yourself as they are close people to me which I have not discussed it with yet*. *And I really don't what it to come out before I have told them as this is very important to me and Mitch. Thank you*" (sic).

34. What is noteworthy about this is that it amounts to a polite and measured request for the Respondent not to mention to anyone else that the Claimant is pregnant. This is not consistent with someone who believes they have been sacked merely because they are pregnant. There is no suggestion that the Respondent acted unfairly by the Claimant and indeed her next text messages ends with a "*x*" which is in effect a sign of affection and is not consistent with somebody who thinks they have been dismissed merely because they have advised their employer that they are pregnant.

35. Thus we find that the Respondent has provided an explanation which shows she did not contravene the Equality Act. The Respondent dismissed the Claimant as she believed that the Claimant had made a racist comment, even though made in the circumstances as set out by the Claimant and that this was the last straw. Thus, the reason for dismissal was not the Claimant's pregnancy and the pregnancy played no part in the Respondent's reason for dismissal. Therefore, it follows that the claims under section 99 Employment Rights Act 1996 and section 18 Equality Act 2010 fail and are dismissed.

Employment Judge Brewer

Date: 17 April 2019

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE