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EMPLOYMENT TRIBUNALS

Claimants		***Respondent***
Mrs C Cole (1) **Mrs M Kawik (2)** **Ms A Gedagh (3)**	**AND**	**Tops Hair & Beauty Limited**

HELD AT: **London Central** **ON:** 5-8 August 2019

BEFORE: Employment Judge K Welch (Sitting Alone)

Representation:

For Claimants: Mr J Holy, Solicitor (for all three Claimants)
For Respondent: Mr P Ward, Counsel

JUDGMENT

1. The Claimants' claims for a redundancy payment are not well founded and fail.

2. The Respondent is ordered to pay to the first Claimant the gross sum of £376.26 in respect of unpaid holiday pay from which the Claimant may be required to account for any tax and/or employee's national insurance payable.

3. The Respondent's counter claim against all of the Claimants is dismissed.

4. There shall be no order for costs.

REASONS

1. This is a claim brought by three complainants for statutory redundancy payments from their former employer following the termination of their employment on 24 August 2018. Additionally, the First Claimant brought a claim for unpaid holiday pay. The Respondent defended the claims for redundancy payments but failed to respond to the holiday pay claim.

2. The Respondent had sought to bring a counter claim against all three Claimants in respect of their alleged breaches of contract relating to their taking former clients of the Respondent to their new employer. Having considered article 5 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 I asked the Respondent's representative to explain how the Tribunal had jurisdiction to hear the counter claim since it appeared to relate to terms imposing obligations of confidence. The Respondent's representative agreed that it would be very difficult for him to argue against this and therefore did not provide any arguments to the contrary. However, he confirmed that he did not wish to withdraw the counter claim. In light of this the counter claim was dismissed for want of jurisdiction.

3. The case was originally listed for a short hearing on 8 March 2019. An adjournment was granted due to one of the Respondent's witnesses being abroad; sufficient evidence had been provided subsequently to confirm this. Another reason for the adjournment was that the hearing could not be heard in the allotted time. It was therefore listed for four days due to the number of witnesses required to give evidence. The issues were agreed at the start of the hearing to be as follows:

(1) Were the Claimants dismissed with effect from 24 August 2018 or did they resign?

(2) If they were dismissed, was redundancy the reason for dismissal?

(3) If so, to what redundancy payments are they entitled?

(4) In relation to the First Claimant, are payments of accrued untaken holiday outstanding?

4. The parties agreed during the hearing the amount of holiday pay owed by the Respondent to the First Claimant was in the sum of £376.26 gross and this therefore forms part of the Judgment.

5. I had before me an agreed bundle of documents and references to page numbers are to pages within that bundle. Whilst the Respondent's witness statements had separate exhibits attached to them these were inserted into the agreed bundle.

6. I heard evidence from the three Claimants themselves, Mr Etheridge a share holder in the Respondent, Mr Qaisar, a Director of the Respondent and Mr Sheridan a former employee. A further witness statement was provided for Mr Bennett but the Respondent did not consider it necessary to call this witness and the statement was therefore ignored for the purposes of this hearing. Witness statements were taken as evidence in chief and all witnesses were subject to cross examination and questions from myself.

Findings of Fact

7. The Claimants were all stylists working at the Respondent's hairdressing salon. They all had considerable lengths of service; the First Claimant had been employed since 13 May 1985, the Second Claimant from 1 August 1998 and the Third Claimant from 1 August 2011. The only other stylist at the Respondent's salon at material times was Mr Sheridan, until he left for health reasons at the end of June 2018. He briefly returned after 24 August 2018 for approximately six weeks but has not worked for the Respondent since.

8. The Respondent was in some financial difficulties during 2017/2018; the bailiffs had previously attended the premises although it was acknowledged that they had ultimately been paid. The lease for the Respondent's salon was due to expire on 24 August 2018 and the owners of the Respondent

considered that due to lack of business and revenue they would not renew the lease. They also believed at this time that there was a huge VAT bill to pay and therefore considered it likely that the Respondent would be made insolvent by HM Revenue and Customs. Mr Etheridge and Mr Qaisar therefore decided to hold a meeting with the staff, being at the time the three Claimants and Mr Sheridan. This took place on 1 June 2018 after the shop had closed for the day. This was to appraise the Claimants of the situation the Respondent found itself in and to warn them that the landlord may put a "to let" notice outside the shop as it was entitled to do in accordance with the terms of the lease [pages B12-B36].

9. On 1 June 2018, Mr Sheridan had a client which prevented him from attending the majority of the staff meeting. There was a difference in evidence between the Claimants' and the Respondent's witnesses as to the amount of the meeting Mr Sheridan was present for. I accept the evidence of Mr Sheridan that he attended the latter part of the meeting during which he was told by Mr Qaisar what had been said and following the end of the meeting was provided with greater detail by the First Claimant.

10. There was also a dispute of evidence between what was said during the meeting on Friday 1 June 2018, which took approximately an hour, and this formed the main dispute between the parties.

11. The First Claimant had written up a brief note of the meeting the following day which was then signed by the other Claimants on Monday 4 June and appeared the original at page A9 and a typed-up version at A10. This stated:

> "*Tonight, we have been told Tops is closing. The lease comes to an end on 24 August 2018 and the business is running at a loss. Therefore, our last day will be Friday 24 August 2018. We were advised to find alternative employment, we were told they could not pay redundancy or remaining holiday owing as the VAT bill was so high. There is a big possibility that Tops Hair & Beauty will have*

to go into receivership. They told us they have to be seen to find a buyer for the salon but hold out no hope. We asked about redundancy, they advised us to claim from the government. We asked in this case, can we take our clients with us and they said yes. They wished us luck and the meeting ended'.

12. The Claimants gave evidence that this was a true reflection of what they were told in the meeting, but accepted that this did not cover everything which was said, as the meeting lasted about an hour. They also stated that they were told that their last day would 24 August. The latter statement was what was disputed by the Respondent. The Claimants admitted in evidence that they were offered the opportunity to buy the business although Mrs Cole's evidence was that they immediately rejected this during the meeting on 1 June. The Respondent's evidence was that they were given a period of time in which to confirm which was reflected in the Respondent's note of the meeting, which I will come onto.

13. In any event it was accepted that the Claimants refused the offer to consider carrying on the business of the Respondent. Also, the Claimants accepted that they were informed that the Respondent would look for a buyer although it did not hold out any hope of one being found. Whilst I accept that the Claimants generally believe what was put into the attendance note prepared by Mrs Cole at A9 and A10, I am not satisfied that they were specifically told that their employment would end on 24 August 2018. The implication was certainly that this was most likely but I do not accept that it was clearly stated that notice was being given that they were being made redundant and/or that their last day of employment was to be 24 August 2018. I accept that they were told to look for alternative employment.

14. The Respondent also had a typed note of the meeting which was very lately produced to the Claimants' representative and whose authenticity was disputed by the Claimants. This appeared at page R4 and R5. This note had more detail to it, although it did not state the 'last day of employment will be 24 August 2018' as attested to by the Claimants. This stated in part

> "*The purpose of the meeting was to inform the staff that the shareholders of the Tops Hair & Beauty Limited would not be renewing the shop lease when the existing list currently held by [CE] and [GG] former partners of Tops … runs out on 24 August 2018. This means that the business would cease to trade on that date under the present arrangement.*
>
> *The meeting was then focussed on likely outcomes and options for the staff to continue to operate a business out of the premises after that date…"*

15. There was some discussion on redundancy and it was believed that there may be statutory redundancy payable by the Government in the event the business went into receivership. There was evidence of the Respondent's note of the meeting being first sent by Mr Etheridge to Mr Qaisar and then a further email from Mr Etheridge to the Respondent's accountant which said

> *"We held a staff meeting on Friday night to appraise them of the situation and asked them if any or all of them would like to take on the business I put the attached meeting notes together and Shahzad would likely to vet them to see if there is anything in there that is detrimental to us moving forward and which should be changed*".

16. Mr Sheridan's evidence was that he was unable to say what had been said prior to him coming down to the meeting after his client had left. However, during his time at the meeting he confirmed that no one was given notice of redundancy; he also said his fellow staff did not discuss redundancy in his presence following the meeting. I accept Mr Sheridan's evidence but this is not conclusive as to what was said during the time when he was not present.

17. Having considered the evidence I am satisfied that the Respondent's note of the meeting is genuine and has not been fabricated and I have taken into account the email sent around the time enclosing the notes, together with the evidence of Mr Sheridan and Mr Etheridge to come to this conclusion. I also consider that, as the Claimants accepted that they were offered the chance to continue operating the business, it seems more likely than not that

the Respondent was considering its options at this point in time such that confirmation of the Claimants' definite dismissal on 24 August 2018 was not given.

18. In answer to a question from the Claimants at the meeting on 1 June 2018, Mr Etheridge confirmed that should the business go into receivership they would have to claim redundancy from the Government and the business would be unable to pay holiday pay. Also that the Claimants could take their clients with them should this happen.

19. Following the meeting Mr Etheridge sent a message to the First Claimant page A11 saying they were, "*sorry about the news we had to give you but are glad that we were able to use the meeting constructively*." He went on to give his mobile phone number.

20. Unfortunately, there was no letter sent by either party confirming what had been discussed in the 1 June meeting. It was clear from the evidence that the Claimants continued to work at the salon; The First Claimant returned stock and cancelled electronic testing due to take place in view of the situation and with the full knowledge of the Respondent in light of the likely closure of the shop. The Claimants also looked for, and obtained, offers of employment and should be commended for this. There was also evidence of messages sent by WhatsApp to the First Claimant at A15 during which it was confirmed that the shop was being advertised on line.

21. On 3 July 2018, the First Claimant sent a group chat message to Mr Etheridge and Mr Qaisar page A18, which contained a number of queries from staff including a request for P60s and "… *are you going to pay us holiday leave that has not been taken bearing in mind my holidays are year behind, 3/ Andy seems to think the employer claims redundancy on our behalf and assisting I ask you, 4/ Magda has requested that we should all receive a beautiful reference* …".

22. Mr Etheridge confirmed that he needed to come back on the holiday and redundancy question at page A19 although confirmed that he would be happy to write them all references and would work on that over the next couple of weeks. He did not respond to the other queries.

23. On 25 July 2018, all of the Claimants sent identical messages to Mr Qaisar and Mr Etheridge which appeared at page A21 which said, "*Dear Colin and Shahzad you have informed me that the lease on the salon comes to an end on 24 August, four weeks on Friday, I have a contract with you at Tops. Therefore as my employer you are obligated to give me four weeks' notice by Friday. Look forward to receiving a reply*". The First Claimant stated in evidence that this was in order to get something in writing about her redundancy in order to claim from the Government.

24. Mr Etheridge telephoned the First Claimant the same day to tell her that the salon was not closing as a buyer had been found. The First Claimant informed him that he was too late, as they had all followed the instructions given on 1 June and had all found employment elsewhere. The Respondent accepted that this information had been given but not it was informed that the staff had all found alternative employment.

25. A meeting was therefore held in Hanwell on 26 July 2018 between Mr Qaisar, Mr Etheridge and the First Claimant. During this meeting, the First Claimant was offered the equivalent of redundancy once they had got their funds should she stay in the salon and convince the other Claimants to stay with her. A further staff meeting was held on Friday 27 July at the salon. The Respondent made no notes of this meeting. The First Claimant's notes (including her observations) appeared at page A25. The Respondent confirmed that the salon was not closing and that a new lease had been signed. The Claimants said again that it was too late and that they had followed the instructions issued on 1 June and had found alternative employment. A video call was then held between Mr Qaisar and all three Claimants on 28 July 2018. The First Claimant prepared two sets of notes from this meeting which appeared at A27 and A29 having forgotten that she

had already prepared a note. Both notes confirmed that the staff were acting on the instructions given on 1 June; one states that they were told the shop was remaining open and that they would have to resign in writing should they wish to leave. On 31 July Mr Etheridge sent an email to the Claimants 'formally' confirming that the salon was not closing on 24 August and that the lease was to be extended; it went on to say that, from the meeting with Mr Qaisar, he understood that all of the Claimants intended to resign. It also explained that a new manager had been arranged to oversee the operations of the salon [page A33].

26. The First Claimant responded on 1 August page A34 asking for confirmation of her title and stating that she had been given five different forms of instructions since 4 June 2018.

27. Mr Etheridge sent a follow up email to each individual Claimant on 20 August 2018 which said that the Respondent was presuming that they were staying on having no had a response to his request contained in the email of 31 July, these appeared at page A38 and other pages within the bundle but were identical. The Claimants sent an identical email to the Respondent in response on 20 August [page A42 and others] which said "*do not assume anything we are acting on the instructions given on 1 June 2018*".

28. The Claimants left the Respondent's salon on 24 August 2018 and did not return. The keys were not collected and so the First Claimant took them to Mr Qaisar's place of work, along with the amplifier which she had taken with her for safe keeping. Mrs Cole sent a WhatsApp message [page A49] which stated amongst other things that they were advised on 1 June that the salon was closing and that their employment would cease on 24 August 2018. This was followed up by all three Claimants separately confirming their view that they had been given twelve weeks' notice. The salon continued to trade after 24 August 2018 and Mr Sheridan briefly returned for approximately six weeks before leaving again. Further correspondence was sent following 24 August 2018 but it is not necessary for me to deal with that for the purposes of this Judgment.

Submissions

29. The Respondent contended that notice had not been given to the Claimants. In particular, for the Second Claimant, notice had not been given in writing as was required by her contract of employment and she continued to work after her contractual notice would have expired. Whilst there was a dispute in evidence the Respondent contended that its evidence should be preferred. If there was any ambiguity in what was said during the meeting on 1 June 2018 then the test would be how the words would have been understood by a reasonable listener, which is an objective test.

30. If notice had been given then it cannot be rescinded unilaterally, however due to the ambiguity of the wording the Respondent's representative contended that it should be allowed to 'repent' of the notice. Finally, even if notice had been given the Claimants had unreasonably refused an offer of renewal/reengagement that prevented them from being entitled to redundancy payment under section 141(4) of the Employment Rights Act 1996.

31. The Claimants' submissions were that they had been given notice of redundancy on 1 June 2018 when the Respondent intended to close its salon on 24 August 2018 and that the First Claimant's attendance note was a true reflection of the salient points. The Respondent's note was bogus.

32. The actions following the meeting on 1 June were consistent with notice having been given. It was a surprise when a potential buyer was found and the Respondent at this time sought to revoke the redundancies.

33. Finally, the Claimants had not unreasonably refused an offer of alternative employment since by that time the First and Second Claimants had secured alternative employment and the Third Claimant was in negotiations concerning alternative employment, such that it was reasonable to decline the offer from the Respondent.

<u>The Law</u>

34. I had regard to s.136(1) of the Employment Rights Act 1996 which states;

"**136 Circumstances in which an employee is dismissed**

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—

(a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),

(b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) 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."

35. I also have regard to section 141 of the Employment Rights Act 1996 which states;

141 Renewal of contract or re-engagement

(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment—

(a) to renew his contract of employment, or

(b) to re-engage him under a new contract of employment,

with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.

(2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3) This subsection is satisfied where—

(a) the provisions of the contract as renewed, or of the new contract, as to—

(i) the capacity and place in which the employee would be employed, and

(ii) the other terms and conditions of his employment,

would not differ from the corresponding provisions of the previous contract, or

(b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.

(4) The employee is not entitled to a redundancy payment if—

(a) his contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of the offer,

(b) the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the previous contract,

(c) the employment is suitable in relation to him, and

(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated."

36. In order to be a dismissal under s.136 of the Employment Rights Act it is necessary for notice to have been served by the employer. A notice is not effective until it is actually given and effectively communicated to the employee with an ascertainable date on which the employment will end. That is from the case of Mitie Security London Limited v Ibrahim (2010) UKEAT/0067/10.

37. I had regard to the IDS Employment Law Handbook volume 9 on redundancy which states;

"*A warning of future redundancies is not a dismissal with notice (or at all) under S.136(1)(a). If an employee leaves following such a warning, he or she will be treated as having resigned and will not be entitled to a redundancy payment. A true notice of dismissal will not only inform the employee that his*

or her employment will end but will also inform him or her either directly or indirectly of the date upon which the employment will end".

In other words, to warn of possible redundancy on a provisional date is not sufficient.

38. It is necessary to consider all of the surrounding circumstances to consider whether valid notice of termination has been given and, if so, when it was given. Once notice has been given it cannot be withdrawn by the employer without the employee's agreement.

39. I also considered whether a warning of redundancy could have given rise to a constructive dismissal and therefore a redundancy payment by virtue of being a dismissal under s.136(1)(c) of the Employment Rights Act. However, this argument was rejected by the Employment Appeal Tribunal in the Secretary of State for Employment v Greenfield EAT 147/89 where Sir John Latey said:

"*The authorities in our view, establish beyond a peradventure that an indication to an employee of an impending redundancy does not constitute a repudiation of contract or dismissal, actual or constructive.*
which held an indication of impending redundancy does not constitute a repudiation of contract or dismissal actual or constructive".

Application of Facts and Law

40. At the crucial meeting on 1 June 2018 I do not consider that clear notice of dismissal for reason of redundancy was given by the Respondent for the reasons stated above.

41. Whilst the Respondent indicated that closure of the business was highly likely on 24 August 2018, (being twelve weeks away from the 1 June) due to the lease expiring on that day, I am not satisfied that the Claimants were given clear notice of the termination of their employment during this meeting. A number of options were discussed, including the possibility of the Claimants taking on the running of the business, a buyer being found or insolvency. I understand that the Claimants had been advised to look for alternative

employment, which they did and, thankfully, obtained.

42. I understand entirely why the Claimants felt that they had been given notice during the meeting on 1 June; I found them to be honest witnesses and loyal employees with many years' service between them. However, I have to apply the law to the facts as I find them and in doing so, I have to hold that formal notice of dismissal for reason of redundancy was not actually given on 1 June 2018 or subsequently.

43. Therefore, their termination was in fact a resignation from their employment and no redundancy payment is payable. It is unnecessary therefore, to say whether the Claimants had forfeited their entitlement to redundancy by unreasonably refusing an offer of renewal or reengagement and the Claimants claims for redundancy payments are therefore dismissed.

44. Having heard the Judgment given orally on the last day of the hearing, the Respondent made an application for costs in the sum of £5,000, being Counsel's brief fee for attending the four-day hearing. The grounds for the costs application was that the Respondent considered that the Claimants had acted unreasonably in:

a. continuing with their claims for redundancy payments;
b. making an allegation of fraud concerning the recently produced Respondent's notes from the meeting on 1 June 2018; and
c. by refusing the drop hands settlement on the first day of the hearing.

45. Mr Holy on behalf of the Claimants stated that the Claimants had acted reasonably; they were found to be honest witnesses and genuinely believed what they had been told and therefore, having written to the Respondent concerning what their view was following the termination of their employment and having received no response, they had not acted unreasonably in bringing their claims before the Tribunal.

46. I have no hesitation in dismissing the application for costs in its entirety. Whilst I appreciate that the amount being sought by the Respondent was

reasonable, in order to consider whether costs should be awarded, I have to first consider whether the threshold has been reached for me to award costs and I do not consider that to be the case here.

47. Under rule 76 of the Employment Tribunals Rules of Procedure 2013,
"**When a costs order or a preparation time order may or shall be made**
(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
(a) a party (or that party's representative) has acted …… otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted"

48. I do not consider that threshold to have been met I consider, and explained in my reasons, that the Claimants had reasonable grounds for considering that they might be entitled to a redundancy payment and, in the absence from a response from the Respondent until the tribunal claim, and in light of their belief over what was said to them in the meeting on 1 June 2018, I consider that they were reasonable in bringing/ continuing with their claim. In any event, the First Claimant has succeeded in her claim for holiday pay, which had not, until the hearing, been accepted. Therefore costs will not be awarded.

Employment Judge Welch

Dated: 16th August 2019

Judgment and Reasons sent to the parties on:

21/08/2019

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For the Tribunal Office