



EMPLOYMENT TRIBUNALS

Claimant: Miss E Fitzpatrick

Respondent: Rush Hair Limited

Heard at: London Central

On: 20 & 21 August 2019

Before: Employment Judge Khan

Representation

Claimant: In person

Respondent: Ms L Hatch, Counsel

JUDGMENT having been sent to the parties on 22 August 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

1. By a claim form presented on 23 March 2019 the Claimant brought a complaint of unfair constructive dismissal. The Respondent resisted this complaint.

The Issues and Relevant Legal Principles

2. I was required to determine the following issues:

- 2.1 Did the Respondent fundamentally breach the Claimant's contract of employment thereby entitling her to terminate her contract without notice as alleged or at all?

The Claimant relies on the following alleged conduct:

- 2.1.1 The Respondent failed to investigate her complaints of harassment seriously and promptly.

2.1.2 The disciplinary sanction of a first written warning was disproportionate and was not based on a reasonable investigation.

2.1.3 She was pushed to leave on 21 December 2018.

This is also the last straw relied on by the Claimant.

2.2 If so, were the breaches sufficient to amount to a constructive dismissal?

The Claimant contends that the foregoing conduct had the effect of breaching the implied duty of mutual trust and confidence.

2.3 Did this cause the Claimant to resign?

3. For there to have been a constructive dismissal the following three conditions must be met:

3.1 There must be a fundamental breach on the part of the employer.

3.2 The employee must not, by the time of the resignation, have conducted herself in such a way as to have relinquished the right to rely on the breach. This is known as affirmation. The Respondent does not say that the Claimant affirmed her contract in respect of the fundamental breach(es) she relies upon.

3.3 The fundamental breach must be a contributing cause of the resignation though it need not be the principal cause.

4. The implied terms of a contract of employment include the implied term of mutual trust and confidence i.e. that a party not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the other party to the contract. This breach can be the result of a single act / omission or of cumulative conduct which culminates in a last straw. A last straw need not amount to blameworthy or unreasonable conduct but it must contribute in some meaningful way to the overall cumulative breach.

5. Whether there has been a fundamental breach is an objective test. Accordingly, there will be no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held.

6. If there has been a constructive dismissal, there may still be a dispute over whether the dismissal was fair. The Respondent does not rely on a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"). I was not therefore required to consider the fairness of any dismissal under section 98(4) ERA.

Procedure

7. At the start of the hearing the Claimant applied to amend her claim to include two new allegations of conduct which she says had the effect of destroying or seriously damaging her trust and confidence. The Respondent opposed this application. I allowed the Claimant to amend her claim to include the new allegation which is set out above at paragraph 2.1.1 having considered the balance of hardship and injustice. The Respondent was able to address this amendment in its evidence by putting supplemental questions to Ms Hibbert who was the focus of this new allegation.
8. The Claimant gave evidence herself. The Respondent called Francesca Hibbert, Manager of the Aldwych salon, and Craig Teeter, a hairdresser at the same salon.
9. I read the pages in the bundle to which I was referred. This included, by way of an appendix, a number of legible copies of pages in the main bundle.
10. I also considered closing submissions from both parties. This included written submissions from the Respondent.

The Facts

11. Having considered all of the evidence, I make the following findings on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.
12. The Respondent is a hairdressing business. It owns 97 salons nationwide. There are a further 22 salons that operate under a franchise arrangement.
13. The Claimant commenced employment with the Respondent on 26 February 2008. She was based initially in the Horsham salon in Sussex. She was employed as a Hair Stylist.
14. In late 2017 the Claimant was transferred to the Respondent's flagship salon in Piccadilly, central London. The Claimant says that following this transfer she contacted George Phouli, Operations Manager, to discuss concerns she had about customer service at the salon and he asked her to write a report. She wrote a report and this was disclosed to the Area Manager, Chris Beaumont. The Claimant says that this resulted in the following adverse treatment: firstly, Mr Beaumont and the salon manager met with her when they made her feel uncomfortable because of what she had written in her report; secondly, neither manager supported her when she was assaulted by another colleague in the salon.
15. As the Claimant was unable to provide a legible copy of this report I was unable to make any findings on the extent to which it was critical of Mr Beaumont and on the likelihood that he harboured any animosity towards her because of this.

16. The Claimant says that because of these issues with her managers she applied to transfer to the Respondent's salon in Aldwych. This transfer took place in March 2018.
17. The Claimant worked four days a week in the Aldwych salon and a fifth day, every Monday, training apprentices at the Hair Academy.
18. She says that she raised her concerns about Mr Beaumont to Ms Hibbert, her line manager at the Aldwych salon, on several occasions between June and December 2018. She agrees that she never raised a grievance or a formal complaint against Mr Beaumont. Ms Hibbert agreed that they discussed Mr Beaumont but only to the extent that the Claimant repeatedly told her that she hated him. She denied that the Claimant told her that she had been bullied and harassed by Mr Beaumont.
19. The Claimant says that she first complained about Mr Beaumont to Ms Hibbert in June 2018, when Ms Hibbert confided in her about her difficult working relationship with their Area Manager, Omorfi Topalideu. The Claimant says that during this discussion she told Ms Hibbert about the report she had written and Mr Beaumont's failure to protect her in relation to the alleged assault. Ms Hibbert's evidence was that the Claimant only told her that she hated Mr Beaumont. She recalled that the Claimant referred to a situation in the Piccadilly salon but she was unable to remember any other details. I find that the Claimant did discuss these issues with Ms Hibbert. I found that the Claimant's recollection was detailed and consistent, whereas I found that Ms Hibbert had a very poor recollection of these discussions.
20. When Ms Topalideu was dismissed in August 2018, Mr Beaumont became the Area Manager for the Aldwych salon. The Claimant says that this was when she raised her concerns about Mr Beaumont to Ms Hibbert again. She says that she told Ms Hibbert that she felt that Mr Beaumont had not protected her and had bullied and laughed at her, and she hoped that this would not be repeated now that he was their Area Manager. Ms Hibbert says that the Claimant only reiterated that she hated Mr Beaumont. She said that it was not uncommon for stylists to dislike area managers. I find that the Claimant did refer again to her allegation that Mr Beaumont had not protected her for the same reasons set out above.
21. The Claimant was on sick leave on 21 and 22 September 2018. This meant that she had taken three days of sickness absence that year.
22. Ms Hibbert says that the Claimant had originally requested holiday on those dates in order to complete a photo shoot. She says that she refused this request as another team member had already booked these days off. I was taken to a screenshot of a WhatsApp conversation between them on 8 August 2018 in which the Claimant requested leave on 12 and 13 September 2018 to prepare for one photo shoot "that Sunday" i.e. on 16 September 2018 and then she referred to a second shoot a week after that. This did suggest to me that the second photo shoot was scheduled on / around 23 September 2018. The Claimant denied this but she was unable to confirm the date when she says the second photo shoot took

place. I find that the Claimant did request these dates as leave to prepare for the second photo shoot. I find that Ms Hibbert therefore believed that the Claimant had taken sick leave in lieu of annual leave to prepare for this event. As a consequence, Ms Hibbert felt that her authority had been overridden by the Claimant and because of this she contacted Mr Beaumont for support, and he agreed to visit the salon to speak to the Claimant.

23. It is agreed that Mr Beaumont visited the salon in early October 2018 when he took the Claimant out to a nearby coffee house. The Claimant says that during this meeting Mr Beaumont told her that she was being monitored and that he had the power to take away the things she enjoyed doing i.e. her teaching and creative work. She was upset by this. She says that when she became distressed Mr Beaumont told her she was “a mess”.
24. Ms Hibbert accepts that she saw the Claimant return from this meeting in tears. It is agreed that she and the Claimant spoke afterwards. The Claimant says that she told Ms Hibbert that Mr Beaumont had threatened her position. She says that Ms Hibbert reassured her and told her that area managers were difficult to work with. She also says Ms Hibbert told her, presumably to illustrate the point, that she felt “left out” by Mr Beaumont as he did not visit or answer her texts or calls and she also complained that Ms Topalideu had once instructed her to issue a disciplinary warning to one of her team against her own wishes. Ms Hibbert was unable to recollect any details of this discussion although she denied that the Claimant told her that Mr Beaumont had bullied or harassed her. She agreed that she had felt left out by Mr Beaumont, not least because she was used to a more attentive style of management from Ms Topalideu. In her evidence to the Tribunal she said that the Claimant was upset because she had been confronted about doing something wrong i.e. taking sick leave on dates that she had refused to authorise as leave. I find that the Claimant told Ms Hibbert that Mr Beaumont had threatened to take away her teaching and creative work, and that whilst Ms Hibbert did try to reassure her, she viewed the Claimant’s reaction as a normal response to a justified management intervention which she had in fact initiated.
25. The Claimant says that Mr Beaumont visited a second time in early November 2018 when he repeated his previous threat although this was a much shorter meeting. Ms Hibbert was unable to recall whether this second meeting took place. I find that the Claimant did meet with Mr Beaumont in early November 2018. I also find that she told Ms Hibbert about this second meeting.
26. The Claimant says that on 15 November 2018 a colleague told her that he had heard that she had been unwell and was drinking at work. He said that Mr Beaumont was the source of these allegations although they had

not spoken directly about them. The Claimant did not say whether she discussed this with Ms Hibbert.

27. The Claimant took sick leave on 27 and 28 November 2018.
28. The Claimant sent an email to Ms Hibbert, Mr Beaumont and others on 30 November 2018 regarding holidays and the potential use of annual leave for the sick days she had taken. This email was not dispatched until 6.13 am the next morning.
29. The Claimant was not at work the next day, on 1 December 2018. This was the first Saturday in December 2018 and a critical day for the salon's pre-Christmas business. Her shift was due to start at 9 am. She says that she overslept and this was related to a migraine. Ms Hibbert was not at work that day. Jelena, who was working on front of house notified Ms Hibbert that the Claimant was not at work and Ms Hibbert instructed her to contact the Claimant. Jelena then attempted to contact the Claimant several times without success. It is agreed that at some time after 10 am the Claimant telephoned the salon and spoke to Jelena. The Claimant says that she told Jelena that she was sorry and that she was very unwell, and Jelena told her that Ms Hibbert knew she was not at work. The Claimant also says that she asked Jelena whether she should call Ms Hibbert and Jelena told her not to worry and to get some rest.
30. The Respondent's Employee Handbook staff stipulates that staff are required to contact the manager or duty manager personally by telephone no later than 1 hour before the scheduled start time on the first day of their sickness absence. The Claimant says that the duty manager was whoever was working on front of house in the salon as this had been the practice in other salons where she had worked. She therefore says that Jelena was the duty manager on 1 December 2018. Ms Hibbert's evidence was that there was no duty manager at the Aldwych salon. I accept Ms Hibbert's evidence and I find that the Claimant was or should have been aware that the salon did not have a duty manager.
31. Ms Hibbert also says that the sickness reporting procedure changed in September 2018 when Mr Beaumont instructed her by email that staff would now be required to report sickness absences to both herself and him. She says that she told colleagues about this change at a team meeting that month and via the staff notice board, and she ensured that everyone had Mr Beaumont's phone number. The Claimant says that she was never made aware of this change.
32. Ms Hibbert contacted Mr Beaumont on 3 December 2018 about the Claimant's absence on 1 December 2018. She says that the purpose of her call was to seek his advice and authorisation on how to deal with this issue. She says it was her decision to proceed with a disciplinary hearing in relation to this issue and also on whether to apply any disciplinary

action. I find that both decisions were made ultimately by Mr Beaumont as on Ms Hibbert's own evidence his authorisation was required.

33. Ms Hibbert says that a decision on what sanction to apply to the Claimant, if any, was not made at this stage but she and Mr Beaumont discussed the potential options which were a verbal warning, a first written warning or no further action.
34. The Employee Handbook also provides that managers are required to conduct return to work interviews. Ms Hibbert agreed that she was required to do this after every episode of sickness absence. She also agreed that in spite of this requirement she conducted only one such interview with the Claimant which was on 17 December 2018 in relation to her sickness absences on 14 and 15 December 2018.
35. There is a dispute about whether the Claimant told Ms Hibbert about the reason for her absence on 1 December 2018. She says that she told Ms Hibbert that it was related to migraine. This is denied by Ms Hibbert. I make no findings on this but note that if Ms Hibbert was not aware of the reason for the Claimant's absence on 1 December 2018 it was as a result of failures on both sides to follow the correct procedures.
36. It is agreed that when the Claimant came in to work on 4 December 2018 she apologised to Ms Hibbert who said that they would discuss this matter later. This discussion took place that afternoon when Ms Hibbert referred to the 1 December 2018 email. Ms Hibbert was concerned that the Claimant had been able to send this email yet unable to call her to report her sickness absence. She handed the Claimant a letter inviting her to attend a disciplinary hearing on 6 December 2018. This letter referred to the following two allegations: firstly, a failure to attend work on 1 December 2018; and secondly, a failure to properly report her absence.
37. At this disciplinary hearing the Claimant produced evidence that the 1 December 2018 email originated on 30 November 2018. This was accepted by Ms Hibbert. The Claimant says that because of this Ms Hibbert changed the focus of the meeting to the allegation that she had failed to report her absence correctly. I find that any change of focus by Ms Hibbert onto this second allegation was based on the new information provided by the Claimant and was not unreasonable.
38. Mr Teeder was also present to take a note of this hearing. His note recorded that Ms Hibbert told the Claimant that the correct reporting procedure was to call "your manager or area manager". This contradicted Ms Hibbert's evidence to the Tribunal that staff were required to call both managers.
39. I do not accept Ms Hibbert's evidence that staff were required to report sickness absences to both herself and Mr Beaumont: her own evidence was self-contradictory; I was shown no documentary evidence to

substantiate this purported change to the Employee Handbook; it follows from the Claimant's evidence that she did not contact Mr Beaumont when she took sick leave in September and November, but the Respondent did not take issue with her about this. I therefore find that the correct sickness reporting procedure was that the Claimant was required to contact Ms Hibbert only.

40. The Claimant agreed that she had failed to contact Ms Hibbert. She explained that Jelena had told her that this was not necessary. Ms Hibbert's evidence was that she had asked Jelena about her conversation with the Claimant on 1 December 2018 when Jelena reported to her that she told the Claimant not to worry because she sounded upset but she also asked the Claimant whether she had called Ms Hibbert or Mr Beaumont. Ms Hibbert accepted that she did not put this evidence to the Claimant during the hearing.
41. The outcome was that the Claimant was given a first written warning to remain on her file for 12 months. This was confirmed in writing in 10 December 2018.
42. I find that the decision to apply this sanction to the Claimant was made by Mr Beaumont in advance of the disciplinary hearing on 6 December 2018 for the following reasons: firstly, the Claimant had not reported her absence to Ms Hibbert on 1 December 2018 and she had therefore breached the Respondent's sickness reporting procedure; secondly, it was expected that the Claimant would not have a reasonable explanation for this breach because of the 1 December 2018 email; thirdly, this was a key period for the salon's pre-Christmas business and Mr Beaumont wanted to take action to prevent any further impact on the business.
43. The Claimant says that when she was given the warning letter on 10 December 2018 she complained again about Mr Beaumont to Ms Hibbert. She was unable to provide any specific details of what she says was discussed on this date. I am therefore unable to make any findings in relation to this allegation.
44. The Claimant was on sick leave on 14 and 15 December 2018.
45. She had a return to work interview with Ms Hibbert on 17 December 2018. The Claimant says that during this interview she told Ms Hibbert that she was depressed, stressed and anxious because of Mr Beaumont. She also says that she told Ms Hibbert that she was going to go back on anti-depressant medication. Ms Hibbert denies this. She says that the only medical condition that the Claimant referred to was hypothyroidism. The record of this interview, which was counter-signed by the Claimant, refers to hypothyroidism and whilst there is no reference to depression it also notes that the Claimant was "going back on medication". I find that this entry relates to anti-depressant medication so that the Claimant did refer to depression at this interview. However, I do not find that the Claimant

complained that she was depressed because of Mr Beaumont during this discussion as I find that her focus was on the impact of her 12 – 9 pm working pattern on her diet, sleep and availability to attend her GP to obtain a repeat prescription, and not on Mr Beaumont.

46. On 21 December 2018 the Claimant left the salon for her lunch break and on her way out told Jelena that she would only be 10 minutes away and could be contacted via her mobile phone if she was needed. She says she left at 4 pm. Ms Hibbert says that she left at 3 pm. Although he was unable to recall any specific times, Mr Teeder agreed that the Claimant took an extended lunch on this date and also on about two or three previous occasions. Ms Hibbert's shift ended at 5 pm and she says that because the Claimant had not returned by this time she asked Jelena to contact her when the Claimant was back. Ms Hibbert left the salon and received a text from Jelena at 5.15 pm confirming that the Claimant had returned. I find that the Claimant did take an extended break on 21 December 2018. The Claimant's words to Jelena as she left the salon, Ms Hibbert's instruction to Jelena and Mr Teeder's evidence are all consistent with this. I also accept Mr Teeder's evidence that the Claimant had taken an extended lunch break on two or three other occasions.
47. When the Claimant returned to the salon Mr Teeder was with a long-standing client. The client commented that the Claimant looked like she was not at work. The Claimant replied that she was working and she questioned the client's comment, laughing. Mr Teeder said that once the Claimant was out of earshot the client told him that she thought the Claimant looked dazed. Mr Teeder's evidence was that the Claimant was acting out of character, her actions were exaggerated and she seemed "looser". He thought she had been drinking. I find that Mr Teeder and the client believed that the Claimant was acting out of character when she returned to the salon.
48. Mr Teeder then told his client that this was not the first occasion when the Claimant had taken an extended lunch and he also confided that the Claimant had an issue accepting Ms Hibbert's authority. He says that prompted by the client he called Mr Beaumont to report his suspicion that the Claimant had been drinking. Mr Beaumont then called Ms Hibbert and asked her to return to the salon. She says that he instructed her to keep the Claimant away from any clients. He said he would also come to the salon to speak to the Claimant himself.
49. Ms Hibbert was with a friend, who was also a manager of one of the Respondent's salons, and they both returned to the salon. She saw that the Claimant was not with any clients. She says at one point the Claimant was sitting across the colour dispensary and in a way she thought to be strange. She says that she avoided speaking to the Claimant and was instead talking to her friend. The Claimant now knew that something was wrong. Ms Hibbert had returned to the salon, was talking and laughing

with her friend, and she felt that she was being scrutinised by other colleagues.

50. When Mr Beaumont arrived he went downstairs, Ms Hibbert followed him and he told her to ask the Claimant to come downstairs to speak to him. The Claimant refused. Ms Hibbert saw that the Claimant was getting ready to leave the salon early. The Claimant agreed to speak to Mr Beaumont at the second time of asking. She says that she went downstairs and when Mr Beaumont asked her sarcastically if she was alright she replied "I'm done". He told her to collect her things. She left the salon. She did not return. This was her last day at work.

Conclusions

Did the Respondent fundamentally breach the Claimant's contract?

A) Did the Respondent fail to investigate the Claimant's complaints of harassment seriously and promptly?

51. The Employee Handbook provides for both formal and informal grievance procedures. Under the formal procedure an employee is required to submit a written notice of grievance setting out the details of their complaint. Under the informal procedure an employee is required to outline their complaint and to explain what outcome they are seeking at a meeting with their manager.
52. The Claimant agreed that she did not make a formal complaint or grievance.
53. I have found that the Claimant complained to Ms Hibbert about Mr Beaumont in June and August 2018 in relation to the events in the Piccadilly salon and about her meetings with Mr Beaumont in October and November 2018.
54. I find that Ms Hibbert did not consider or treat these complaints as allegations of bullying and / or harassment for the following reasons: firstly, she was used to a culture in which stylists were routinely hostile towards area managers; secondly, she viewed the Claimant's complaints about Mr Beaumont as the venting of animosity by someone whose own conduct she saw as increasingly insubordinate; thirdly, she was reliant on Mr Beaumont's support in managing the Claimant; finally and crucially, the Claimant did not follow the formal or informal grievance procedure and she did not otherwise make a formal complaint or tell Ms Hibbert that she wanted her complaints to be investigated.
55. In these circumstances, I do not find that Ms Hibbert's failure to investigate these complaints destroyed or seriously damaged the Claimant's trust and confidence.

B) Was the disciplinary sanction of a first written warning disproportionate and not based on a reasonable investigation?

56. I have found that the decision to proceed with a disciplinary hearing and to issue the Claimant with a first written warning was made by Mr Beaumont. I have also found that the decision to apply this action was premeditated as it was made in advance of the disciplinary hearing.
57. I have also found that the Claimant was required to contact Ms Hibbert to notify her of her sickness absence on 1 December 2018. She did not do this. I find that this gave the Respondent reasonable cause to convene a disciplinary hearing.
58. The Claimant's evidence was that Jelena told her that she did not need to contact Ms Hibbert. Ms Hibbert's evidence was that this conflicted with Jelena's account. It is agreed that Ms Hibbert did not put this account to the Claimant, however, I accept that Ms Hibbert did canvass Jelena as part of her limited investigation and it is likely that this was considered by both Ms Hibbert and Mr Beaumont when they formed a view on the Claimant's culpability.
59. In any event, the Claimant accepted at the disciplinary hearing that she failed to report her sickness absence to Ms Hibbert. She had therefore breached the sickness reporting procedure as set out in the Employee Handbook. This meant that regardless of any defects in the investigation process the Respondent had reasonable cause to apply a disciplinary sanction to her. Whilst the Respondent could have exercised leniency I do not find that the sanction of a first written warning in these circumstances had the effect of destroying or seriously damaging the Claimant's trust and confidence.

C) Was the Claimant pushed to leave on 21 December 2018?

60. I have found that the Claimant took an extended lunch break on 21 December 2018, that when she returned to the salon Mr Teeder thought that she had been drinking and that both he and his client believed that she was acting out of character. I have also found that the Claimant had taken an extended lunch break on two or three previous occasions.
61. I find that in Ms Hibbert's absence, it was reasonable for Mr Teeder to have escalated his concerns to Mr Beaumont. I also find that on learning of these concerns Mr Beaumont had reasonable cause to instruct Ms Hibbert to return to the salon and to attend the salon himself to question the Claimant.
62. The final exchange of words between the Claimant and Mr Beaumont took place in an extremely heightened environment in which she conveyed clearly her resignation and he conveyed equally clearly his acceptance of her resignation. I do not find that the Claimant was forced to resign.

63. I do not find that the events on 21 December 2018 destroyed or seriously damaged the Claimant's trust and confidence. The Claimant genuinely interpreted these events as hurtful and destructive of her trust and confidence but considered objectively I do not find this to be the case.

Were these breaches sufficient to amount to a constructive dismissal?

64. I have found for the reasons set out above that the Respondent did not destroy or seriously damage the Claimant's trust and confidence in relation to each of three allegations she has made.

65. I do not find that taken cumulatively this conduct had the effect of destroying or seriously damaging the Claimant's trust and confidence.

66. For these reasons I do not find that the Claimant was constructively dismissed and her complaint fails, and is dismissed.

Employment Judge Khan

Date : 29th August 2019

REASONS SENT TO THE PARTIES ON

30th August 2019

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FOR THE TRIBUNAL OFFICE