EMPLOYMENT TRIBUNALS

Claimant: Mrs R. Lovelady

Respondent: Mrs J. Fowler trading as Daniel James

HELD AT: Mold **ON:** 7th October 2019

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Litigant in person (assisted by Mrs Ibbotson)
Respondent: Litigant in person (assisted by her husband, Mr N. Fowler)

JUDGMENT

The judgment of the Tribunal is:

1. The claimant was unfairly dismissed by the respondent on 19 February 2019 for a reason related to her conduct in breach of contract; her claims that she was unfairly dismissed and that the respondent breached her contract regarding notice are well-founded and succeed;

2. Such was the risk facing the claimant of her being fairly dismissed without notice, the award to her will be reduced to reflect that risk;

3. Upon announcement of judgment the parties agreed to settle the claimant's successful claims without a remedy hearing; the respondent shall pay to the claimant £524.44.

4. The claimant's claim that the respondent made unauthorised deductions from her wages is dismissed in the absence of evidence or submissions on the issue.

REASONS

1. **The Issues**: In a situation where the claimant, a hairdresser and beauty therapist, was accused of "intimidation and bullying behaviours towards colleagues" at work

and lying about the respondent and her husband and was summarily dismissed for gross misconduct in relation to these allegations (and the claimant alleges that the respondent made unauthorised deductions from her wages) the parties agreed that the following issues arose:

1.1. whether the reason for the dismissal was a reason related to the claimant's conduct, or otherwise what was the real reason;

1.2. whether the respondent acted fairly and reasonably in treating the claimant's conduct as sufficient reason for dismissal and in that context the parties said that the following issues arose:

1.2.1. whether the dismissing officer had a reasonable and genuine belief in the alleged conduct;

1.2.2. whether when that belief was formed it followed and was based upon a reasonable investigation;

1.2.3. whether dismissal fell within the band of reasonable responses of a reasonable employer.

1.3. If unfairness is found the tribunal will have to consider the risk that the claimant faced of her being fairly dismissed and the extent to which such risk ought be taken into account in reducing the claimant's compensatory award, if any.

1.4. Would it be just and equitable to reduce any award to reflect the claimant's conduct and the extent, if any, to which she caused or contributed to her dismissal?

1.5. As regards the wages claim the claimant would have to show that there was a deduction form her wages and, if so, how much, and I would have to decide whether the respondent was entitled to make such deduction in accordance with a term of the contract or following the claimant's signed authority; (in the event neither party advanced any evidence or made any submissions on this claim).

2. **The Facts**:

2.1. The claimant was employed by the respondent from 23 March 2016 until her dismissal on the 19 February 2019. Initially she worked 16-hour week; latterly this increased to 18 hours per week; in fact, when the claimant was busy with regular customers she would on occasion work well in excess of her contracted hours. Any increase in hours' work in any week over the contracted hours would be due to the personal commitment or attachment of particular customers to the claimant whom they wanted to attend to them. The claimant had a period of maternity leave between February 2018 and 6 November 2018 when she returned to work.

2.2. The respondent is sole trader and small employer. She employs two people one of whom is her husband Neil Fowler. She engages two self-employed

workers. The respondent is responsible for management of those working in her salon and this is typically carried out in an informal fashion. There is no documentation with regard to personnel policies and procedures although personnel management was dealt with by the respondent; that said, a written statement of employment particulars was issued to staff and throughout the disciplinary procedure involving the claimant there was written correspondence. The respondent prided herself on creating, and there being, a good working environment and a pleasant environment for customers in the salon. She required that there be no bullying in the salon and made it clear she would not tolerate it from any of those working for her; this was generally known, including by the claimant who was told of it on initial recruitment interview and reminded at the start of her employment explicitly. I accept the respondent's evidence that the spoken but unwritten rules were that there must be "no bitchiness and no dirtiness".

2.3. The respondent obtained a draft principal statement of terms and conditions from the Hairdressing Federation and that appears in the trial bundle at pages 118 – 119, which is the version issued to the claimant; the respondent has not retained a counter-copy signed by her. There was no employee handbook. There was no written notice or any rule posted on a board or otherwise. I accept the respondent's evidence that she did not look at any disciplinary policies and procedures prepared in draft by the Federation but that when matters came to a head with the claimant's she accessed the ACAS website and followed advice and proformas there.

2.4. Those working for the respondent were retained on 16-hour per week contracts in a situation where any hours worked over that time was based on client demand and was optional. 16 hours per week was the core working week of all those employed and engaged. Saturday was the busiest day each week and the best opportunity for anyone to work additional hours.

2.5. Two of the claimant's colleagues (JV, and PD, from whom I heard evidence) made it known to the respondent that they found the claimant to be overbearing at times, that she made "snide" remarks, being unfairly critical of perceived untidiness which JV in particular found to be hurtful; he found her to be intimidating and "there was always a sense of malice from behind her words" reporting that she "was offensive in her tone and attitude". JV viewed her as being underhanded and said that she engaged in inappropriate conversation with customers that "mainly consisted of sexual nature and vulgar toilet talk". The respondent also received complaints from at least two customers that were consistent with the reports received from JV and PD; the respondent considered that the reports were credible given all that she knew and had witnessed and heard about the claimant.

2.6. The respondent had occasion to speak to the claimant informally on at least three occasions (July 2018, November 2018 in December 2018) about her behaviour towards her colleagues and what was considered to be inappropriate behaviour towards or in front of customers. These were not formal disciplinary investigations, hearings or warnings. The conversations were more in terms of counselling. The claimant did not know that she was being warned either formally or informally or that those sessions could lead to

disciplinary proceedings. Her perception of her general conduct was that she was joining in with in general friendly chit-chat and that she was fairly critical of JV's levels of tidiness.

2.7. The claimant regularly attended at the salon during her maternity leave on a social basis. The claimant had three children and spoke to the respondent about her hours saying that she could not for example work at weekends in future. Saturday is a typically busy day in the salon but the claimant felt that she was unable to work it. She asked whether she could return to work following maternity leave on the same contractual hours that she had before but not on the same days such that she would drop Saturday working. Her expectation initially was not that she would work 16 hours in the mid-week but the same number of hours (that is more than 16 hours) as previously, pre-maternity leave, when she had a customer following at the salon, but not on Saturdays.

2.8. Events at work took a turn for the worse once the claimant returned from maternity leave in November 2018. During her maternity leave the respondent lost some of her regular customers. The respondent could not offer the claimant any additional hours over and above her contracted hours. The claimant considered that she was being badly done to and deprived of working opportunity. The respondent had spent time and money advertising for customers in the hope that upon the claimant's return to work some of those that had left would return but few had done so. The respondent tried to reassure the claimant that her workload would increase to hours and on days that would suit her over time following her return to work when her old clientele returned or she gained the confidence of new clientele but that in the meantime her contracted hours would be honoured. The claimant was upset and the respondent agreed to increase her hours at this stage from 16 hours per week to 18 per week to pacify her. Following this however PD reported to the respondent that she had been pressurised by the claimant to drop her Saturday working hours so that the respondent could take them which both shocked and upset PD. It is the respondent's belief that "this appears to have been the start of her (the claimant's) bitchiness and bullying".

2.9. Matters then came to a head in the first week of February 2019 when the respondent and her husband took a week's holiday. Before their return PD reported via a WhatsApp message on Saturday 9 February that there had been issues between the claimant and others, in particular JV, creating "a negative atmosphere" in front of clients. She referred to the claimant as having been "a bit of a bully this week". In the course of the messaging dialogue the respondent says that she is "not pleased. Just hope you and JR okay. I really don't understand Rachel x what the hell is going on", "I'm upset that since Rachael has returned she has not been friendly or professional. I just hope you and Jay are ok x I'm going to have to tackle this problem next week in a way without implicating you or Jay. It's nit (sic) fare (sic) and it's not right. I clean and tidy and I'm happy to do so x why does she think she shouldn't have to and if she does it's unfair x so sorry you and Jay had to go through this. To be honest she (sic) not busy like she used to be" and "it's really upsetting it really is", "please don't be afraid to tell me if this type of behaviour is taking place. I want everyone to feel comfortable and valued at

work a happy place to work. This is really disturbing. I feel really bad you have suffered this week x". Those comments with the respondent's reaction to the initial complaint that she received from PD prior to any investigation.

2.10. In the above circumstances the respondent met with the claimant on 11 February 2019 and subsequently wrote to her on that day confirming suspension pending investigation into an allegation of gross misconduct. She used a pro forma letter. This was followed up 15 February 2019 with what was called the results of investigation and that letter sets out details at page 72 of the trial bundle; the claimant was invited to a meeting on 18th February and the letter concludes by saying "a decision as to whether there is reason to continue to disciplinary proceedings will be made after the meeting". This letter put to the claimant six allegations relating to her conduct where the complainants were anonymized.

2.11. The claimant wrote a letter dated 18th February (page 73) responding to the six allegations. She denied misconduct but accepted that she had "struggled to settle after my maternity as the dynamics of the salon have changed quite a lot since being away". She said she hoped matters would be resolved "one way or another as quickly as possible".

2.12. The respondent investigated the allegations by talking to her staff and some customers. Mr Fowler was present during the interviews. She did not record any interview and she did not disclose any details of the allegations to the claimant in preparation for the meeting, other than as in the invitation of 15 February. Whilst that letter refers to anonymous complaints it gave no dates of any incidents or the exact words spoken, conduct complained of, or any particular occasion. The claimant did not know who had alleged what.

2.13. The respondent had already spoken to the claimant about her conduct on three occasions prior this investigation and had formed a view of the claimant that she could be bullying and intimidating. This view and the credibility that she attached to the complaint made by PD were expressed by her in the WhatsApp exchange with PD on 9 February 2019, before any investigation. The respondent was genuinely concerned that she would lose staff because of the claimant's conduct and at least one member of staff had indicated that they had considered seeking alternative employment.

2.14. The respondent decided to dismiss the claimant following her enquiries of staff and a limited number of clients that she chose to speak to about the claimant and in consultation with her husband. The meeting on 18 February was attended by the respondent and her husband, who led on most of the dialogue, the claimant and her husband Mr Colin Lovelady. Mr Fowler put the anonymised and general allegations to the claimant and asked her to comment upon them but no evidence or detail was disclosed. Following her comments, the claimant asked what would happen next and Mr Fowler said a decision would be made as to whether she "would be let go or not". The claimant and her husband were, in their word, "shocked" and I accept that they had not understood, nor been led to understand, that this meeting was the disciplinary hearing at which the claimant's future would be decided; the claimant had not prepared herself for such a consideration.

2.15. The rationale followed by the respondent and her husband was that they believed there had been bullying conduct and that the members of staff spoken to were credible about that; the claimant had not to their mind given them any reason to doubt the allegations; they were concerned about potentially losing staff and having to close the salon if they were seen to be "siding with a bully rather than dealing with the problem". The respondent and her husband made notes during the meeting and reached a joint decision. Significantly in his witness evidence Mr Fowler says that both he and the respondent "also lost trust in Rachel as she lied to our faces about us shouting/screaming at her".

2.16. The respondent wrote a dismissal letter to the claimant dated 19 February 2019 (page 76) summarising that there had been allegations of bullying behaviour against the claimant and that she had alleged both Mr and Mrs Fowler had raised their voices to her or shouted at her. The respondent considered that the allegations about her and her husband were untrue and that on balance "it is accepted that intimidation and bullying behaviour towards colleagues has occurred for some time". The claimant was summarily dismissed. The effective date of termination of employment was 20 February 2019 being the date upon which that letter was received by the claimant. The reason for dismissal was a reason related to her conduct. The claimant was given five working days to present an appeal stating the grounds of appeal.

2.17. The claimant presented an "Appeal notice against termination of employment by reason of gross misconduct" dated Wednesday, 3 April 2019. Which is at pages 77 to 79. The respondent was to have been the appeals officer. She did not accept the claimant's late appeal on the basis that it was five weeks late and it did not present any new evidence.

3. **The Law**:

3.1. Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98(2)(b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).

3.2. Case law has provided guidance but is not a substitute for the statutory provisions which are to be applied. Case law provides that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the

circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.3. Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (**Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**).

3.4. The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness. **In *Secretary of State for Justice v Lown*** **[2016] IRLR 22** , amongst many others, it was emphasised how a tribunal can err in law by adopting a "substitution mindset"; the point was made in **Lown** that the band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. Tribunals must asses the band of reasonable responses open to an employer, and decide whether a respondent's actions fell inside or outside that band, but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.

3.5. Under the **Polkey** principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a claimant of being fairly dismissed or to limit the period of any award of losses to reflect this risk, estimating how long a claimant would have been employed had he not been unfairly dismissed, in circumstances where the respondent would or might have dismissed the claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation and should not be put off the exercise because of its speculative nature.

3.6. Where a Tribunal finds that a complainant's conduct before dismissal was such that it would be just and equitable to reduce a Basic Award it may do so (s.122 ERA). Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (s.123 ERA). In doing so a Tribunal must address four questions (**Steen v ASP Packaging Ltd [2014] ICR 56 EAT**):

3.6.1. What was the conduct giving rise to the possible reduction?

3.6.2. Was that conduct blameworthy?

3.6.3. Did the blameworthy conduct cause or contribute to the dismissal?

3.6.4. To what extent should the award be reduced?

4. **Application of law to facts**:

4.1. The respondent had reason to suspect that the claimant's conduct on some occasions could amount to intimidation and bullying and that it was resented by some of her colleagues. She also had grounds to believe that the claimant had accused both her and her husband of having raised their voices to her which she considered to be "falsehoods". There were grounds for investigation into the claimant's conduct in terms of a disciplinary process. If proven during a fair, transparent, objectively assessed disciplinary procedure such allegations could lead to summary dismissal. Dismissal falls within the band of reasonable responses of a reasonable employer where there is serious proven bullying and intimidation of colleagues. Where a relationship involving trust and confidence has broken down a reasonable consequence would be to terminate the relationship formally. That said however an employer must act fairly and reasonably in reaching such conclusions. It is not enough for an employer to take sides and reach a conclusion without a reasonably thorough and fair investigation, consideration of any defence or mitigating circumstances and the conscientious and diligent analysis of options which may include dismissal but ought to include measures short thereof.

4.2. It is not enough for an employer to prove that they have dismissed an employee for a reason related to conduct, a potentially fair reason. The employer must also act fairly and reasonably in all the circumstances in treating that reason as sufficient reason for dismissal.

4.3. The respondent was in effect the investigating officer, dismissing officer (or joint dismissing officer), and appeals officer. In those circumstances there was a risk that this could lead to unfairness to an employee facing disciplinary proceedings. I appreciate that where a business is small it may be difficult to allocate tasks in-house. This can be a problem. That said the claimant has a professional body or Federation from whom she could take advice, she was aware of the services of ACAS and advice available from it, and if neither channel presented her with a practical solution to the issue of her having multiple roles in the disciplinary proceedings then she could at least have delegated some part of it to someone else, for example her husband or better still a third-party. Mr Fowler's actual role however was somewhat prejudiced by the fact that he had been accused of shouting at the claimant and because he felt this was untrue he too says that he lost trust in her despite which he assisted the respondent in reaching the decision to dismiss the claimant, and he was not even her employer. The respondent involved Mr Fowler in all aspects of the investigation, consideration of the outcome and the formal hearing up to and including the decision to dismiss the claimant. This procedure was unfair to the claimant.

4.4. The respondent's mind appears to have been made up about the claimant's culpability when she received WhatsApp messages from PD on 9 February 2019, prior to the commencement of the investigation. That was unfair to the claimant.

4.5. The respondent did not give any consideration to the appointment of an outsider or third-party investigator or disciplinary hearing chairperson. It

would have been a reasonable step to at least consider it as it may have been a practicable solution. If it was not a practicable solution the respondent may have justified keeping the matter in-house albeit with some safeguards none of which were put in place. The respondent was at absolute risk of dismissal once the respondent appeared to side with PD on 9 February 2019. That was unfair to the claimant.

4.6. The wording of the invitation to the hearing that turned out to be the final disciplinary meeting reads as if it is invitation to a further investigation. The letter did not suggest to the claimant that it was the meeting at which her future would be decided. I consider that the claimant's reading of the letter and that understanding is a reasonable and natural one. It follows from this that the claimant attended the meeting on 18 February 2019 ill-prepared and not realising that when she commented on the vague allegations that were put to her, her future employment was at stake. That was unfair to the claimant.

4.7. The claimant was not given any evidence to support the allegations against her. The respondent had not taken statements from any witnesses. The evidence, such as it was, consisted largely of hearsay and opinion all of which was adverse to the claimant and none of it which could have assisted her. Other than noting the claimant's general assertions of innocence in the face of vague allegations of bullying and intimidation, the respondent made no effort to consider any exculpatory or mitigating material. That was unfair to the claimant.

4.8. The respondent dismissed the claimant's late appeal out of hand without proper consideration. She was entitled to refuse to accept such a late appeal however there was no evidence that she gave the matter any conscientious consideration. That was unfair to the claimant.

4.9. All that said, the respondent was in possession of evidence of unacceptable behaviour on the part of the claimant including that in the respondent's absence the claimant had created a bad atmosphere at work. I accept that the respondent was concerned with the risk of losing both her self-employed and employed staff and also customers because of a bad atmosphere at work caused or contributed to by the claimant. In those circumstances I considered that even if a fair procedure had been followed the likely consequence for the claimant was dismissal. In a small business such as this where one person is identified and recognised as being the cause of a bad atmosphere and relationship breakdown it is likely that an employer will terminate the relationship. The claimant had been spoken to informally on earlier occasions and whilst there was no formal disciplinary warning on those occasions the respondent was fairly convinced that the claimant would not improve her conduct. If anything, her conduct had dis-improved because of her dissatisfaction upon return from maternity leave.

4.10. The respondent made an effort to find out about proper procedures and made enquiries of ACAS but she got the procedure wrong and in any event her mind was made up. In saying that I am not suggesting that she ought to have had a complicated multi-staged disciplinary procedure but the

procedure adopted ought not to have been inherently unfair to the claimant and it was.

4.11. In those circumstances I consider that the likely risk to the claimant of her being fairly dismissed was very high. Indeed I consider that a fair procedure of investigation, proper notice of a disciplinary hearing with disclosure of evidence and a more reasoned decision, with time for a timely appeal, would have taken somewhere in the region of four weeks in addition to the time spent on this by the respondent and that the claimant would then have been dismissed.

4.12. On the basis of the hearsay evidence and opinion that I received, including the witness evidence from JV and PD, I accept that the claimant's conduct was unsatisfactory. In the absence of disciplinary warnings and more detailed statements and evidence of serious misconduct I might conclude that the claimant should not suffer any further deduction from her Basic Award or Compensatory Award, matters to be determined at a remedy hearing.

4.13. [NOTE: Upon announcement of the above judgement the parties took the opportunity to discuss potential terms of settlement of the issues relating to remedy. I adjourned. On resuming the hearing, I was informed by the parties that the claim for remedy, over and above a declaration of Unfair Dismissal, had been settled. The parties had agreed a resolution of all financial claims, pursuant to my judgment on liability above, in the sum of £524.44 in full and final settlement].

Employment Judge T.V. Ryan

Date: 12.11.19

JUDGMENT SENT TO THE PARTIES ON

17 November 2019

FOR THE TRIBUNAL OFFICE