EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107763/2019

Held on 25-27 November 2019

Employment Judge P O'Donnell
Tribunal Member A McAlindin
Tribunal Member S Lawson

Miss Z Sutherland	**Claimant** **Represented by** **Ms N Munday**
The Beach Beauty (Kirkcaldy) Limited	**Respondent** **Represented by** **Mrs K Cooper**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

1. The claim of direct disability discrimination is not well founded and is dismissed.

2. The Claimant was dismissed contrary to ss15 and 39(2)(c) of the Equality Act 2010 as the Claimant was dismissed due to something arising from disability. The Tribunal awards the Claimant the sum of **£17937.58 (Seventeen thousand nine hundred thirty seven pounds and fifty eight pence)** in respect of this claim.

3. The Claimant was dismissed in breach of contract as she was not given the correct notice of her dismissal. The Tribunal awards the sum of **£248.42 (Two hundred forty eight pounds and forty two pence)** in respect of this claim.

4. The Respondent had unlawfully deducted the Claimant's wages as they did not pay her for untaken holidays on the termination of her employment. The Claimant was entitled to one week's pay in lieu of untaken holidays and the Tribunal awards the sum of **£225.84 (Two hundred twenty five pounds and eighty four pence)** in respect of this claim.

5. The Tribunal makes and additional award under s38 of the Employment Act 2002 and awards the Claimant the sum of **£451.68** (**Four hundred fifty one pounds and sixty eight pence).**

REASONS

Introduction

1. The Claimant has brought complaints of direct disability discrimination, discrimination arising from disability, unlawful deduction of wages (in relation to pay in lieu of untaken holidays) and breach of contract (in relation to a failure to give notice of dismissal). The discrimination claims are based on the allegation that the Claimant was dismissed on 9 May 2019.

2. The Respondent resists the claims although they do concede that the Claimant is "disabled" for the purposes of **section 6 of the Equality Act 2010**. The Respondent's defence to the discrimination and breach of contract claims are that the Claimant was not dismissed but that she resigned on 29 April 2019.

Evidence

3. The Tribunal heard evidence from the following witnesses:-

    a. The Claimant
    b. Christine Grahame, the Claimant's aunt
    c. Christine Curtis, a former employer of the Claimant
    d. Ann Sutherland, the Claimant's mother
    e. Keely Cooper, the director and owner of the Respondent company

4. There was an agreed bundle of documents prepared by the parties. Page references below are references to the pages in that bundle.

Findings in fact

5. The Tribunal made the following relevant findings in fact.

6. The Claimant commenced employment with the Respondent on 5 March 2019 as a beauty therapist/nail technician.

7. Prior to starting employment with the Respondent, the Claimant had been working on a self-employed basis as a beauty therapist and continued to work on that basis during her employment with the Respondent.

8. The Claimant was employed on a part-time basis by the Respondent although her hours of work fluctuated considerably over her short period of employment. She was not issued with a written contract or provided with a statement of main terms and conditions of her employment. There was a folder containing company policies on the reception desk at the Respondent's premises but this was never drawn to the Claimant's attention and she was not aware of it.

9. On Sunday, 21 April 2019, the Claimant was out with friends when there was an altercation with her ex-partner. This escalated and he hit her in the face with a glass. She was hospitalised with severe injuries that ultimately led to her losing an eye.

10. On Monday, 22 April 2019, the Claimant underwent a four hour operation in an attempt to save her eye. She was concerned to ensure that the Respondent was aware of the situation and that she would unable to attend work.

11. In these circumstances, the Claimant's aunt, Christine Grahame, undertook to contact the Respondent to inform them of the situation. She spoke to Robert Cooper, the husband of Keely Cooper. Ms Grahame explained that the Claimant had been attacked and that she was in hospital undergoing an operation. It was explained that it was not known how long the Claimant would be in hospital.

12. Mr Cooper expressed his shock at what had happened. He and Mrs Cooper were on holiday at the time and he explained that this had not gone well as Mrs Cooper's grandfather had taken ill.

13. The conversation ended with Ms Grahame advising Mr Cooper that she would keep him and Mrs Cooper informed. There was no discussion of how the Claimant should report her absence.

14. On the same day, Mrs Cooper sent the Claimant a text saying that she was thinking about her and not to worry about anything at the shop. The Claimant responded on 24 April 2019 expressing her condolences about Mrs Cooper's grandfather. There then followed a series of messages in which the Claimant gave more detail about what had happened to her. The exchange of text messages is at pp174-176.

15. On 29 April 2019, Mrs Cooper phoned the Claimant to ask how she was doing and to find out how she would like to be paid for that month; all in cash, all paid into the

bank or half-and-half. The Claimant asked for half in cash and half into the bank as she needed to have money in the bank to cover payments such as her mortgage. There was no discussion of when the Claimant would be returning to work.

16. On 1 May 2019, the Claimant attended the Respondent's premises to collect the cash element of her wages. She was driven there by her mother. She was given a "Get Well Soon" card and she was informed that clients had been told what had happened to her.

17. On 8 May 2018, the Claimant attended the Respondent's premises for a nail appointment with another employee, Avril Lavelle. The Claimant brought with her a Fit Note (p188), backdated to cover her whole absence and covering the period up to 31 May 2019. This had not been provided previously as the Claimant was in and out of hospital and had not had the chance to pick it up. It was picked up by her mother and the Claimant took it with her to hand in on 8 May.

18. The Claimant handed the Fit Note to Robert Cooper who said that he was not sure how this worked. The Claimant explained that they would pay her Statutory Sick Pay which she believed the Respondent could claim back from the government.

19. After the Claimant attended the premises that day, Mrs Cooper contacted her accountant to find out more information and was informed that the Claimant expected her to pay Statutory Sick Pay to the Claimant.

20. On 9 May 2019, Mrs Cooper telephoned the Claimant. The call took place in the morning and the Claimant was in bed. At the time, the Claimant was staying with her parents. Mrs Cooper informed the Claimant that she had spoken to her accountant and was going to have to terminate the Claimant's contract. Mrs Cooper said that she was going to scale down the business but then went on to say that she was going to employ a full-time person.

21. The Claimant was shocked by what Mrs Cooper had said as she did not expect this. She was crying and very upset. She was "on her knees" after her injury and was devastated at losing her job. She described this as the "worst day" and that she felt that she could have gone "straight to the bridge and jumped".

22. The Claimant's mother overheard the Claimant's side of the conversation and realised something was wrong. She described the Claimant as crying and that she kept saying that this was the "last straw".

23. The Claimant left the house and got into her car after the call. The Claimant's father had to physically remove her from the car and reassure her that everything

would be okay. The Claimant's mother believed that the Claimant had contemplated driving to the bridge and throwing herself off it.

24. The Claimant and her parents attended a local Citizens' Advice Bureau the same day to find out the Claimant's entitlements to benefits and to get advice on her employment rights.

25. As a result of this advice, the Claimant sent an email to Mrs Cooper on 9 May (p182). In this email, the Claimant asked for written reasons why Mrs Cooper had terminated her employment and asking for confirmation that the Claimant will receive all payments which she is due on termination.

26. Mrs Cooper responded by email dated 10 May 2019 (p182) saying that she had to terminate the Claimant's employment due to receiving some complaints. No mention is made of the Claimant having resigned rather than being dismissed nor is there any detail of the alleged complaints.

27. The Claimant subsequently received her P45 but did not receive any further payments from the Respondent.

28. In a letter dated 30 June 2019 (pp12-13), in replying to a letter from the Fife Centre for Equalities alleging that the Claimant was dismissed because of her disability, the Respondent repeats their position as having terminated the Claimant's employment due to performance issues. Again, no mention is made of the Claimant having resigned.

29. This letter does not provide any detail of the complaints although it does specify training which Mrs Cooper alleged took place after complaints were received.

30. The first mention of the Claimant's resignation comes in the ET3 lodged in August 2019.

31. A table setting out the detail of the alleged complaints was produced for the purposes of the Tribunal hearing; the final version includes comments from the Claimant in response to the alleged complaints. The table is set out at pp202-226.

32. The Claimant was aware of three of the customers listed in the table returning to the salon for further work. In one instance, the client was not happy with the design and so this was covered over. In two others, there had been issues with the gel applied to their nails which needed remedial work. The Claimant was aware of a fourth customer but did not believe that she had done the work with which the client was unhappy. The Claimant was unaware of the remainder of the alleged complaints.

33. The Claimant had taken no holidays during her employment with the Respondent.

34. Since her dismissal, the Claimant has continued with her self-employed business but has not increased her earnings in that business. The Claimant worked for another beauty salon named "Beyond the Mirror" from 25 May 2019 to 1 August 2019, earning £8.75 an hour and working 8 hours a week. This employment ended when the business reorganised and no longer directly employed staff but rather allowed people to rent a nail bar. The Claimant commenced employment with Nuffield Health on 4 November 2019 earning £8.24 an hour for 16 hours a week. The Claimant did not claim any state benefits.

Claimant's submissions

35. The Claimant's agent made the following submissions.

36. This was a unique case and, in her research, the Claimant's agent had found that discrimination claims tended to be brought by long-standing employees.

37. Specific reference was made to the following cases in support of the Claimant's case:-

    a. *Heritage Homecare Ltd v Mason* UKEAT/0273/14/BA
    b. *Case Childrenswear Ltd v Otshudi* UKEAT/0267/18/JOJ
    c. Shamoon v Chief Constable of the Royal Ulster Constabulary

38. Reference was made to the relevant sections of the Equality Act 2010 being ss6, 13(1), 15(1) and 39(2)(c) of the Act.

39. The Claimant's agent went on to set out the evidence given by the witnesses. She urged the Tribunal to find that the Claimant did not resign on 29 April 2019 but that the relationship between the Claimant and the Respondent changed after the Claimant submitted her sick notes.

40. The Tribunal was asked to find that the Claimant was dismissed on 9 May 2019 and that the reason for dismissal was not anything to do with alleged performance issues but was the Claimant's disability and the submission of the Fit Note confirming her absence due to that disability.

41. The Respondent was aware of the Claimant's disability; the Claimant's aunt made them aware of the injury; the Claimant sent a photograph of it to a colleague (p170-173); it was widely discussed with the Respondent and colleagues.

42. It was submitted that the detriments to which the Claimant was subject were as follows:-

    a. Direct discrimination; she was dismissed.
    b. Discrimination arising from disability; she was dismissed after submitting a sick note.
    c. She was subject to other detriments in that the Respondent continually attacked the quality of the Claimant's work and her professionalism.

43. The Claimant relied upon herself as a comparator. She believes that she would still be employed by the Respondent if she had not suffered the injuries which she had suffered on 21 April 2019 and take time off to undergo surgery and recover from those injuries.

44. In terms of remedies, reference was made to the Schedule of Loss in the bundle at pp199-201.

45. In response to questions from the Judge, the Claimant's agent made the following comments:-

    a. She accepted that the recommendations set out in the Schedule of Loss would have no effect on the Claimant.

    b. She did not consider that the Claimant's departure from Beyond the Mirror was an intervening act breaking the chain between the loss of her job with the Respondent and the loss of wages:-

        i. Beyond the Mirror had discontinued employing people directly.

        ii. It was less hours and a lower hourly rate than with the Respondent.

        iii. The Claimant looked for employment straightaway and continued to look for employment

    c. It would be appropriate to make an additional award of 2 weeks' pay under the Employment Act 2002 if the Tribunal found in favour of the Claimant given that the Respondent had not complied with section 1 of the Employment Rights Act 1996.

    d. The Respondent had failed to comply with the ACAS Code of Practice as they not followed any process in dismissing the Claimant; she was not invited to any meetings and no appeal was offered. No submissions were made on the amount of any uplift.

46. In response to a question from Ms McAlinden regarding the use of the April salary for calculating losses, the Claimant's agent confirmed that this was used as a standard month as it was unclear how many hours the Claimant might normally work.

Respondent's submissions

47. The Respondent produced written submissions and supplemented these orally.

48. The Respondent set out the facts that they asked the Tribunal to find based on the evidence heard. In particular, the Respondent asked the Tribunal to find that there was no dismissal of the Claimant (and, therefore, no discrimination of any kind).

49. In terms of the Respondent's knowledge, it was submitted that they only became aware of that the Claimant had a disability when they received a medical report dated 15 May 2019.

50. It was the Respondent's position that the Claimant resigned from her employment. In addition to this meaning that there was no discrimination, it also meant that the Claimant had no entitlement to any notice or pay in lieu of notice from the Respondent and that no ACAS uplift should apply.

51. A contract of employment would have been offered to the Claimant is she had been retained on a permanent basis. If the Tribunal was minded to make an additional award under the Employment Act 2002 then an award of 2 weeks' pay would be appropriate.

52. The comparator for the purposes of the discrimination claim would be a nail technician of comparable experience and the reason for dismissal would be poor performance.

53. The Respondent had accounted for the holiday pay owed to the Claimant.

Relevant Law

54. Disability is one of the protected characteristics covered by the Equality Act 2010 and section 6 of the Act defines disability as a physical or mental condition which has long-term, substantial adverse effects on a person's day-to-day living activities.

55. The definition of direct discrimination in the 2010 Act is as follows:-

> ***13 Direct discrimination***
> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

56. The definition of discrimination arising from disability in the 2010 Act is as follows:-

> ***15 Discrimination arising from disability***
>
> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

57. These provisions do not stand on their own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to discriminate in particular circumstances. The relevant provision in this case is:-

> ***39 Employees and applicants***
> *An employer (A) must not discriminate against an employee of A's (B)—*
> *by dismissing B*

58. The burden of proof in claims under the 2010 Act is set out in s136:-

> ***136 Burden of proof***
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

59. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

60. Although the test for direct discrimination forms a single question, the caselaw indicates that it is often helpful to separate this into two elements; the less favourable treatment and the reason for that less favourable treatment.

61. In order for there to be less favourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

62. A claimant can rely on an actual or hypothetical comparator for the purposes of establishing less favourable treatment. There must be no material difference in the circumstances of the claimant and comparator (s23 of the Equality Act 2010). In deciding how a hypothetical comparator would have been treated, the Tribunal is entitled to have regard to the treatment of real individuals (see, for example, *Chief Constable of West Yorkshire Police v Vento* [2001 IRLR 124).

63. However, a difference in treatment and a difference in protected characteristic is not enough to establish that the difference in treatment was caused by the difference in protected characteristic; "something more" is required (*Madarassy v Nomura International* [2007] IRLR 246). The Tribunal needs evidence from which it could draw an inference that race was the reason for the difference in treatment.

64. It is important to remember that unreasonable or unfair behaviour is not enough to allow for an inference of direct discrimination (*Bahl v The Law Society* [2004] IRLR 799).

65. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870):-

> ''*(1) Pursuant to s 63A of the SDA 1975[now s136 of the Equality Act 2010], it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".*
> *(2) If the claimant does not prove such facts he or she will fail.*
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex*

discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

66. The *Igen* case was decided before the Equality Act was in force but it is submitted that the guidance remains authoritative, particularly in light of the *Hewage* case.

67. Guidance as to how to apply the test under s15 was given in *Pnaiser v NHS England [2016]* IRLR 170, EAT:-

    a. Was there unfavourable treatment and by whom?

    b. What caused the treatment, or what was the reason for it?

    c. Was the cause/reason 'something' arising in consequence of the claimant's disability?

    d. This stage of the test involves an objective question and does not depend on the thought processes of the alleged discriminator.

    e. The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

68. Section 86 of the Employment Rights Act 1996 provides that:-

> *(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*
>
> *(a) is not less than one week's notice if his period of continuous employment is less than two years,*
>
> *(b) ...*
>
> *(c) ...*

69. Section 88 of the 1996 Act goes on to provide that:-

> *(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—*
>
> *(a) the employee is ready and willing to work but no work is provided for him by his employer,*
>
> *(b) the employee is incapable of work because of sickness or injury,*
>
> *(c) the employee is absent from work wholly or partly because of pregnancy or childbirth [or on adoption leave, [shared parental leave,] parental leave or paternity leave], or*
>
> *(d) the employee is absent from work in accordance with the terms of his employment relating to holidays,*

the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

(2) Any payments made to the employee by his employer in respect of the relevant part of the period of notice (whether by way of sick pay, statutory sick pay, maternity pay, statutory maternity pay, [paternity pay, [statutory paternity pay], adoption pay, statutory adoption pay,] [shared parental pay, statutory shared parental pay,] holiday pay or otherwise) go towards meeting the employer's liability under this section.

70. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year. Where there is no relevant agreement setting out the worker's leave year than, for workers who commence employment after 1 October 1998, the leave year begins on the date they commencement employment and on each subsequent anniversary of that date.

71. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:-

(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(AxB)-C

where—

A	*is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];*
B	*is the proportion of the worker's leave year which expired before the termination date, and*
C	*is the period of leave taken by the worker between the start of the leave year and the termination date.*

72. Section 38 of the Employment Rights 2002 provides that where the Tribunal finds in favour of a claimant in respect of proceedings listed in Schedule 5 of the Act and the Tribunal finds that the employer was in breach of its duties under section 1(1) or 4(1) of the Employment Rights Act 1996 then the Tribunal must increase the award to the claimant by a sum equivalent to two weeks' wages and can increase the award by a sum equivalent to four weeks' wages.

73. Section 1 of the 1996 Act states that an employer must give an employee a written statement setting out specific information about their terms and conditions of employment. Section 4 provides that where there are any subsequent changes to those terms then the employer must give the employee a written statement of those changes.

Decision – Direct disability discrimination and discrimination arising from disability

74. The Tribunal considered that in order to determine these claims there were two fundamental issues which had to be decided; whether the Claimant was dismissed on 9 May 2019 or whether she resigned on 29 April 2019; if she was dismissed then what was the reason for dismissal?

Was the Claimant dismissed?

75. The Tribunal was faced with a fundamental dispute of fact between the Claimant and Mrs Cooper on this issue. This was not a case where ambiguous words had been used or one party had misinterpreted what the other had said; Mrs Cooper was very clear that the Claimant had terminated her employment on 29 April whereas the Claimant was very clear that she had not do so and was dismissed by Mrs Cooper on 9 May.

76. The Tribunal prefers the evidence of the Claimant in this regard and finds that her account of both conversations is the true and accurate account of what was said on those days.

77. In coming to this conclusion, the Tribunal has taken into account the following factors:-

a. On either side's evidence, the word resignation or some similarly clear and unambiguous words were not used during the telephone conversation on 29 April.

b. The Claimant was clearly concerned about the impact her absence was having on the Respondent; the evidence of both her aunt and her mother was that the Claimant wanted to return to work and so it would be unlikely that she would then resign.

c. The evidence from the Claimant's aunt, mother and her former employer was that the Claimant had a very strong work ethic and so, again, it was unlikely that she would leave her job.

d. Very significantly, the Respondent's email of 10 May 2019 and their letter of 30 June 2019 make no mention of the Claimant having resigned and confirm that the Respondent had terminated the Claimant's employment. Given that these communications were in response to communications by, or on behalf of, the Claimant alleging an unlawful dismissal by the Respondent, an obvious reply would be that there was no dismissal and this was not said. When asked about this, Mrs Cooper could not give a satisfactory explanation why she did raise the issue of resignation and all that she could say was she felt that this was the right way to do it at the time. The Tribunal considered that if the Claimant had resigned then this would have been said in these communications.

e. Related to this, there is the fact that the alleged resignation by the Claimant was not mentioned at all until the ET3 was lodged.

f. There was no discussion about the Claimant having resigned when she visited the salon on 1 May 2019. Mrs Cooper gave evidence that she believed that everyone understood on the day that the Claimant had left but her evidence on this was very vague and it was not clear why she believed that this was understood by everyone.

g. This is particularly important in the context of a text message exchange between the Claimant and another employee, Avril Lavelle (who was present on 1 May), after the Claimant's dismissal (pp183-184) in which Ms Lavelle was surprised at the Claimant being dismissed and indicated that Mrs Cooper had been acting as if the Claimant was going to return. If there had been an understanding by all those involved that the Claimant had resigned then it is unlikely that Ms Lavelle would have responded in these terms.

h. The Claimant's position was supported by the evidence of her mother who the Tribunal found to be a highly reliable and credible witness. She was present during the telephone conversation on 9 May and spoke to the Claimant immediately afterwards. The evidence from Mrs Sutherland was that the Claimant told her that she had been dismissed by Mrs Cooper during the call.

78. For all these reasons, the Tribunal prefer the evidence of the Claimant and find that she was dismissed by the Respondent on 9 May 2019.

What was the reason for dismissal?

79. Having determined that the Claimant was dismissed, the next question for the Tribunal is what was the reason for that dismissal?

80. In this regard, the Tribunal took note of the fact that the Respondent's pled case as set out in their ET3 did not seek to advance an alternative or *esto* case that, if the Claimant was dismissed, there was a non-discriminatory reason for her dismissal. Although the ET3 sets out a narrative about the Claimant's performance and evidence was lead about this, this was not in the context of saying that this was a lawful reason for dismissal but in the context that the Respondent would have dismissed the Claimant for performance reasons had she not resigned (on the Respondent's case). In the Tribunal's view, this is an issue which goes to remedies (and will be addressed further below) and is not being advanced as the reason for dismissal.

81. However, the Tribunal is also aware that there were reasons for dismissal asserted by the Respondent before they pled their formal case in the ET3.

82. In these circumstances, the Tribunal has had to draw an inference from the primary facts found above as to what was the reason for the Claimant's dismissal on 9 May 2019. In this regard, the Tribunal's preference for the Claimant's evidence as to what happened on the relevant dates extends not just to the narrow issue of whether or not she was dismissed but to what was said during the telephone call on 9 May.

83. The Tribunal has taken account of the following matters:-

a. Mrs Cooper gives different reasons for dismissal during the telephone call on 9 May and in subsequent correspondence:-

i. She says that her accountant had told her that she had to dismiss the Claimant.

ii. She then says she is going to scale down the business but goes on to say that she wants to take on a full-time person. The Tribunal considers that these are contradictory positions as taking on a full-time person in preference to the part-time Claimant would involve scaling up.

iii. The Respondent then goes on to assert the performance issues as a reason for dismissal.

iv. Finally, they assert that there was no dismissal at all.

b. The Claimant's dismissal followed on closely from her handing in her fit note and raising the issue of Statutory Sick Pay.

c. On any account, Mrs Cooper spoke to her accountant about the significance of the fit note.

d. The Tribunal considered that, whilst there may have been some issues with the Claimant's performance, the importance or significance of these have been exaggerated for the purposes of defending the claim.

e. In particular, there was no evidence that the alleged complaints were ever advanced as formal complaints by customers to the extent that an employer would take formal action against an employee. The Tribunal considered that these were the sort of issues which a business such as this would face where customers were dissatisfied and that they were only categorised as "complaints" as part of the Respondent's defence to the claim.

f. If there had been genuine concerns about the Claimant's performance then Mrs Cooper had more than enough time before her holiday to raise this with the Claimant and address them. Mrs Cooper's explanation as to why she had not done so was unsatisfactory; if there were such issues with the Claimant's work then a business such as the Respondent which is so reliant on their reputation and customer goodwill would have taken steps to address this as soon as possible.

g. The Tribunal also considered that there had been no performance reviews in the way in which the Respondent sought to present in their evidence. There may have been discussions about work but not in a formal manner indicating to the Claimant that she might be dismissed if there was no improvement.

h. Many of the alleged complaints had never been raised with the Claimant at all.

84. In these circumstances, the Tribunal was of the view that the Claimant's dismissal on 9 May 2019 was triggered by the submission of her Fit Note on 8 May and the discussion around Statutory Sick Pay. It was clear, on both the Claimant's evidence and that of Mrs Cooper, that this action by the Claimant was what prompted Mrs Cooper to contact her accountant leading to the telephone call the next day in which the Claimant was dismissed.

85. The Tribunal, therefore, finds that the reason for the Claimant's dismissal was that she had provided the Respondent with a Fit Note on 8 May 2019.

Conclusion

86. Having determined that the Claimant was dismissed and the reason for her dismissal, the Tribunal requires to consider whether the circumstances of her dismissal amount to unlawful discrimination contrary to either s13 or s15 of the Equality Act 2010.

87. Dealing with discrimination arising from disability under s15 first, the Tribunal considered that the submission of the Fit Note to the Respondent was "something" arising from her disability. The Fit Note clearly related to the Claimant's absence from work caused by her disability (that is, the injury to her eye). In these circumstances, the Claimant was treated unfavourably (that is, she was dismissed) for something arising in consequence of her disability (that is, handing in her fit note). This amount to a *prima facie* case of discrimination arising from disability.

88. The Respondent lead no evidence that the Claimant's dismissal was a proportionate means of achieving a legitimate aim and so has not discharged the burden of proof in this regard. The Tribunal does not consider that the Respondent has objectively justified the Claimant's dismissal in such circumstances.

89. The only remaining issue is the Respondent's knowledge. The Respondent may not have known that the Claimant's injury met the legal definition of "disability" under s6 of the 2010 Act until after her dismissal but that is not the question to be determined. The Respondent was clearly aware of the Claimant's injury (which amounts to the disability), that she required time off to recover and that she was submitting a Fit Note in respect of the absence caused by her disability. The Tribunal, therefore, considered that the Respondent had the necessary knowledge under s15 of the 2010 Act.

90. In these circumstances, the Tribunal finds that the Claimant's dismissal amounts to discrimination arising from disability by the Respondent contrary to ss15 and 39(2)(c) of the Equality Act 2010.

91. The issue of direct disability discrimination is rendered somewhat academic by the finding of discrimination arising from disability given that it would not produce any additional remedy but, for the sake of completeness, the Tribunal will address that claim as well.

92. In order to establish a claim of direct disability discrimination, the Claimant would require to persuade the Tribunal to draw an inference that the reason for her dismissal was her injury itself (as opposed to the consequences of that injury which would fall within a claim under s15). In light of the Tribunal's finding above that the reason for the dismissal was the submission of the Fit Note to the Respondent, the Tribunal did not consider that there was any evidence from which it could draw an inference that the Claimant was dismissed because of her injury itself.

93. In these circumstances, the Tribunal did not consider that the claim of direct disability discrimination was well-founded and dismissed that claim.

Decision – Breach of Contract

94. Having found that the Claimant was dismissed on 9 May 2019, the Tribunal also finds that she was dismissed without notice and that the correct amount of notice would have been 1 week.

95. Therefore, the Claimant is entitled to compensation for this breach of contract equal to one week's wages.

Decision – Unauthorised deduction of wages (holiday pay)

96. There was no payment of pay in lieu of untaken holidays made to the Claimant on the termination of her employment.

97. There being no relevant agreement setting out the Claimant's entitlement to annual leave, the Claimant's leave year began on the first day of her employment.

98. Based on the Tribunal's finding that the claimant was dismissed on 9 May 2019 and applying the formula in Regulation 14 of the 1998 Regulations, the Tribunal calculates the holiday pay due to the claimant as follows:-

    a. A is 5.6 weeks

    b. B is 65 days divided by 365 = 0.18

c. C is 0

d. The calculation is therefore (5.6x0.18)-0 = 1 week

Decision – Additional award under section 38 of the Employment Act 2002

99. Given that the Tribunal has found in the Claimant's favour in respect of her claim of discrimination arising from disability then the power to make an additional award under section 38 of the 2002 Act applies.

100. The question for the Tribunal is whether the Respondent failed in their obligation to provide the Claimant with a statement of written terms and conditions which complied with section 1 of the Employment Rights Act 1996.

101. In these circumstances, the Tribunal finds that the Respondent had failed in their duties under section 1 of the Employment Rights Act 1996 and so will make an award under section 38 of the Employment Act 2002. It was quite clear that no statement complying with section 1 of the 1996 Act was ever provided and, indeed, the Respondent did not seek to argue that they had complied.

102. The Tribunal considered the amount of award to be made. The Tribunal took account of the Claimant's relatively short service and that she had only just passed the date on which a statement of her written terms and conditions should have been provided.

103. The relevant statutory provisions state that the Tribunal must (emphasis added) make an award equivalent to two weeks' wages in such circumstances and this is the award made by the Tribunal.

Remedies – Discrimination arising from disability

Recommendations

104. As was accepted by the Claimant's agent during her submissions, the recommendations set out in the Schedule of Loss would not avoid or reduce any adverse effect on the Claimant and so these are no "appropriate recommendations" in terms of s124(3) of the Equality Act 2010.

105. The Tribunal, therefore, makes no recommendations.

Injury to feelings

106. In determining the award for injury to feelings, the Tribunal first considered into which of the *Vento* bands this case fell. Taking account of the most recent Presidential Guidance on the award of injury to feelings, the Tribunal considered that this was a case where the appropriate *Vento* band was the first band; this was a one-off act of discrimination (that is, dismissal) which did not merit an award in the second band.

107. In determining the level of the award within the first band, the Tribunal took account of the particular effect on the Claimant. It was quite clear that her dismissal came at a very difficult time for the Claimant and had a very serious effect on her. The evidence from the Claimant and her mother was that the Claimant was very distressed at the time and had suicidal thoughts as a result of her dismissal.

108. The Tribunal, therefore, considered that an award at the top of the first *Vento* band was appropriate and that a sum of **£8800 (Eight thousand eight hundred pounds)** should be awarded.

109. The Tribunal considered that it was appropriate to award interest on this sum in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. In this case, the date of the contravention is 9 May 2019 (that is, the date of dismissal) and the "day of calculation" is 27 November 2019 when the Tribunal made its award.

110. Applying the formula in the Regulations, the Tribunal awards the sum of **£389.34 (Three hundred eighty nine pounds and thirty four pence)** as interest on the compensation for injury to feelings.

111. The Tribunal, therefore, awards the sum of **£9189.34 (Nine thousand one hundred eighty nine pounds and thirty four pence)** as compensation for injury to feelings (inclusive of interest).

<u>Compensation for financial loss</u>

112. There were a number of issues that the Tribunal required to determine in considering what compensation for financial loss it would be just and equitable to award in respect of the claim for discrimination arising from disability.

113. First, there was the question of what figure should be used for the Claimant's weekly wage. She had only worked for a short period and worked a varying amount of hours each week. The Tribunal considered that it would be just and equitable to calculate an average weekly wage based on the total sum paid to the

Claimant over the period of her employment divided by the number of weeks worked over this time. This method produced a weekly wage of £225.84.

114. Second, there was the question of whether it would be just and equitable to reduce the compensation for financial loss on the basis that the Claimant would have been dismissed for poor performance in any event. This may be done by limiting the period of loss to the period the Tribunal considered it would have taken for the Respondent to dismiss the Claimant or by applying a percentage deduction to reflect the chance that the Claimant would have been dismissed in any event.

115. As stated above, the Tribunal considered that the significance or importance of the alleged complaints about the Claimant's work had been exaggerated by the Respondent for the purposes of defending the claim. The Tribunal did not consider that there was sufficient evidence for it to draw any inference that the Claimant would have been dismissed in any event. In particular, the fact that none of these issues had been raised with the Claimant as a concern prior to her dismissal indicates that the Respondent was not taking these issues forward as any formal disciplinary action.

116. In these circumstances, the Tribunal does not make any reduction of the compensation for financial loss.

117. Third, the Claimant's schedule of loss included a deduction for self-employed earnings based on her earnings in the previous year. However, the evidence heard by the Tribunal was that the Claimant would have continued with her own business if she had remained with the Respondent and so the Tribunal did not consider that these self-employed earnings were a replacement for the loss of earnings flowing from her dismissal. In these circumstances, the Tribunal did not consider that these earnings should be deducted.

118. Fourth, the period of loss would start from 16 May 2019 to avoid double-compensation as the Claimant would be receiving compensation for breach of contract for the Respondent's failure to give her notice of her dismissal. This would be one week's pay and would be equivalent to the period of 9 to 15 May 2019.

119. Fifth, the Tribunal considered that for the period up to 25 May 2019, the Claimant would have been paid Statutory Sick Pay if she had remained employed by the Respondent. From 25 May, the Claimant began employment with Beyond The Mirror and the Tribunal considers that this is evidence that she would have returned to work for the Respondent on this date and so losses from that date onwards will be based on full pay and not SSP.

120. Sixth, the Tribunal did not consider that the end of the Claimant's employment with Beyond The Mirror amounted to an intervening act. It was clear that this business had changed how it operated and this was not a decision of the Claimant. Further, there was no evidence that this work was intended to permanently replace the Claimant's earnings which she would have received from the Respondent in order to break the chain of causation.

121. Seventh, the Tribunal considered that an appropriate period for future loss would be the end of April 2020. The Tribunal considers that, given the effect of her injury, it would take this period of time for the Claimant for the Claimant to secure employment at the same level of earnings with the Respondent.

122. Applying these principles to the calculation of the compensation for financial loss, the Tribunal determined the following:-

    a. For the period 16 May to 25 May there was a period of 1.14 weeks loss of SSP at £94.25 a week amounting to £107.45.

    b. For the period of past loss from 25 May 2019 to 27 November 2019 (that is, the date of the hearing), there was a period of loss of 27.43 week at £225.84 amounting to £6194.79.

    c. For the period of future loss from 28 November 3019 to 30 April 2020, there was a period of loss of 22 weeks at £225.84 amounting to £4968.48.

    d. This gives a total gross loss of £11270.72.

123. From this sum, the following deductions are to be made in respect of earnings made by the Claimant after her dismissal:-

    a. The earnings from Beyond the Mirror which amounted to £879.38.

    b. The earnings from the Claimant's employment with Nuffield Health from 4 November 2019 to 30 April 2020, a period of 26 weeks at £131.84 a week amounting to a total of £3427.84.

    c. The total deductions are, therefore, £4307.22.

124. The net award for financial loss is therefore **£6963.50 (Six thousand nine hundred sixty three pounds and fifty pence)**.

125. Again, the Tribunal considered that it was appropriate to award interest on this sum in terms of the Employment Tribunals (Interest on Awards in Discrimination Cases)

Regulations 1996. In this case, the date of the contravention is 9 May 2019 (that is, the date of dismissal) and the "day of calculation" is 27 November 2019 when the Tribunal made its award.

126. Applying the formula in the Regulations, the Tribunal awards the sum of **£154.05 (One hundred fifty four pounds and five pence)** as interest on the compensation for injury to feelings.

Remedies – Total award for disability arising from discrimination.

127. The Tribunal, therefore, makes a total award (subject to the uplift in respect of the failure to comply with the ACAS Code of Practice) for discrimination arising from disability of **£16,306.89 (Sixteen thousand three hundred six pounds and eighty nine pence)**

Remedies – Breach of contract

128. The Claimant should be placed in the position she would have been in had the Respondent given her the correct notice.

129. If the Claimant had been given the notice to which she was entitled under s86 ERA then the provisions of s87 would have applied so as provide the Claimant with certain rights during the period of her notice.

130. In particular, the provisions of s88 ERA would have applied so as to make the Respondent liable to pay the Claimant for her normal working hours, "*a sum not less than the the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours"*.

131. In other words, even though the Claimant would have been incapable of work because of sickness or injury, she would still have been entitled to be paid for her normal working hours during the period of notice.

132. The Claimant has, therefore, lost this entitlement by reason of the Respondent's breach of contract in dismissing her without the correct notice.

133. The Claimant should, therefore, awarded compensation for breach of contract equal to one week's full pay (and not at Statutory Sick Pay rates).

134. In these circumstances, the Tribunal awards the Claimant the sum of **£225.84 (Two hundred twenty five pounds and eighty four pence)** as compensation for breach of contract.

Remedies - ACAS Uplift

135. The Claimant sought an uplift to her compensation in relation to a failure by the Respondent to follow the ACAS Code of Practice.

136. There was a complete failure to follow any form of procedure by the Respondent. The Tribunal consider that there was no adequate explanation for this and so there was an unreasonable failure by the Respondent to follow the ACAS Code of Practice.

137. In these circumstances, the Tribunal considered that there was a failure to comply with the ACAS Code and that an uplift of 10% was appropriate to reflect the nature of the failure.

138. The uplift will apply to the compensation related to the Claimant's dismissal as this is to what the failure relates. It will not apply to the award for deduction of wages.

139. The uplift applied to the compensation for discrimination arising from disability amounts to **£1630.69 (One thousand six hundred thirty pounds and sixty nine pence)**. This brings the total compensation for this claim to **£17937.58 (Seventeen thousand nine hundred thirty seven pounds and fifty eight pence).**

140. The uplift applied to the compensation for breach of contract amounts to **£22.58 (Twenty two pounds and fifty eight pence)**. This brings the total compensation for this claim to **£248.42 (Two hundred forty eight pounds and forty two pence).**

Remedies – Unauthorised deduction of wages

141. The Claimant being entitled to one week's pay in lieu of untaken holidays, the Tribunal awards the sum of **£225.84 (Two hundred twenty five pounds and eighty four pence).**

Remedies - Additional Award

142. In respect of the additional award under section 38 of the Employment Act 2002, this is two weeks' wages at £225.84 a week = **£451.68** (**Four hundred fifty one pounds and sixty eight pence)**.

Date of Judgement: 7th January 2020

Employment Judgement: P O'Donnell

Date Entered in Register: 9th January 2020

And Copied to Parties