EMPLOYMENT TRIBUNALS

Claimant: **Ms R Martin-Long**

Respondent: **Bebabo Ltd**

Held at: **Leeds** **ON:** **30 November 2017, 1 December 2017 4 and 5 February 2020**

BEFORE: Employment Judge Eeley (sitting alone)

REPRESENTATION:

Claimant: **Mr D Bunting, counsel**
Respondent: **Mr R Morton, solicitor**

JUDGMENT having been sent to the parties on 5 February 2020 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

Claims

1. By an ET1 which was presented on 3 August 2017, the claimant claimed constructive unfair dismissal, unauthorised deductions in respect of a sum of £2,400 withheld from her final salary plus pay for accrued untaken annual leave. I was presented with an agreed bundle of 115 pages and I read the documents to which I was referred by the parties.

2. I read witness statements and heard oral evidence from the following witnesses:

   a. The claimant;
   b. Mr Warren Mitchell, owner of the business and stylist at the respondent,
   c. Mrs Olivia Mitchell, fellow owner of the business. She had responsibility for reception and front of house at the respondent;
   d. Lindsey Burns, the respondent's salon manager.

3. I had the benefit of a skeleton argument for the claimant plus oral submissions from both parties and I would like to thank both parties' representatives for their assistance in this case.

Findings of Fact

4. The claimant started work for the respondent on 2 September 2013 as a Senior Stylist at the respondent's salon. She signed a statement of terms and conditions on 21 April 2015 at page 55 of the bundle and on 15 March 2016 she signed a training contract at page 57. The training contract was said to commence on 11 May 2016. There were no particular problems in work for the claimant in the period up to March 2016 hence she was happy to sign the training contract for a year-long course where it was assumed that she would continue in her employment with the respondent for the duration of the course. It could be said, however, that after she signed up to the course and the training contract the relationship between the claimant and her employers deteriorated and was fractious for an extended period of time. The claimant was clearly a strong personality and the respondent found her harder to manage than other members of staff. The claimant was more likely to challenge decisions and things with which she disagreed. However, the parties managed to rub along together for a significant period of time.

5. This was a relatively small workplace and the claimant and the respondent's managers were effectively in customer facing roles. Swearing, as a rule, was not tolerated. Swearing if something went wrong (e.g. in the case of an accident) was perhaps acceptable but calling someone names or directly swearing at them was not.

6. There may have been problems between the claimant and the respondent in 2014 about the payment of overtime but this was clearly overcome and was no longer a live problem at the time of the resignation or in the period leading up to it. There is nothing to suggest it was anything other than a genuine disagreement about pay rather than something more sinister which could undermine the employment relationship.

7. Likewise, an issue was raised by the claimant about being encouraged to become a shareholder in the respondent business. That was not pursued in evidence to any great extent and I do not find that there was a particular breach or anything improper in relation to that. It is part of the background but of limited relevance to the issues in this case.

8. The claimant said that she raised queries about wages payments during 2015 because some were made by BACs and some were paid cash in hand. However, these queries must have been adequately responded to as there was no ongoing issue about whether she had been properly paid and she did not raise any sort of formal grievance about it. She would have done so if there was a genuine problem. In oral evidence she accepted that the issues were resolved in the end but that she was made to feel like a 'nuisance' for asking about it.

9. The claimant further alleges that the respondent changed salon rules without discussion and when she challenged this Mr Mitchell was not happy about it. Again, no contemporaneous documents support this and an assertion that someone is not happy about being challenged is not the same thing as an allegation that there was an act in breach of contract or an inappropriate incident which undermined the employment relationship. It is the rough which goes with the smooth of some employer/employee management relationships. Just because a manager does not necessarily actually welcome feedback doesn't mean that there is a breach of contract.

10. Although the claimant complains about 2016 and Mr Mitchell's demeanour towards her (for example in relation to 'snapping at' her, becoming patronising towards her or being aggressive) the claimant did confirm in cross examination that there were no big issues during this period. It is important not to mischaracterise the relationship during this period with the benefit of hindsight.

11. It appears that the main issues between the parties arose from October 2016 onwards. On 14 October 2016, the claimant was at work and she says she was feeling unwell, although there was little other evidence of this. However, because of an incident with Lindsey the Salon Manager the claimant felt she wanted to leave the premises. There was an argument about how long the claimant had been on a break and whether she was working hard enough during a shift. Lindsey accused the claimant of calling her "a fucking bitch" but the claimant denied this. She accepted that Lindsey may have misheard but says that this is not what she called her. The claimant says that it is not acceptable to swear on the salon floor. Once again, I accept that calling staff names or directing such comments directly at other members of staff whilst on the shop floor was not seen as acceptable conduct in this workplace. This was not the sort of workplace where so-called 'industrial language' was acceptable. The customer service context meant that swearing as a general rule would not be accepted. That said, I accept that someone might exclaim using an expletive if something went wrong. To the extent that it is relevant for me to make a finding as to whether the claimant called Lindsey "a fucking bitch" she may well have done so but of course she did receive a written warning in relation to the incident in question albeit more clearly for leaving the premises early. This demonstrates that this sort of language was not widely tolerated on the shop floor.

12. Following this disagreement, the claimant spoke to Mr Mitchell to get permission to go home. Her case is that Mr Mitchell said that it was ok for her to go home and he would contact Lindsey. I do not accept that this is correct. The respondent subsequently started a disciplinary process about this and it is unclear why it would do so if permission had actually been given to the claimant to leave early. I also query why the respondent would grant permission for the

claimant to leave early because of an argument or disagreement rather than because of a specific illness. There is nothing more broadly to suggest that the claimant was not fit to work and it is unlikely that the respondent would want her to leave as this would leave the business short of a stylist on the shop floor. This would potentially have an adverse impact on customers. It is also unclear why Mr Mitchell would give the claimant permission to leave and then subsequently lie about it. Therefore, I do not accept that the claimant had permission to leave early.

13. Olivia Mitchell contacted the claimant to discuss what had happened and said that she would talk to the claimant about it once back in work after the weekend. She was entitled to do this. Whilst the claimant was on this call she received a voicemail. The voicemail was from Warren Mitchell. She realised that he had called her by mistake. The message made derogatory comments calling the claimant lazy. Mr Mitchell expressed the view that the claimant had been 'caught out'. The claimant's subsequent grievance records Warren Mitchell as saying *"everyday one day after another there is always something and then she phones me. This is what she does she sits on her arse. She has done nothing which is what she does. She thinks it's funny and she is caught out on TV"*. The claimant was upset about the message. She realised that it had been sent to her by mistake but I accept that she reasonably concluded it was a message referring to her rather than to someone else. Whether that was what Warren Mitchell was in fact doing or not, the reality is that the contents of the message reasonably led her to conclude that it was herself who was being talked about. I find it is more likely than not that, in fact, Warren was referring to the claimant in derogatory terms in the voicemail. After all, from his point of view he had good reason to be annoyed with her. She had had a row with Lindsey and left early without permission. Whilst he should not have said it in a voicemail he certainly had subjective motive to make that derogatory comment about the claimant. In cross examination he seemed to accept that the voicemail was in fact referring to the incident involving the claimant and that it was referring to her in a negative way.

14. I accept that the claimant was genuinely upset by the message. As a result, she forwarded it to Olivia and said that she wanted to discuss it. The respondent accepts that the voicemail was sent to the claimant.

15. On 15 October 2016 (the Saturday after the claimant left work early) Olivia took the claimant to one side and started discussing allegations that the claimant had accused Olivia of stealing when talking to other members of staff and that there had been a complaint from the hotel manager about the claimant's attitude. Olivia stated that she felt there would be too much of an atmosphere for the claimant to be in work and so she sent the claimant home from work.

16. The following Monday the claimant returned to work and asked to speak with Olivia. She tried to talk about recent events. Olivia Mitchell stopped her and handed her a letter inviting her to a disciplinary hearing (page 81). The allegation was that the claimant had left work early without permission and that she had an insubordinate attitude. The claimant also says that she noticed that her access to the online booking system on the phone app had been changed and her access to the main online bookings system and main computer had been changed. The respondent did not challenge this assertion in evidence albeit

asserted that it was not targeted specifically at the claimant. It was thought to be a glitch in the system. Following this the claimant raised a written grievance dated 18 October (page 73) complaining about the events including the voicemail and the way she had been accused of further disciplinary matters.

17. On 22 October, the claimant was issued with a letter saying that her grievance and the disciplinary matters would be heard together but making it clear that instead of gross misconduct and potential dismissal the respondent was now considering a sanction up to a final written warning.

18. The respondent commissioned Sally Benston of Limelight HR to conduct the disciplinary and grievance process. She was an independent third party. The disciplinary hearing took place on 27 October and then reconvened on 4 November (notes are at page 62 and 68 of the bundle respectively). The grievance and disciplinary outcomes were both issued by a letter on 11 November (pages 95 and 99 respectively). The outcome of the process was that the grievance was partially upheld and it was concluded that there had been a breakdown in communication on 14 October. Ms Benston found it difficult to establish whether one party or another was more responsible for it as both parties appeared to share some degree of responsibility. The recommendations were that any changes that impact upon staff (such as changing lunch breaks) should be discussed in person first, if possible. Olivia or Warren were to confirm with Lindsey and Ria (and other staff as necessary) an agreed approach on how and when to address issues and what to do if there was a disagreement. Expectations were to be set by Olivia or Warren as to what was deemed appropriate and professional behaviour and how to address conduct or attitudes that were deemed inappropriate or unprofessional.

19. In relation to the call between Ria and Warren, it was found that there were two different accounts of the same call and Ms Benston could not offer any further comment. The voicemail from Warren (left in error for Ria) was found to be upsetting and sympathy was expressed for the claimant. It was concluded that the lack of apology from Warren caused further hurt. Ms Benston understood from Warren's statement that he was sorry and whilst she acknowledged the hurt this had caused she did not believe that it was intentional. The recommendation was that Warren and Ria should have a private conversation so that Warren could apologise in person and so that the two of them could put the matter behind them and move forwards.

20. There were further recommendations. Ms Benston concluded that there was no evidence of bullying towards the claimant or that she had been purposefully singled out for mistreatment. With regards to 14 October the claimant was upset at having her work ethic criticised in a public place without warning. Ms Benston felt that both parties contributed to the escalation of the matter. Parts of the grievance were upheld and I refer to the outcome letter for further details of that.

21. In relation to the disciplinary matter, regarding the allegation of insubordination Ms Benston concluded that the manager had made it clear that he did not wish to be challenged in front of other staff or to be spoken to inappropriately and it was felt and hoped that the claimant had taken this feedback onboard such that it would not be repeated. As such, Ms Benston felt that the incident was dealt

with at the time and no disciplinary action was taken in relation to that allegation. In relation to the issue of leaving work early without permission, that aspect of the disciplinary case was upheld and a written warning was imposed on the claimant.

22. The claimant did not appeal. She says that this was because it was a case of 'one person's word against another' even though any appeal might well have been referred to an independent third party for determination.

23. On about 22 November (which was about ten days after the disciplinary and grievance outcome) the claimant says that she went to the pub with Mr Mitchell. She asserts that he said he was happy that she had been disciplined as he had noticed a change in her attitude at work. Mr Mitchell's position is that he said he was happy it was all over. He accepts that he did say that there had been a change for the better in the claimant's attitude since the disciplinary. On the whole I prefer the claimant's account of this exchange, it being more consistent with the surrounding circumstances. When challenged, it is asserted that Mr Mitchell became aggressive and angry and said *"don't you get clever and raise your voice at me in here"*. Mr Mitchell denies this. I prefer the claimant's account. It is clear that Mr Mitchell's patience with the claimant was starting to wear rather thin. Mr Mitchell had been asked to apologise with regard to the voicemail as part of the grievance outcome. As a result, the claimant alleges that he then said "so I am sorry". Mr Mitchell's account is that the purpose of the meeting was not to say sorry because there was nothing to say sorry for. I am not convinced that this really fits with the tone of the disciplinary and grievance outcome. It is clear that he was supposed to say sorry and on balance I conclude that he did but rather grudgingly.

24. The claimant left the meeting crying and she felt that her relationship with Mr Mitchell had broken down. She asserts that she reported how Mr Mitchell had spoken to her in a 1-2-1 with Mrs Mitchell. She said she could no longer work with him. The claimant says that during the course of the 1-2-1 Olivia reported that Mr Mitchell was taking a 'step back' from the business and that this should resolve matters going forward. The claimant says that she agreed that she would 'give it a go'. I do not think this would have been discussed if the claimant had not been genuinely upset by the way Mr Mitchell had spoken to her. Why would she talk about how to manage the working relationship between her and Mr Mitchell going forward if it had not started to breakdown? The very fact that this was discussed suggests that Mr Mitchell's apology had been less than genuine and Olivia Mitchell was trying to smooth things over for the future. On the other hand, I do not accept that the claimant was informed that Mr Mitchell was never coming back to the business. However, she was effectively told that she would not have to deal with him on a daily basis and work alongside him on a daily basis in quite the same way as she had hitherto.

25. On 29 November 2016, or thereabouts, Mr Mitchell announced to staff members that he was taking a back seat with the business. Effectively, he was not taking on new clients and he was just going to look after existing clientele. He was not going to be on the online booking system, for example. The claimant took this as confirmation that he would no longer be working as a stylist at the salon. I am not sure how realistic this assumption was given his role as owner of the

business. He might be cutting down on his work but it was inherently unlikely that he would be leaving altogether. I think, therefore, that the announcement that was made was consistent with what Mrs Mitchell previously said to the claimant: not that Mr Mitchell was leaving but that he wouldn't be around as much and she wouldn't have to deal with him on a daily basis. Things in fact improved after this, Mr Mitchell and the claimant didn't see as much of each other and there were fewer opportunities for them to disagree or argue.

26. From February 2017, however, Mr Mitchell started visiting the salon more often. He was eventually working considerably more, albeit not on a full-time basis. He was certainly present in the salon on a more regular basis. The claimant and Mr Mitchell therefore had more reason to be in each other's company. The claimant says that Mr Mitchell's attitude towards her hadn't changed. She asserts that he would regularly undermine her in front of colleagues and clients, was aggressive or ignored her, talked over her and did not allow her to express an opinion, snapped at her and raised his voice. The claimant, however, did not raise a grievance at this point in time and Mr Mitchell denies these allegations. I find that their working relationship continued to be a difficult one. Mr Mitchell probably did snap at her on occasions and avoided or minimised direct contact with her. However, this upset the claimant and she felt that the relationship had not been repaired.

27. On 7 April 2017, a conversation took place in the reception area at the salon. Mr Mitchell had been to the dentist. The claimant attempted to join the conversation but was ignored by Mr Mitchell. She was effectively (as he saw it) 'butting in'. He raised his voice and said, "yes I have been to the dentist is that ok with you Ria?" The claimant walked away embarrassed. Mr Mitchell denies the precise words alleged but it is clear from his own account that she had butted into a conversation which he didn't think she had any involvement in. She had no need to get involved. I suspect his tone probably was aggressive even if those precise words were not used. The claimant says that colleagues approached her and remarked on his inappropriate conduct: one of them said that they would have punched him in similar circumstances. I have no independent verification of those staff comments. The claimant says that Mr Mitchell did not speak to her for the rest of the day. She says that she discussed it with Lindsey who suggested that she speak directly to Mr Mitchell albeit Lindsey herself offered to talk to Mr Mitchell on the claimant's behalf. The claimant, however, turned down her offer as she wanted to talk to him herself. Lindsey accepted in evidence that the issue had been raised with her and accepted that the claimant did look upset. She didn't specify to the claimant that if she spoke to Mr Mitchell it should be during working hours. This report made to Lindsey so soon after the event corroborates that something was said which in fact upset the claimant sufficiently for her to want to raise it with Mr Mitchell.

28. The claimant phoned Mr Mitchell after work. Mr Mitchell said that that he was okay to talk to her on the phone call. He didn't say that she should speak to him the next day in working hours. However, during the phone call Mr Mitchell became aggressive and said that he didn't like the claimant, that the claimant was impertinent and shouted "why don't you just fuck off" and put the phone down. Mr Mitchell denies that he said "why don't you just fuck off". Instead his account is that he pulled his phone away from his ear and said "oh Ria oh fuck

off" in an exasperated tone because she was getting louder and louder on the telephone. I'm not sure whether this distinction between the words used makes any direct difference to the seriousness of the event. In any event, Mr Mitchell should have hung up before making that comment. He would have known that she would hear it if he did not hang up so it was clearly directed at her. He didn't apologise for his tone on the day. He felt he had dealt with it and that the claimant was getting louder and louder. He says that he didn't swear at her but I don't think that stands up to scrutiny in the circumstances of this case. He swore about her within her hearing. In terms of the impact that would reasonably have on the claimant it is a distinction without a difference. The reality is that he had lost patience with her and told her what he really thought of her. He had been honest in fairly clear terms about what he saw as a difficult working relationship because of her personal characteristics. The claimant discussed it with Lindsey after the phone call. The claimant felt that it was a personal attack rather than just frustration or that he found her difficult to manage. I conclude that the motivation for what Mr Mitchell said may well have been frustration but that it was expressed in a personal way which could reasonably have been received by the claimant as a personal attack.

29. On 8 April 2017, the claimant discussed the previous day's phone call with Olivia. Olivia tried to blame the claimant for contacting her husband after working hours. The claimant said things had got worse since Mr Mitchell had come back to the salon and she said his behaviour was intolerable. The claimant asserts that Mrs Mitchell sniggered and said that, as it was his business, Mr Mitchell could work whenever he wanted to. I'm not convinced that Mrs Mitchell sniggered but she probably did say that Mr Mitchell could work whenever he wanted to in his own business as that was a matter of fact. The claimant alleges that for the rest of the day Mr Mitchell ignored the claimant and Mrs Mitchell spoke to her on a "needs must" basis. I think this is true. I suspect that neither of the managers necessarily knew how best to resolve the issue that had blown up between them and the claimant. Mr Mitchell says that he finished work at 3.00pm and that the claimant finished at 5.00pm and there was no time to apologise to her during this time as he had back-to-back appointments. I am not convinced by that. It is likely that Mr Mitchell could have apologised to her or made it clear at some point during the day that he wanted to speak to her in order to apologise. I suspect that he avoided doing so because he was unsure how best to resolve the matter.

30. On 10 April 2017, the claimant received what she says was effectively a forced apology for Mr Mitchell having said "fuck off". Mr Mitchell tried to say that he had been pushed into using foul language by the claimant and she says that he was defensive and aggressive. She says that Mrs Mitchell tried to say that Mr Mitchell had been worrying about it but the claimant took the view that the apology was not a genuine one. Mr Mitchell, on the other hand, denies that it was a forced apology. He says that he came in specifically on his day off in order to apologise to the claimant for the language used. On balance I think the apology was given under sufferance. It was not exactly immediate or fulsome. I find that Mr Mitchell knew he had to apologise for the way that he had expressed himself in order to maintain the working relationship but that there was significant degree of frustration underneath the apology. It was unlikely to have come across as a genuine or heartfelt apology.

31. On 11 April 2017, the claimant was back in work. She says she was ignored by Mr Mitchell. Mr Mitchell's view is that he didn't ignore her but that he could just have been busy with clients. Either way they did not really have any direct contact during that day.

32. The claimant submitted her resignation on 13 April (page 102). The claimant clearly makes criticisms within the body of the letter about what has happened to her. She was put on garden leave during her notice. I note there is a letter dated 19 April (page 103) from the respondent accepting her resignation. On 24 May there was a further response (page 111) containing an admission that he swore at the claimant in frustration and an allegation that the claimant mistakes authority for aggression. I'm not convinced that the claimant can be said to have mistaken authority for aggression in relation to the swearing incident. However, it might be true of the wider working relationship between the claimant and Mr Mitchell.

33. The claimant found alternative employment as a salon stylist around 12 May 2017. The evidence is that she was offered the role on about 18 April. She was offered work the same day that she spoke to the new employer. This apparently followed a speculative email application that she made on the bank holiday Monday. I accept that she had been looking for a new job but that she had not actually obtained it as at the date that she tendered her resignation.

34. There are other relevant facts. Firstly, in relation to training. There is a clause in the contract of employment (clause 13.8 at page 54) which states:

    "On termination of employment for whatever reason, other than redundancy, the Employer reserves the right to recover from the Employee costs and loss of income incurred in respect of training. Such costs will be limited to those incurred in the three months prior to such termination for which receipts are available and will include fees for college courses, private courses, seminars or similar. Where such fees are paid in advance of the date of the actual course they will be deemed to be incurred in the relevant period i.e. the three months preceding the termination date. Loss of income is restricted to that income payable by the Training and Enterprise Councils and Local Enterprise Companies and Learning and Skills Councils or their successors arising directly from the reasonable and normal expected completion of training by the Employee during the three month period commencing with the date of termination of employment. It is specifically agreed that such repayment may be made by way of deductions from wages or salary. This is without prejudice to the Employer's right to claim any balance remaining from the Employee as a debt. An agreement will be provided for this purpose."

    It also points out that another written agreement is expressly anticipated. The training contract is at page 56. It started on 11 May 2016. The relevant clause is clause 7 at page 57 which states:

    "Should the trainee leave the employment of BeBaBo Ltd during the term of this contract or during the period of 12 months thereafter, she shall be liable to pay a sum of £2,400. If the trainee leaves the employment of BeBaBo Ltd within 12

months after this she shall be liable to pay £1,200 to BeBaBo Ltd in recognition of the investment made by BeBaBo Ltd in respect of this contract."

The training contract was said to expire within two years which would be by 11 May 2018. The claimant's employment in fact terminated on 12 May 2017 halfway through the contract.

35. The material training course was "Wella MCP". The claimant accepted in cross examination that it ran from May 2016 until March 2017. The invoice for the course is at page 115 and is dated 10 April 2016. The total sum charged appears to be £1,920 which comprises £1,600 net plus £320 VAT. The claimant accepted in cross examination that the respondent had paid for the course before she started it. I think it unlikely that she would have been allowed to go on the course before it had been paid for, given that it was external professional training. I am prepared, on balance, to accept the respondent's case in this regard. The claimant accepted that as well as having course fees paid, she was paid her normal daily wages for the days that she was on the course. She was also reimbursed for travel expenses such as petrol, car parking etc.

36. The claimant accepted that the course was thirteen days long. Thirteen days pay would amount to nearly £900 so the claimant was accepting that the total cost to the respondent of her going on the course would be more than the £2,400 taking into account pay, fees and travel expenses.

37. There are some further findings of fact in relation to annual leave. The last payslip in the bundle is at page 48 but there is no holiday pay within it. The penultimate payslip at page 47 dated 30 April 2017 appears to refer to five days holiday pay at a gross sum of £418.44. The contract of employment is at page 50. Clause 6 gives an annual entitlement to 28 days holiday including public holidays. Clause 6.2 at page 50 states:

"Due to the nature of our business, you may be expected to work on public holidays in the ordinary course of your employment. You will be allowed to take your holiday entitlement on a different day if you do not use the allowance for a public holiday. You will not receive any additional pay or overtime when you work on a public holiday unless your contract of employment allows for this."

It indicated that the claimant may be required to work public holidays but would be given another day off in lieu. The contractual holiday year ran from 1 January – 30 November. Clause 6.9 at page 51 indicated that the claimant could not carry over leave from one year to the next unless she could not take it because of sick leave, statutory maternity leave etc such that she was prevented from taking it within the correct leave year. The claimant gave evidence that she thought she could carry December holiday over to the new year but she could not show evidence of how this would work. Consequently, I do not accept that there was the entitlement to carry over holidays that she asserts.

38. One day's holiday pay apparently amounts to £69.74 (see payslip at page 45 and the claimant's own evidence in chief). It therefore looks as though the payslip at page 47 in fact reflected six days' holiday pay. The claimant has received six days' pay.

39. In February 2017, the claimant took one day of holiday for which she was paid (see payslip page 45). New year's day was taken as a day off. The claimant says this was classed as the previous year's holiday but I cannot see how that works. I accept that she had one day's paid holiday in respect of New Year's Day. Good Friday was worked by the claimant and she did not take a holiday there. The claimant did not work Easter Monday. Her normal day off would be a Wednesday so this day off was paid as holiday. Again, one more day paid holiday taken. The first May bank holiday was during the garden leave period but was paid so again counts as a day's holiday taken.

40. Totalling all this up this means that by the effective date of termination the claimant had taken and been paid for four days holiday. In addition, she was given six days pay for accrued untaken holiday at termination. Consequently, a total of ten days holiday is accounted for.

The law

Unauthorised deductions from wages.

41. Section 13 Employment Rights Act 1996 ("ERA") sets out the right not to suffer unauthorised deductions for wages. The salient points to note for the purposes of this case are that:

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

a. The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or

b. The worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised-

a. In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

b. In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in the writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion.

…

(5) for the purposes of this section a relevant provision of a worker's contract having effect by virtue of variation of the contract does not operate to authorise the making of deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) for the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified."

42. In this case the respondent relies upon written terms to authorise the making of a deduction from wages in respect of the claimant's course fees. The claimant asserts that the terms which might be said to authorise the deduction amount to a penalty clause which is unenforceable. I have been referred to the case of Cavendish Square Holding BV v Makdessi [2016] AC 1172. The salient points to take from Makdessi are that:
    (a) A provision is penal (and unenforceable) if it is a secondary obligation which imposes a detriment on the contract-breaker which is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation;
    (b) The fact that a provision did not provide for a pre-estimate of loss, or that it was deterrent, did not necessarily mean that it was penal, since the legitimate interest of the innocent party might extend well beyond the recovery of compensation for his loss. One has to look at whether the clause is "unconscionable" or "extravagant".
    (c) In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption had to be that the parties themselves were the best judges of what was legitimate in a provision dealing with the consequences of breach

42. The courts are asked to consider in each case firstly, what legitimate business interest is served and protected by the clause in question and secondly whether, assuming such interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable.

Claim for holiday pay

43. The contract in this case reflect the minimum statutory entitlement of 28 days per annum inclusive of public holidays.

44. Whether this claim is looked at as a claim for unauthorised deductions or as a claim for breach of contract, the provisions of the Working Time Regulations 1998 ("WTR") are relevant.

45. Regulation 14 WTR states:

"(1) this regulation applies where-
(a) the 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 the period of leave determined according to the formula-

$$(A \times B) - C$$

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.

(4) a relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Constructive unfair dismissal

46. It is necessary to consider whether there has been a constructive dismissal within the meaning of s95(1)(c) ERA. The Tribunal must consider whether the respondent has committed a fundamental or repudiatory breach of contract which would entitle the claimant to resign and treat herself as dismissed. Second, the Tribunal must determine whether the claimant in fact resigned in response to said repudiatory breach. Third, the Tribunal must consider whether the claimant waited too long between the breach and the resignation so as to have waived the breach/affirmed the contract.

47. As a matter of principle even if there has been a constructive dismissal this does not necessarily mean that the dismissal has been unfair. An employer can still contend that the dismissal is for a potentially fair reason (s98(1)(b) or s98(2) ERA) and that it was reasonable and fair within the meaning of section 98(4) ERA.

48. In this case the respondent does not contend that any constructive was nevertheless fair.

49. The claimant asserts that there has been a breach of the implied term of mutual trust and confidence. That is the implied term that the parties shall not, without

reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between them. As it is a fundamental term, then any breach of this term is considered to be repudiatory in nature. I should consider whether the employer had reasonable and proper cause for its behaviour and I am to examine the actual impact of the behaviour on the relationship between the parties.

50. If I find that this is a so-called "last straw" case then the final straw itself, which led the employee to resign, might not in isolation always be unreasonable or blameworthy. Its essential quality is that it is an act in a series whose cumulative effect was to amount to a breach of the implied term. The last straw does not have to be of the same character as the earlier acts but it has to contribute something to that breach, even if what it adds might be relatively insignificant. If the final straw is not capable of contributing to the series of earlier acts, there is no need to examine the earlier history to see whether it did in fact have such effect (Omilaju v Waltham Forest London Borough Council (no2) [2005] ICR 481).

51. Looking at the case of Omilaju the three specific matters clearly relied upon by the claimant are a phone call with Mr Mitchell on 7 April, the lack of an apology on 8 April, the forced apology on 10 April and, to some extent, Mr Mitchell ignoring her on 11 April.

52. In terms of causation the breach of contract must cause the resignation. The question is whether it was 'an effective' cause, it need not be the sole effective cause.

53. The employer cannot rectify a breach once it has occurred so as to avoid constructive dismissal. Once the repudiatory breach has taken place it is for the claimant to decide how to respond and whether to waive the breach or not (Bournemouth University Higher Education Corpn b Buckland [2010] ICR 908)

Conclusions

Conclusion on holiday pay

54. The claimant had worked 132 days out of the year. This equates to 0.36 of the year. 0.36 of 28 days is 10.13 accrued days. This is rounded it up to 10.5 days pursuant to clause 6.5 of the contract. The parties seemed to be in agreement that 10.5 days of annual leave had been accrued at termination. Referring back to my findings of fact,10 days have already been accounted for. This means that half a day's pay has been accrued and is owed. Half a day's pay on the agreed rate appears to be £34.87 which is the sum that I have ordered in my Judgment.

Conclusion regarding training costs

55. I have to read the two clauses relied upon together as both had been agreed to by the time the clawback of the fees took place. That is the only way in which to glean an accurate reading of the contractual obligations between the parties. One cannot look at the two clauses in isolation. Taking those two clauses together I find that the claimant had agreed in principle to repay the costs and

loss of income in respect of training and that any sums owing at termination could be clawed back in the final payslip. The written terms constituted written consent for the purposes of section 13(1)(b) of the 1996 Act. The costs were in fact incurred and paid prior to the course starting. Therefore, they were deemed to have been incurred within the relevant period of three months prior to the effective date of termination so that clause 13.8 (page 54) kicked in. However, clause 13.8, was implemented subject to the agreement in clause 7 at page 57. This asks whether the claimant left employment during the currency of the contract or within twelve months of the end of it. She did leave within that period and so the loss clawed back is specified as being £2,400.

56. I have already found, as set out above, that the total cost to the business of the claimant attending the course was more than £2,400.

57. The claimant's case primary case on this point was that the relevant clauses were not engaged because it was not known whether or not the course fees were paid before she started the course. That primary argument fails because I have found as a fact, on the balance of probabilities, that the fees were in fact paid prior to the course starting.

58. The claimant's second argument is that clause 13.8 is worded so that the clawback is in place in perpetuity however long ago the course was completed. The assertion, therefore, is that it cannot be a genuine pre-estimate of loss and is also unconscionable as a result. Consequently, it is asserted for the claimant that it is unenforceable as a penalty clause.

59. As indicated above I find that clause 13.8 and clause 7 have to be read in conjunction with each other because that is what the claimant had agreed to by the relevant date. It properly reflects the whole agreement between the parties at the relevant date. If one does read the two clauses together, clause 7 modifies clause 13.8 so that the money is not owed in perpetuity because there is effectively a tapering provision so that the respondent gives credit for the benefit it has had of an employee who has undergone that training. Effectively, the longer that the employee is employed post training and before resigning, the more benefit the respondent has had. Therefore, the respondent gives more credit over time. The reality is that if the claimant had stayed employed for long enough post training, she would have escaped all liability to pay back the fees. In this case the claimant only stayed in employment for a couple of months after the end of the training contract. Therefore, she had to pay back the full amount. There was a genuine business interest being protected by the clause. If the respondent is going to pay to train staff then it wants the benefit of having those more highly trained staff working for it for a reasonable period of time. Otherwise it is wasting money and paying to train someone in circumstances where a different employer gets the benefit of it.

60. I find, in any event, that amount in question (with the taper) is a genuine pre-estimate of loss. It takes the upfront costs to the business as a starting point and then tapers them down over time to reflect the benefits to the business of the claimant continuing to work over a period of time post training. That is a genuine pre-estimate of loss and not unconscionable. It is not disproportionate. The claimant's claim therefore fails in this regard.

Conclusion on constructive unfair dismissal

61. Turning first to the issue of breach. As I have already noted the personal relationship between the parties was strained for a long time. There was evidently something of a personality clash between the claimant and Mr Mitchell. The older incidents in the chronology are of limited relevance and don't constitute a breach of contract in themselves but they are relevant background. The relationship did not start from a particularly secure or close working foundation.

62. The main problems started in October 2016 when the claimant was disciplined for leaving early. The respondent was entitled to discipline her. However, the voicemail that the claimant heard about herself damaged the relationship as a matter of fact. Whilst there was a subsequent apology it was rather perfunctory and did not completely repair the damage that had been done. The claimant was further mollified by the suggestion that Mr Mitchell would be taking a back seat in the business thereafter. The claimant continued to work and may have waived that particular breach but the parties' subsequent actions have to be viewed in the context of the history between them.

63. From February 2017 onwards when Mr Mitchell increased his working time at the salon there was an increased risk of interpersonal friction between him and the claimant. This tested the relationship given that each was easily offended by the other.

64. The trigger event was Mr Mitchell's response to the claimant 'butting in' on the dentist conversation. The claimant was clearly upset by this. The most serious event was the phone call where Mr Mitchell effectively told the claimant to "fuck off". The comment was clearly directed at her and was not made 'in passing'. He took no care to ensure he hung up before making the comment. This in itself was likely to seriously damage the relationship of mutual trust and confidence, particularly when seen against the previous problems in the relationship. However annoyed Mr Mitchell was, he had no proper cause to speak to her in those terms. There were other appropriate ways to deal with the matter. In essence, by acting in this way he was saying he had had enough of the working relationship.

65. Nothing was done to improve the position on 8 April, it was allowed to fester. Mr Mitchell could probably have found time to apologise if he had wanted to. This failure to apologise in effect compounded the breach. The apology on 10 April was half hearted and again did more to compound the harm than ameliorate it. The relationship was no better on 11 April. I think, that taken against the relevant background, the events of 7 April onwards constituted a fundamental breach of mutual trust and confidence. Indeed, the phone call on 7 April alone could be seen as a fundamental breach. It was certainly compounded by the later matters.

66. I do not accept the respondent's argument that industrial language was common place in the workplace such that the claimant cannot reasonably have been as offended as she now says that she was. I don't accept it was common place. In any event, this was specifically directed at the claimant in a context where it was saying he had had enough of having to deal with her. It also has to be looked at against the background of the relationship. I conclude that there was enough

there both objectively and subjectively to constitute a fundamental breach of contract. I do not accept that it wasn't a comment directed at her given that it was during the phone call to her. She did not overhear, for example, another conversation, she did not overhear it in passing. It was either deliberately or recklessly said when she could hear it.

67. I conclude that the claimant did resign in response to the breach. She had no job to go to at the point of resignation. The breach was an effective cause of the resignation. The claimant did not wait too long to resign or otherwise affirm the contract. The gap was between 10 and 13 April. She took a reasonable period of time to consider her position. There was no requirement on her to wait and see if the respondent rectified the breach.

68. Hence all the component parts of a constructive unfair dismissal are established in this case and I uphold the complaint of unfair dismissal.

Compensation

69. The parties have agreed that the applicable basic award in this case is £1,403.13.

70. Taking into account all of the circumstances of the case I conclude that an appropriate award for loss of statutory rights would be £500.

71. There is no claim for loss of earnings because the claimant has fully mitigated her loss since dismissal.

72. The only outstanding matter put before me by the claimant was whether or not I should make an award of £2,400 to reflect the fact that the clawback of training costs flowed directly from the constructive dismissal and therefore that it would be just and equitable to award it as part of the compensatory award.

73. In considering this I have to look at what would have happened in the absence of a constructive unfair dismissal to work out what is just and equitable as a compensatory award. I have to take into account the evidence that I have already heard. Clearly, the claimant's difficulties with the respondent went back as far as October 2016. There was a recurrence in the difficulties in April 2017 which is less than a six months gap between the two. To some extent, the only reason there hadn't been further difficulties already by that stage was because Mr Mitchell had taken "a back seat" and wasn't working as often with the claimant. Clearly, he was entitled to come back to work and in fact did so, so that the personality clash would be perpetuated. It is not necessarily the case, however, that it would have culminated in a constructive unfair dismissal or some other statutory tort on the part of the respondent.

74. The claimant on the other hand had already started looking for work. She clearly felt she couldn't work in the long term alongside and being managed by Mr Mitchell. I have to ask myself what is the chance that she would have stayed in employment at least twelve months more in order to reduce or extinguish the clawback of £2,400 or £1,200? Based on the evidence that I have I conclude that there is less than a 50% prospect of her staying there for twelve months,

given the recent history and given the fact that, once she started looking for employment, she quickly found a role which fully mitigated her loss. In those circumstances and given her unhappiness in her working relationship why would she then stay in employment longer than necessary? If she had stayed for a matter of months it is unlikely to have been an extra year.

75. I also note, in passing, that the claimant had incurred a disciplinary warning. There may have been further disciplinary proceedings in due course given the history of the employment relationship but that is more speculative. The reality is that, in all the circumstances, she was unlikely to stay in employment for more than a year in the absence of the constructive dismissal. Consequently, I do not think that the £2,400 or £1,200 flows from the constructive unfair dismissal such that it should be awarded as part of the compensatory award on a just and equitable basis.

Employment Judge Eeley

Date: 14th April 2020