



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**MRS S HAYWARD**

**v**

**RUSH HAIR LIMITED**

**Heard at:** London Central (by video)

**On:** 1,2,3 and 4 June 2021

**Before:** Employment Judge P. Klimov, sitting alone

## **Representation**

**For the Claimant:** Ms B. Balmelli (of Counsel)

**For the Respondent:** Mr R. Holst (lay representative)

**JUDGMENT** having been sent to the parties on 4 June 2021, and written reasons having been requested by the Claimant on 8 June 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## **Reasons**

### **Background and Issues**

1. By a claim form presented on 1 June 2020 the Claimant brought claims for unfair (constructive) dismissal, wrongful dismissal (notice pay) and holiday pay. The holiday pay claim was for additional leave days that would have accrued during her notice period.
2. The Respondent denies dismissing the Claimant. It avers that she resigned and was not dismissed. The Respondent did not plead in the alternative any potentially fair reason for dismissal. At the start of the hearing, Ms Balmelli said that the Respondent was relying on some other substantial reason, namely restructuring, as a potentially fair reason for dismissal. Ms Balmelli said that this issue had been raised at the case management hearing on 25 November 2020, and the Respondent was told by Employment Judge James that there was no need to amend ET3. However, after taking instructions during a short

adjournment Ms Balmelli confirmed that the Respondent was not pursuing a defence of some other substantial reason for dismissal, in the alternative.

3. At the hearing, the Claimant was represented by her husband, Mr Holst, and the Respondent by Ms Balmelli. I am grateful to both of them for their submissions and assistance to the tribunal.
4. The Claimant gave sworn evidence and was cross-examined. The Respondent called three witnesses, Ms Preetii Kalsi-Serrao (former Head of Talent Development), Ms. Lisa Wheatcroft (Chief Operating Officer) and Mr Andrew Phouli (a co-founder and director). They all gave sworn evidence and were cross-examined.
5. I was referred to various documents in the common bundle of documents of 623 pages and an additional document of 2 pages, the parties introduced in evidence.
6. There was an agreed list of issues:

***Constructive unfair dismissal & wrongful dismissal***

*1. Did the Respondent act towards the Claimant in a manner which was calculated and or was likely to destroy (or did destroy) the implied term of trust and confidence in the Claimant's contract of employment entitling her to resign? The Claimant relies upon:*

- 1.1. Ms Kalsi-Serrao having been given the majority of the claimant's role and projects over the period of 3 June 2019 – 4 February 2020, with the result that the Claimant had effectively been demoted or replaced.*
- 1.2. The claimant's exclusion from the operational meeting held on 16 January 2020.*
- 1.3. Failing to properly accommodate her at the operational meeting held on 16 January 2020, following having requested to be 'reinstated' as an invitee.*
- 1.4. The announcement at that meeting, dated 16th January 2020 that Ms Kalsi-Serrao was to be recruited to lead the education plan including training and development (the Claimant's area and something that was never discussed with her).*
- 1.5. Her meeting with Ms Kalsi-Serrao on 29 January 2020 during which it was clear that Ms Kalsi-Serrao was assuming responsibility for training and treated the claimant as her 'assistant' and/or subordinate.*
- 1.6. Revising Ms Kalsi-Serrao's job title to "Head of Talent Development" as stated on the 'Leadership Update' of 2020 sent to the whole company on 4 February 2020.*
- 1.7. Failing to make any mention of the Claimant or her role (Head of Salon Development) in the 'Leadership Update' of 2020.*

- 1.8. *The Respondent's failure to provide the Claimant with a written job description despite several requests from the Claimant, both verbally and in writing.*
- 1.9. *The Respondent's actions which the Claimant alleges were to remove her as Head of Salon Development by offering her alternative roles, including as a salon manager, running her own franchise salon, setting up a salon based training school to only teach BYB, two different joint venture salons and a role as head of customer services.*
2. *Was the failure to mention the Claimant in the 'Leadership Update' of 2020 and the announcement of Ms Kalsi-Serrao (including the description of such role) in the 'Leadership Update' of 2020 the 'last straw' incident?*
3. *Did the Claimant resign in response to the alleged 'last straw' incident?*
4. *If so, did the Claimant affirm her contract after any breach or waive any alleged breach by delaying her resignation? In determining whether the delay between the alleged last breach and the Claimant's resignation waived the alleged breach the Tribunal should consider the context of the Claimant's resignation including the fact that the Claimant was on sick leave suffering from stress and anxiety for the majority of the period categorised as a delay.*
5. *If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA") (respondent says SOSR, no need to amend); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?*

### **Constructive Wrongful Dismissal**

6. *Was the Claimant entitled to terminate her contract without notice by reason of the Respondent's conduct?*
7. *If so, to how much notice is the Claimant entitled and how much extra holiday pay in addition, if any?*

### **Remedy**

8. *What remedy is the Claimant entitled to if she succeeds?*
9. *What loss, if any, has the Claimant sustained?*
10. *What financial compensation is appropriate in all of the circumstances?*
11. *Has the Claimant properly mitigated her loss?*
12. *Did the Respondent unreasonably fail to follow the ACAS Code of Practice?*

*13.If so, should the Claimant's compensatory award be increased by up to 25%?*

*14.Did the Claimant unreasonably fail to follow the ACAS Code of Practice?*

*15.If so, should the Claimant's compensatory award be reduced by up to 25%?  
Unpaid annual leave – Working Time Regulations/Breach of Contract*

*16.When the claimant's employment came to an end, was she paid all of the compensation she was entitled to under regulation 14 of the Working Time Regulations 1998 and/or under her contract of employment?*

*17.If not, how many days pay is she owed and at what daily rate of pay?*

7. At the start of the hearing, I discussed with the parties the list of issues. As the Respondent confirmed that it was not advancing a defence of fair dismissal for some other substantial reason in the alternative, it was agreed that I did not need to deal with issue 5. I have also agreed with the parties that I should deal with the liability issues first, and the remedies issues (if relevant) would need to be considered after I have given my judgment on liability. At the end of the hearing there was not enough time left for me to deal with all the remedies issues. These will be decided at a remedies hearing on 20 August 2021.

### **Findings of Fact**

8. The Respondent is a well-known hair and beauty treatments business. It owns and operates a number of salons as well as offering franchise arrangements. To support its business the Respondent runs a training academy for its staff.
9. The Claimant is a talented stylist. She started working for the Respondent on 1 July 2010 as a stylist and progressed to do other hair treatments. From 2015 to 2017 she was awarded the "Stylist of the Year" award for being the company's highest grossing stylist.
10. The Respondent wanted to use the Claimant's knowledge and experience to help other stylists to achieve the Claimant's level of success. The Claimant, on her part, was looking to re-align her work-life balance and diversify her career into other areas of beauty treatments business, such as training and development. In January 2018, there were various email exchanges and conversations between the Claimant and Mr Stell Andrew, a co-founder of the Respondent, discussing those matters.
11. On 19 March 2018, the Claimant had a meeting with Mr Andrew Phouli ("Mr Phouli") to discuss the Claimant's ideas and career aspirations. In advance of the meeting the Claimant had prepared a comprehensive Business Development Plan for the next 18-24 months, which included developing and delivering training courses, staff coaching and other programmes with a view for the Claimant to move into a business coaching development role, managing the Respondent's business education team and working closely with the Respondent's senior directors, the training academy and salon managers.

12. At the meeting, the Claimant and Mr Phouli “brainstormed” the Claimant’s ideas. The outcome of the meeting was an agreement for the Claimant to develop various coaching courses, which latter became known as “Be your Best” (“BYB”) training programme. The Claimant’s remuneration and working hours in her new role were also discussed and agreed.
13. In April 2018, the Claimant started her work on developing the BYB training programme (initially called “Platinum Club”), initially on a three months’ trial basis, which was then extended to nine months. The training was a success, and the Respondent wished to extend it further into 2019 to get all its stylists BYB trained.
14. In November 2018, the Claimant spoke with Mr Phouli. She was concerned that she had not received a formal contract or a job description for her new role. Mr Phouli told the Claimant that Ms Wheatcroft (the Respondent’s Chief Operating Officer) would organise that.
15. On 21 December 2018, Ms Wheatcroft sent the Claimant a letter stating that her role of running BYB training would continue on a 4 day per week basis at the rate of £300 per day until a review in March 2019.
16. On 27 December 2018, Ms Wheatcroft sent the Claimant an email with further details of the proposed arrangements.
17. On 2 January 2019, the Claimant replied to Ms Wheatcroft, copying Mr Phouli, rejecting the proposed terms, explaining her requirements, and proposing two options.
18. On 3 January 2019, the Claimant and Mr Phouli had a telephone conversation, at which they discussed the Claimant’s requirements. The Claimant requested a formal contract and a job description. Mr Phouli accepted the Claimant’s requirements and said that Ms Wheatcroft would organise the paperwork.
19. On 14 January 2019, the Claimant had a meeting with Mr Phouli to discuss details of the Claimant’s role. At the meeting it was agreed that the Claimant would look after various aspects of salon development, including stylists, front of house (“FOH”), products, retail, L’Oreal, wastage, recurring clients, managers. It was also agreed that the Claimant’s title would be the Head of Salon Development, and that she would be on a fixed salary of £68,900.
20. On 14 January 2019, the Claimant received and signed an offer letter and the Respondent’s standard contract of employment. No job description was included in the documents pack. The offer letter stated the Claimant’s new title, her salary, place and hours of work. The offer letter stated:  
  
*“I would like to confirm the offer to you by RUSH Hair Ltd of an appointment as Head of Salon Development.”*

*You will be based at RUSH Business School, 1st Floor, Central House, 27 Park Street, Croydon. Surrey, CR0 1YD, whilst running the Be your Best course for a maximum of 4 days per week. You will be Salon based for any other days in these weeks at RUSH One New Change.”*

21. On 30 April 2019, Ms Wheatcroft had a meeting with Mr George Phouli (a co-owner and a former operations director of the Respondent) to discuss Ms Wheatcroft’s proposal on organisational changes in the Operations part of the Respondent’s organisation. Ms Wheatcroft prepared slides for the meeting, including a draft org chart. The Claimant’s new role, Head of Salon Development, was not on the org chart. The Claimant was listed as one of three “Educators” reporting into the Head of Ops Education.
22. In March 2019, Ms Kelsi-Serrao joined the Respondent as an Area Manager. In addition to her Area Manager’s duties, she gradually became involved in coordinating various training programmes. That included her coordinating L’Oreal pilot training course to be held on 31 July 2019, which, by email of 3 June 2019, she requested the Claimant to attend “to observe”.
23. On 9 June 2019, Mr Andrew Heasman, the Respondent’s Creative Director, sent an email to various people, including the Claimant, where he explained that the education and creative development was going to be split into three “Worlds” – art team, commercial, and BYB, with Ms Paola Pinto and the Claimant being responsible for BYB.
24. On 9 June 2019, the Claimant forwarded Ms Kalsi-Serrao’s and Mr Heasman’s emails to Mr Phouli, expressing her confusion, because she thought that the areas mentioned in those emails should have been part of her remit as the Head of Salon Development. In one of her forwarded emails she wrote: “*It seems from this email that a decision has been made and I am not really involved with salon development just training BYB courses ....this is not what we discussed when we talked about my new role.*”
25. In the email concerning L’Oreal pilot course, she wrote (***my emphasis***):

*“This is an example of the kind of thing I am worried about ..I had no knowledge of this project and i think this fails directly under salon development and I have been invited to OBSERVE the training if i can make it ...but not have any input to the training ...this seems strange and confusing*  
**Am I just a BYB trainer with a fancy title or are you actually looking for me to help develop the salons?**”
26. On 9 June 2019, Mr Phouli replied to the Claimant saying that he understood the Claimant’s concerns and that he would discuss them with Ms Wheatcroft and come back to the Claimant. He said that “*cross wires [were] creeping in*” and that all would be sorted out.
27. Later that day, the Claimant spoke with Mr Stell Andrew (a co-founder and owner of the Respondent), who reassured her that her position had not changed. The Claimant then emailed Mr Phouli referring to her conversation

with Mr Andrew and stating that it seemed “*like a general lack of communication*”.

28. On 11 June 2019, the Claimant had a meeting with Ms Wheatcroft. Ms Wheatcroft reassured the Claimant that her role had not changed and that Ms Kalsi-Serrao was not moving in her role. The Claimant asked Ms Wheatcroft to give her a job description for her Head of Salon Development role.

29. On 27 June 2019, the Claimant sent an email to Ms Wheatcroft listing her current and future projects. In her email she said that she wished to clarify her role and move onto other projects outside BYB (***my emphasis***):

***“I feel like I also need to be more involved with the commercial aspect of the business as I have been teaching BYB for over a year Now and stuck in the classroom and if I am to be truly effective in my role in salon development I need to be aware of the commercial direction the company is going and be on the same page.***

....

***A Lot of the future projects are areas that I discussed with Andy originally but my role at the moment and what I should be focusing on does not seem very clear and I don't want to upset anybody or cross any lines of responsibility but it not clear what my place is in RUSH so I need some clarification so I can progress and move forward.***”

30. In that email she sets out her future BYB training and future salon development projects, including:

**“Sanchia Future Salon development:**

1. *Create a NEW Assistant training journey for in salon training and a development program that includes there first year on the floor.*
2. *Build a staff development assessment program for managers to enable stylists to get the training they need.*
3. *Built a smart stock ordering process - to reduce wastage and dead stock in salons*
4. *Work closer with the AM's to help access and develop any shops that are not performing.*
5. *TOTEM BYB Training as online Video Modules as refresher options*
6. *Focus on salon retail products - what's sells and what does not looking for market gaps*
7. *Work with the Art team members to create training workshops for faster commercial looks for stylists to do.*
8. *Work on developing NEW reward schemes for all levels of the salon.”*

31. There were further company-wide update communications in July – September 2019, where the Claimant was mentioned in the context of BYB training and Ms Kalsi-Serrao as being involved in development of FOH training.

32. On 4 September 2019, the Claimant had a meeting with Ms Kalsi-Serrao about management FOH training, following which Ms Kalsi-Serrao emailed Ms Wheatcroft updating her on the outcome of the meeting.
33. In September 2019, Ms Wheatcroft became the sole Chief Operating Officer (“COO”), with Mr George Phouli leaving the business. She started to plan to restructure the operations and talents team. Part of her restructuring plan was to create a Head of Talent Development role (with 3 Educators reporting into that role) and a Head of Customer Experience Role, both roles reporting into Ms Wheatcroft. The Claimant’s role of the Head of Salon Development was not included in Ms Wheatcroft’s draft organigrams.
34. In or around October 2019, the role of Head of Talent Development was offered to all Area Manager. Ms Kalsi-Serrao expressed interest in the role. After being interviewed for that role in December she was offered the role with transitioning into it by the end of February 2020.
35. On 7 November 2019, the Claimant taught the “Rush Colour” expert course at the Respondent’s Academy. Ms Kalsi-Serrao was involved in organising the course. After the course sent an email with feedback received from students.
36. In November – December 2019, in addition to her BYB training duties, at Ms Wheatcroft’s requests the Claimant made a few salon visits to assess quality of salons. She prepared quality assessment reports to Ms. Wheatcroft with her findings and recommendations.
37. On 13 December 2019, the Claimant met with Ms Wheatcroft to discuss her future plans and projects. At the meeting, Ms Wheatcroft asked the Claimant if she wanted to become a Salon Manager or own a Rush franchised salon. The Claimant said that she was not interested and wanted to remain and develop in her role as the Head of Salon Development.
38. On 8 January 2020, Ms Wheatcroft informed the Claimant that Ms Phouli wanted to offer the Claimant an “exiting opportunity”.
39. On 14 January 2020, Mr Phouli at a meeting with the Claimant offered the Claimant a joint venture opportunity at the Respondent’s flagship Piccadilly salon.
40. On 16 January 2020, the Claimant emailed Mr Phouli thanking him for the offer but declining it. In her email she wrote (**my emphasis**):

*I am sure you maybe disappointed in my decision but I would very much like to discuss **where you see me positioned in the company as today I was surprised to learn after the restructuring announcement that the position that we had discussed for me in the past has been given to somebody else and Now I am very unsure how I fit in to the new structure** and as far as my future goes I cant see a clear path for progress in RUSH.*



**I feel very disappointed that I have more or less been kept in the dark and stung along till the last moment and It makes me not feel very secure and confident in my position at the moment after many years of service for Rush.**

*I feel Like I have a lot to offer but I have no direction currently so would very much like to meetup for a frank and honest chat about the future.*

41. On 17 January 2020, Mr Phouli replied saying that it was not his intention to offend the Claimant, and that he thought it was a good opportunity for her. He offered to meet with the Claimant the following week together with Ms Wheatcroft to discuss the Claimant's future.
42. On 16 January 2020, the Claimant attended a meeting entitled "Plans for 2020 and New Salon Structure". Due to an administrative error her Outlook invitation had been cancelled on 13 January 2020, but later the error was rectified.
43. At the meeting, the new organisation structure was announced, including two new roles - Head of Talent Development and Head of People and Engagement. It was also announced that Ms Kalsi-Serrao was '*recruited to lead education plans*".
44. Later in January 2020, Ms Kalsi-Serrao became more involved in preparing and coordinating various training courses, which the Claimant thought was part of her responsibilities as the Head of Salon Development.
45. On 21 January 2020, the Claimant had a meeting with Ms Wheatcroft to discuss her future projects. Ms Wheatcroft informed the Claimant that the Respondent was not going to pursue the projects she had planned in 2018. Ms Wheatcroft offered the Claimant the position of the Head of Customer Services to replace a recently left employee.
46. On 22 January 2020, Ms Wheatcroft sent the Claimant a role description for the Head of Customer Services.
47. On 27 January 2020, the Claimant emailed Ms Wheatcroft turning down the offer. In her email she wrote:  
  
*"I am a little confused also as we discussed me being involved in the customer service project any way so I am not clear what part of the project I would be working on in my current role as head of salon development Please can you clarify my involvement in this project going forward."*
48. On 28 January 2020, the Claimant and Ms Wheatcroft had a further meeting to discuss the Claimant's future. Ms Wheatcroft confirmed that the Claimant would remain in her position as the Head of Salon Development and that she would continue to work on customer service projects and training of underperforming salons. Ms Wheatcroft also confirmed that the Claimant would continue to work with Ms Kalsi-Serrao and Ms Pinto and arranged for the Claimant to meet with Ms Kalsi-Serrao to discuss this in greater detail.

49. On 29 January 2020, the Claimant had an operational update meeting with Ms Kalsi-Serrao. At the meeting they discussed training courses the Claimant would be providing. Following the meeting, on 5 February 2020, Ms Kalsi-Serrao sent an update email to Ms Wheatcroft. She did not copy the Claimant.

50. The Claimant was on holiday overseas from the beginning of February returning to London on 9 February 2020.

51. On 4 February 2020, the Respondent sent a Leadership Update to all staff in which it announced that Ms Pinto had assumed the role of Head of People and Engagement and Ms Kalsi-Serrao - the role of Head of Talent Development. The announcement read:

*“Preetii Kalsi-Serrao will take up the role of Head of Talent Development. She will focus on our learning plans and will work with our teams to deliver training programmes for everyone in the business. This will include leadership training, in salon training as well as working closely with our Academy Team.*

*Paola and Preetii will also work together on the Premium Club strategy and building on the current plans.”*

The Claimant’s role was not mentioned in the announcement.

52. On 6 February 2020, the Claimant, while on holiday, emailed Ms Wheatcroft expressing her disappointment with the announcement and stating that she felt that she was being forced out of the team. She asked Ms Wheatcroft to confirm whether her position was no longer and she would be made redundant, or the Respondent was hoping that she would resign.

53. On 5 February 2020, Ms Wheatcroft responded confirming that the Respondent’s position was not redundant and not under any type of review and suggesting to have a meeting to clarify the Claimant’s role and objectives.

54. On 6 February 2020, the Claimant emailed Ms Wheatcroft with various questions about her role and formally requesting a written job description. Ms Wheatcroft replied saying that a meeting had been booked for 10 February 2020 to discuss those matters. The Claimant wrote back asking for “documented answers” to her questions ahead of the meeting. Ms Wheatcroft replied telling the Claimant that if she wished to have clarity, she needed to attend the meeting, following which the discussion would be confirmed in writing.

55. On 9 February 2020, Ms Wheatcroft emailed the Claimant. In her email she gave a brief description of the Claimant’s role as follows:

*“I am sorry that you feel anxious but I can assure you that there is nothing for you to feel concerned about. Your role of Head of Salon Development*

*still remains and focused on BYB, underperforming salons and stylists plus additional projects as required by the business.”*

56. On 10 February 2020, the Claimant was signed off sick with serious stress and anxiety. She continued to be signed off sick until her resignation.
57. On 28 February 2020, the Claimant sent a letter resigning from the Respondent with immediate effect. She said that she was resigning in response to the Respondent’s fundamental breach of contract and considered herself constructively dismissed. She listed various matters which she considered amount to the fundamental breach.
58. On 2 March 2020, Ms Wheatcroft responded refuting the allegations, and telling the Claimant that she did not want to accept her resignation and instead wanted to treat it as a grievance to be heard by Mr Phouli at grievance meeting on 3 March 2020.
59. On 3 March 2020, the Claimant replied stating that she could not see what the grievance would serve and confirming her resignation.

## **The Law**

### ***Constructive dismissal***

60. Under Section 95(1)(c) of the Employment Rights Act 1996 (ERA) an employee will be treated as dismissed if he or she “*terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.*”
61. In order to claim constructive dismissal, the employee must establish that:
  - a. there was a fundamental breach of contract on the part of the employer,
  - b. the employer’s breach caused the employee to resign, and
  - c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal

(see Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA).

62. The implied term of trust and confidence is so fundamental to a contract of employment that a breach of it goes to the root of the contract and therefore will ‘inevitably’ be fundamental (see Morrow v Safeway Stores plc 2002 IRLR 9, EAT).

### ***Implied term of trust and confidence***

63. There are two questions to be asked when determining whether the implied term of trust and confidence has, in fact, been breached. These are:

- a. was there 'reasonable and proper cause' for the conduct in question?
- b. if not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'? (Malik v Bank of Credit & Commerce International SA 1997 ICR 606 (HL))

64. The questions are to be answered objectively, and not by applying a range of reasonable responses test (Sharfudeen v T J Morris LTD t/a Home Bargains UKEAT/0272/16/LA).

65. Even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if — viewed objectively — the employer's conduct was not such as to satisfy the two limbs of the test (Tullett Prebon plc and ors v BGC Brokers LP and ors 2011 IRLR 420, CA).

66. Equally, the employer's subjective intention for the conduct in question is not determinative (see Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT).

### **Last Straw**

67. To constitute a breach of trust and confidence based on a series of acts, the act constituting the last straw does not have to be of the same character as the earlier acts, nor does it necessarily have to constitute unreasonable or blameworthy conduct.

68. Although, while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the test. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. (Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA)

69. An employee who claims unfair constructive dismissal based on a continuing cumulative breach is able to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract. However, the last straw must form part of the series. (Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA).

70. If a fundamental breach has occurred, it cannot be cured. However, there is a difference between trying to remedy an occurred fundamental breach and taking actions to prevent the breach occurring in the first place or attaining the level of seriousness to make it fundamental. (Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA)

### **Affirmation**

71. The employee "*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will*

*lose his right to treat himself as discharged*" (per Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA)

72. Passage of time alone might not be sufficient to establish affirmation. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. (Chindove v William Morrison Supermarkets plc EAT 0201/13)
73. It should be noted that conduct during a period of ill health could have far less force in implying an affirmation of the contract than conduct when an employee was attending work in full health. (Adjei-Frempong v Howard Frank Ltd EAT 0044/15)

## **Analysis and Conclusions**

### ***Credibility***

74. First, I shall deal with the Respondent's submissions on the point of credibility. Ms Balmelli for the Respondent submits that the Claimant was not a credible witness and that, as such, her evidence should not be given much weight and where it conflicts with the Respondent's witnesses' evidence, the Respondent's witnesses' evidence should be preferred. In support of her contention, she refers me to various examples which, she says, show that the Claimant's version did not fit with the contemporaneous documents.
75. I do not accept that. I found the Claimant a credible and honest witness. Although she was understandably emotional, and in giving her evidence was often trying to argue her case rather than giving answers to the posed questions, on the whole, she gave a consistent account of the events.
76. I accept that in her evidence both in her written witness statement and given orally on cross-examination, the Claimant has misinterpreted certain events and put a rather negative spin on them. Looking at those events objectively, I find that the Claimant's interpretation of their significance was an overreaction on her part. However, I must take into account the impact on her mental state caused by the events leading up to her resignation, her resignation, and these proceedings.
77. Ms Balmelli's detailed analysis of certain inconsistencies, such as the use of the words "*I was surprised*" and "*Now*" in the Claimant's email of 16 January 2020 (as suggesting that until that moment the Claimant was perfectly clear and happy with her role), in my judgment, does not cast a shadow over the credibility of the Claimant's evidence as a whole.
78. There are plenty of examples in the contemporaneous documents where the Claimant raised the issue of not understanding what the scope of her role was and how it fitted with the role of Ms Kalsi-Serrao and other people involved in training. For example, on 27 June 2019, when she wrote to Ms Wheatcroft (see paragraph 29 above). Therefore, I do accept that her email of 16 January

2020 suggests that her role being given away was, as Ms Balmelli put it, “a new revelation for her”.

79. I also do not accept that this email gets the Respondent home and dry on the issue of whether Ms Kalsi-Serrao had been given the majority of the Claimant’s role over the period from 3 June 2019 to 4 February 2020, or excludes anything that had gone on between the Claimant and Ms Kalsi-Serrao before 16 January 2020 from the scope of the enquiry.
80. Ms Balmelli argues that the polite manner in which the Claimant wrote to Mr Phouli on 16 January 2020 turning down his offer to take on the Piccadilly salon and her description of that offer as “*slapdash offer*” in her evidence show that her oral evidence is inconsistent with contemporaneous documents and therefore is not to be trusted.
81. I do not accept that the polite manner, in which the Claimant wrote her rejection email to Mr Phouli shows that she cannot be trusted as a witness. She just wanted to be polite and professional whatever she might have actually thought of the opportunity, and why it had been offered to her in the first place.
82. Ms Balmelli further argues that the Claimant gave conflicting evidence on wanting things recoded in writing. However, when a written document was given to her stating that her role had not been taken away, she said that she did not trust what was put in writing. Ms Balmelli referred me to various paragraphs in the Claimant’s witness statement and her answers on cross-examination.
83. The Claimant not trusting what she had been told and wanting things in writing, in my judgment, simply shows the level of her growing anxiety. She wanted to trust people who were giving her assurances, but her view of the reality of the situation was telling her that things were not quite what she was being told. In her evidence she said that she had “*gut feelings*” something was wrong. Therefore, I find that the Claimant wanting things in writing and not trusting written assurances based on what was happening in practice is not inconsistent, and certainly cannot be taken as proving that the Claimant was not a credible witness.
84. Ms Balmelli gives further examples, where, she says, the Claimant on cross-examination refused to agree to straight forward propositions put to her, such as that in the period between June 2019 and February 2020 she did not make requests for a job description.
85. Although documents in the bundle do not show that after June 2019 and until February 2020 the Claimant made further formal requests for a job description, the issue of the Claimant not understanding the remit of her role and asking the Respondent to clarify it had been a constant theme from January 2019 to her resignation. Therefore, the Claimant’s evidence that she had been asking for a job description in various meetings is consistent with her continuous efforts to understand her role and its place in the Respondent’s organisation.

86. I am equally unpersuaded that the fact that in her resignation letter she did not mention her grievance of not being given a job description can be taken as showing the Claimant's lack of candour or credibility. In the resignation letter she refers to the fundamental breach developed over a number of months and gives some of the most recent examples of the conduct she considered to form part of that breach. The list did not need to be exhaustive. As far as the credibility point is concerned, not having a specific reference to the Respondent's failure to provide a job description does not allow me to conclude that the Claimant's evidence is not to be trusted.

87. For the sake of completeness, I shall add that I found the Respondent's witnesses were credible and willing to assist the tribunal. They were open honest and thoughtful in answering questions. Mr Phouli could not recall some events or what exactly was said in his conversations with the Claimant. A better recollection of those events and conversations would have assisted the tribunal. However, I accept that Ms Phouli is a busy person with many things on his mind. His not recalling finer details of his meetings and conversations with the Claimant some 2 - 2.5 years ago cannot be taken as him trying to be evasive or untruthful.

88. I find that where the Claimant's and the Respondent's evidence were in conflict, these areas of conflict were largely related to how the parties interpreted the events and not what the events were.

### **Issues**

89. Now, turning to the list of issues I must answer.

### **Was Respondent in breach of the implied term of trust and confidence?**

*Did the Respondent act towards the Claimant in a manner which was calculated and or was likely to destroy (or did destroy) the implied term of trust and confidence in the Claimant's contract of employment entitling her to resign?*

90. The Claimant relies on 9 specific matters in support of her claim of constructive dismissal (see paragraph 6 above). I shall deal with each of them.

1.1 Ms Kalsi-Serrao having been given the majority of the claimant's role and projects over the period of 3 June 2019 – 4 February 2020, with the result that the Claimant had effectively been demoted or replaced.

91. In her evidence the Claimant gave several episodes that, she says, fall under this heading. She confirmed that these were all episodes she considered as demonstrating that Ms Kalsi-Serrao had been given her role and projects.

92. **Episode 1: 3 June 2019 email "L'Oreal pilot course"** – the Claimant appears to have three issues with that email: (i) that Ms Kalsi-Serrao was

involved because in her view that project was not within the scope of the Area Manager responsibilities; (ii) that the L'Oreal project was discussed at her meeting with Mr Phouli in January 2019 and therefore was part of her role/projects as the Head of Salon Development; and (iii) that email invited her to "*observe*" the training.

93. It was a pilot training to be provided by L'Oreal. It was not a BYB training course to be provided by the Claimant. Ms Kalsi-Serrao was asked to attend the meeting by Ms Wheatcroft and to prepare a note for her. It was for Ms Wheatcroft, as the COO, to decide who should attend, and she thought that both Ms Kalsi-Serrao and the Claimant should be at the training. The fact that Ms Kalsi-Serrao was at that time still an Area Manager and the Claimant's views on Area Manager's responsibilities are not directly relevant to the issue of whether the L'Oreal pilot course was within the scope of the Claimant's role.
94. If the remit of the Claimant's role were limited to developing and running BYB training programme, the fact that L'Oreal project was discussed with Mr Phouli in January 2019 cannot be taken as showing that Ms Kalsi-Serrao attendance of the L'Oreal training was her taking over the Claimant's role, as it would be sitting outside the Claimant's role. However, if L'Oreal project were discussed as being part of the Claimant's broader Head of Salon Development role, Ms Kalsi-Serrao being given the task of co-ordinating L'Oreal pilot training and the Claimant being invited merely to "*observe*" the course, can be objectively viewed as the Claimant being given a rather passive role in what would have been part of her salon development strategy.
95. Further, in her subsequent meeting the Claimant was told by Ms Wheatcroft that her role was more than just *observing* L'Oreal training. Mr Phouli in his email of 9 June 2019 also acknowledges that there was a misunderstanding of the Claimant's role in that project ("*cross wires creeping in*"). The Respondent also admits in its grounds of resistance that the email was sent in error. This, in my judgment, shows that the Respondent accepts that the Claimant's role as the Head of Salon Development was broader than just BYB and included, at the very least, more active involvement in managing L'Oreal training.
96. Around the same time, there was another similar misunderstanding in relation to three "Worlds" (see paragraph 23 above). The Claimant, having spoken with Mr Andrew, accepted that it was "*a general lack of communication*". Therefore, it appears, these misunderstanding and miscommunications were part of the underlying confusion as to the exact scope of the Claimant's role, as it was discussed and agreed with Mr Phouli in January 2019.
97. **Episode 2: 4 September 2019 – FOH meeting update email.** The Claimant complains that Ms Kalsi-Serrao sent an update email to Ms Wheatcroft rather than waiting for the Claimant to do that.



98. Ms Wheatcroft asked Ms Kalsi-Serrao to meet with the Claimant to discuss new training initiatives and she was just updating Ms Wheatcroft on the outcome of that meeting.
99. The fact that she was still signing her emails as Area Manager is a simple matter of her still being Area Manager, albeit undertaking additional training coordination tasks requested by Ms Wheatcroft. It does not appear that the Claimant had an issue with that at that time.
100. Whatever the true scope of the Claimant's role was, viewed objectively, I cannot see how Ms Kalsi-Serrao sending that email to Ms Wheatcroft could be said to be her taking over the Claimant's role. I also accept Ms Kalsi-Serrao evidence that at her meeting with the Claimant it was agreed that Ms Kalsi-Serrao would send an update email to Ms Wheatcroft.
101. **Episode 3: - Platinum club.** This was a reward programme sitting outside the BYB training programme. The evidence of Ms Wheatcroft, which I accept, was that a stylist did not need to go through BYB training to get to Platinum Club, and equally being in Platinum Club did not mean a stylist did not have to do BYB training. Platinum Club members were rewarded with premium BYB training and one-to-one's sessions with the Claimant, all that were meant to be rolled out in 2020. However, these were two separate programmes. Therefore, Ms Kalsi-Serrao and Ms Paola Pinto being given by Ms Wheatcroft responsibilities for the Platinum Club strategy cannot be objectively viewed as them taking away any of the Claimant's responsibilities as far as the BYB scope of her role was concerned.
102. However, I accept that Platinum Club was the Claimant's brainchild, and in her mind, it was part of her broader Head of Salon Development role and her further salon development "non-training" actions - "*Work on developing NEW reward schemes for all levels of the salon*" (**see document at page 289 in the bundle**)
103. **Episode 4: "Maximise your Wage"**. As was accepted by the Claimant on cross-examination, it was a programme developed by Mr Geroge Phouli and on his departure from the business passed to Mr Adam Edem. It was not part of BYB. However, the Claimant contributed to the development and running of that programme until it was put on hold.
104. As with the L'Oreal training, if the Claimant's role were limited to BYB, the fact that Ms Wheatcroft gave the running of an education meeting on 21 January 2020 to Ms Kalsi-Serrao, cannot be said as showing that Ms Kalsi-Serrao was taking over the Claimant's role. However, if the Claimant's role were broader than BYB, "Maximise your Wage" programme would have fallen within the scope of her Head of Salon Development responsibilities. Therefore, replacing the Claimant as the lead on that programme by Ms Kalsi-Serrao objectively shows that part of her role was being given to Ms Kalsi-Serrao.
105. **Episode 5: Meeting with Jess Mitchell.** – The meeting was about Jess Mitchell's project and not about any of the Claimant's projects (whether

her role was limited to BYB or broader). Whether or not Ms Kalsi-Serrao took the lead at that meeting and the fact that she had received data from Ms Wheatcroft directly, looking objectively, cannot be said as Ms Kalsi-Serrao taking over the Claimant's role. It seems the Claimant was more concerned with the fact that Ms Kalsi-Serrao, being "*just*" an Area Manager, was acting at the same level with the Claimant, with her being the Head of Salon Development.

106. **Episode 6: 7 November 2019 Rush Colour course.** The Claimant complains about Ms Kalsi-Serrao "*dominating the day*". That was a colour workshop training that was a technical training and not part of BYB. Emails from that day all seem positive and very complimentary to the Claimant. Therefore, it appears to be the Claimant's perception of Ms Kalsi-Serrao taking on tasks outside the Area Manager role, rather than taking over her role.
107. **Episode 7: Third party discussions with L'Oreal and Orb.** L'Oreal is the same episode as I have already dealt with. Orb was a new supplier. Jess Mitchell organised a meeting with it. It was not related to BYB training programme. Therefore, on the basis that the Claimant role was limited to BYB, Ms Kalsi-Serrao involvement in that meeting cannot be said to be her taking over the Claimant's role. However, as with L'Oreal training, the issue turns on what the true scope of the Claimant's role was.
108. **Episode 8: Ms Kalsi-Serrao arranging training dates for the Claimant.** I find that was simply a matter of Ms Kalsi-Serrao coordinating the Claimant's availability for her BYB training and not directing the Claimant when and where to do her training, as if acting as her manager. Her manager at all material times remained Ms Wheatcroft, who had the ultimate say which salons should receive BYB training and when.
109. **Episode9: Ms Kalsi-Serrao telling the Claimant how to prepare her workshop.** This refers to the meeting on 29 January 2020 where it was discussed how Orb research should be translated into service training for chosen salons. I accept Ms Kalsi-Serrao evidence that it was not a discussion about the content of the Claimant's BYB training. Therefore, and again on the basis that the Claimant's role was limited to BYB, that discussion viewed objectively cannot be said to show that Ms Kalsi-Serrao was taking over the Claimant's role. However, as with Episodes 1, 3, 4, 6 and 7, the issue turns on the true scope of the Claimant's role agreed with Mr Phouli in January 2019.
110. The next three items of the list of issues are all concerned the meeting on 16 January 2020:

1.2 *The claimant's exclusion from the operational meeting held on 16 January 2020.*

1.3 *Failing to properly accommodate her at the operational meeting held on 16 January 2020, following having requested to be 'reinstated' as an invitee.*

1.4 *The announcement at that meeting, dated 16th January 2020 that Ms Kalsi-Serrao was to be recruited to lead the education plan including training and development (the Claimant's area and something that was never discussed with her).*

111. Having heard the parties' evidence, I find that the so-called "exclusion" was just a temporary administrative error, which was quickly rectified. I equally do not accept that there was some sinister design with respect to the number of available chairs and handouts. I accept Ms Wheatcroft evidence that she wanted the Claimant to be at the meeting and that the Claimant was treated no differently to other attendees.

112. With respect to the announcement that Ms Kalsi-Serrao was to be recruited to lead the education plan. By itself, there was nothing wrong in the Respondent's making that announcement, as it was in its plans. However, in my judgment, the announced role for Ms Kalsi-Serrao had an overlap with the Claimant's role as the Head of Salon Development. Ms Wheatcroft evidence at para 36 says (***my emphasis***):

*The role of Head of Talent Development did not replace the Claimant's role as Head of Salon Development. The salon development role ***was specifically focussed on salon development and training*** but excluded any leadership training, co-ordination of training or head office training, ***it was a delivery only role for salon teams***. ***The talent role was focused on salon***, head office and leadership development, ***this was not a delivery role but was instead largely administrative with some planning and creative aspects to it***.*

113. Even on that basis, it appears there is an overlap as both roles have salon development in its focus. Further, the Claimant's role appears to be limited to delivery only and stripped of any planning and creative aspects, which was not how she saw it.

114. I accept the Claimant's evidence that she was not aware of the Head of Talent Development role until it was formally announced on 4 February 2020, and that the role was not offered to her first. If it were, I would have expected to see some contemporaneous correspondence on this matter. Most likely the Claimant would have been asking why she was being offered what she thought was her role anyway. See for example her emails to Mr Phouli regarding L'Oreal training and three "Worlds" (paragraphs 25, 26 above).

1.5 *Her meeting with Ms Kalsi-Serrao on 29 January 2020 during which it was clear that Ms Kalsi-Serrao was assuming responsibility for training and treated the claimant as her 'assistant' and/or subordinate.*

115. Ms Kalsi-Serrao was in fact assuming training responsibilities, and that what she was appointed to do as part of her new Head of Talent Development role. These tasks were outside BYB training programme. Therefore, she was not encroaching on the Claimant's BYB content. I accept Ms Kalsi-

Serrao evidence that she did not say to the Claimant “*when you do well it makes me look good*”, or otherwise treated the Claimant as her subordinate. By then they were on the same level of seniority, and both reported directly to Ms Wheatcroft. However, this issue goes to the core of the dispute, namely Ms Kalsi-Serrao taking on the newly created role of Head of Talent Development role and the overlap of that role with Head of Salon Development role.

*1.6.Revising Ms Kalsi-Serrao’s job title to "Head of Talent Development" as stated on the ‘Leadership Update’ of 2020 sent to the whole company on 4 February 2020.*

116. There is no dispute that Ms Kalsi-Serrao was formally appointed to that role with the corresponding title. The question, however, is whether the content of Ms Kalsi-Serrao role was overlapping with the content of the Claimant’s role as the Head of the Salon Development. If the Claimant’s role were limited to the BYB training programme, there was no such overlap. If the Claimant’s role were broader, as it was discussed with Mr Phouli on 14 January 2019, there were obvious areas where the two roles overlapped.

*1.7.Failing to make any mention of the Claimant or her role (Head of Salon Development) in the ‘Leadership Update’ of 2020.*

117. I accept Ms Wheatcroft evidence that since, in her view, the Claimant role was not changing there was no need to make mention of that fact. Other people whose roles remained the same were also not mentioned in the announcement. Nevertheless, Head of Talent Development role was potentially overlapping with the Claimant’s role, as the Claimant saw it. Therefore, if the Claimant role were in fact broader than BYB then that overlap would have needed to be resolved and an announcement made as to who was responsible for what.

*1.8.The Respondent’s failure to provide the Claimant with a written job description despite several requests from the Claimant, both verbally and in writing*

118. I find that the Claimant asked the Respondent to provide her a job description in writing and orally on various occasions. It seems for various reasons the Respondent did not ascribe particular importance to those requests. Ms Wheatcroft evidence was that it was assumed that it was common knowledge and understanding of what the Claimant’s role was.

119. As these proceedings show the Respondent could not have been more wrong in making that assumption. I also do not understand how the Respondent could have made such an assumption, when the Claimant herself was repeatedly telling it that she did not understand what the true scope of her role was.

120. Not providing a job description when requested, and even when requested more than once, by itself, in my judgment, is not a serious enough conduct to treat it as destroying or seriously damaging the relationship of trust and confidence between the employer and the employee.

121. However, this issue must be viewed in the totality of the events and not in isolation. I consider the disconnect between the Claimant's title and the actual content of her role goes to the root of the problem, which ultimately resulted in this dispute. The Respondent's repeated failure to provide a job description or otherwise clarify the scope of the Claimant's role was a major factor in the Claimant's view that the Respondent's conduct was in breach of the implied duty of trust and confidence.

122. I, however, must assess the Respondent's conduct objectively and not by how the Claimant perceived it and whether it was reasonable or not for her to perceive it in that way. I will deal with this issue later in my judgment.

*1.9. The Respondent's actions which the Claimant alleges were to remove her as Head of Salon Development by offering her alternative roles, including as a salon manager, running her own franchise salon, setting up a salon based training school to only teach BYB, two different joint venture salons and a role as head of customer services*

123. Finally, I do not accept that offering alternative roles, which could be potentially more financially advantageous to the Claimant and help her to further her career could reasonably be said to be conduct calculated or is likely to destroy the relationship of trust and confidence. These were not roles the Claimant wanted to take, and that was her choice. I do not find that the Respondent put unreasonable pressure on the Claimant to accept any of these roles.

124. However, Mr Phouli's oral evidence showed that when the Claimant had turned down the Piccadilly salon franchise role, in his mind the relationship was over. His words were "*no going back*".

125. With some probing by Ms Balmelli on re-examination he tried to retreat from that position. However, his earlier and a rather emotional reaction on cross-examination as to how he could not understand how such a good offer could have been rejected by the Claimant, in my judgment, shows that in fact he was very disappointed by the Claimant's refusal and thought that it was the end, or at the very least the beginning of the end, of their relationship.

126. I find that after that episode, although the Respondent would have still been happy for the Claimant to continue with BYB training and to work as a stylist on her non-BYB days, there was no going back to the full scale of her Head of Salon Development role as it was discussed with Mr Phouli in January 2019.

127. Now, having gone through all these episodes and issues, I must step back and look at the entire picture. In cases like this, analysing each episode individually and weighing it to see whether it can amount to a breach of implied duty of trust and confidence and then adding them together carries the risk of "not seeing the woods for the trees".

128. I find the real issue in this case is a big disconnect between what I would describe as a creative/entrepreneurial vision of the Claimant's role and how that vision was translated into operational reality. The Claimant saw her Head of Salon Development role as what she drew on the whiteboard and her notepad (**see documents at pages 141a – 141e in the bundle**) and what Mr Phouli jotted on a piece of paper (**see document at pages 142-142a in the bundle**) during their meeting on 14 January 2019.
129. However, the Respondent ultimately saw her role as what it wrote in the offer letter. These appear to be two different jobs. The mark-up version of the job description prepared by the Claimant (**see document at pages 583-584 in the bundle**) is the best testimony to that. In that job description Ms Wheatcroft does not accept the purpose of the Claimant's role, and out of 14 main responsibilities accepts two as being within the scope of the role.
130. It appears that the Respondent wanted the Claimant through her BYB training programme to create more "*Sancia Haywards*" for its salons, when the Claimant wanted to be responsible for all elements of salon development with significant parts of that lying outside staff training.
131. Having successfully delivered her BYB courses, she was looking to get more involved in other elements of salon development work outside BYB. That was not happening, and as a result her frustration started to grow. As she wrote to Ms Wheatcroft, she did not want to be "*stuck in the classroom*".
132. On 9 June 2019, she raised her concerns with Mr Phouli. In my judgment, that was the key question which underpins this dispute. It was never properly answered by the Respondent. Her question was: "*Am I a BYB trainer with a fancy title or are you actually looking for me to help to develop the salons?*"
133. On 27 June 2019, she wrote to Ms Wheatcroft in the same vein (see paragraph 29 above). She listed her non-BYB projects (see paragraph 30 above). These items are very much in line with what one can see on the whiteboard her notes (**pages 141a – 141e of the bundle**) and Mr Phouli's note (**pages 142 – 142a of the bundle**), and what Mr Phouli called in his evidence "*the whole thing*".
134. With Ms Balmelli skilful re-examination he said that BYB was the objective. I accept that BYB was the initial objective, and that programme was what the Claimant got on with first. However, the contemporaneous documents clearly show that "*the whole thing*" was much more than just BYB.
135. I asked Mr Phouli what his note of the meeting was (**pages 142 – 142a of the bundle**). His answer was that it was his interpretation of how to build a successful salon. The Claimant was given the title Head of Salon Development. The vision, the purpose of the role and the title all seem to match.

136. That further accords with the Claimant's earlier development plan she pitched to Mr Phouli in March 2018 ( **see document at pages 89a – 89f in the bundle**), and her subsequent action plan she shared with Ms Wheatcroft ( **see document at pages 230-232 in the bundle**).
137. The graphic and written interpretation of the Claimant's role, as can be seen from those documents, in my judgment, unequivocally shows that her role, as it was discussed with Mr Phouli, was much greater than just BYB training.
138. In all these documents, L'Oreal and Respondent's own products are mentioned as falling within the scope of salon development. The fact that the Claimant might not have been asked to attend senior management meetings with L'Oreal, as Mr Phouli said in his evidence, does not take the whole relationship with L'Oreal and their offerings outside the overall salon development scope. FOH, supplier relationship, waste management are all listed too as part of that scope.
139. On 8 July 2019, Ms Wheatcroft replied to the Claimant setting out projects for the Claimant. All of them were concerned phase 2 of BYB training. None of other salon development projects are included or even acknowledged as being within the scope of her role.
140. In Ms Wheatcroft's view of the scope of the Claimant role was:
- Develop the BYB training programme and roll this out Work with individual salons to identify issues relating to BYB and embed this way of working.*
- Escalate problems in those individual salons to the COO and the Ops team for resolution.*
141. This is essentially a trainer/quality assessor role.
142. I accept that the Respondent highly valued the Claimant and wanted to keep her and keep her happy, but because of the disconnect I mentioned in paragraph 128 above, the Claimant was time and again being put back into her "BYB box". When other people started to arrive on the scene and taking on non-BYB pieces of "*the whole thing*", and when, on top of that, the Claimant was being offered alternative roles to take one, she became more anxious and confused about the true scope of her role and her future at the Respondent.
143. It became apparent to her that she was seen by the Respondent as a BYB trainer, albeit a very highly regarded trainer, with a fancy title, and that is not what she thought "the deal" she had made with Mr Phouli was.
144. However, I must decide what "the deal" was, looking at it objectively? As far as contract interpretation is concerned, it does not matter what the Claimant subjectively thought she had agreed with Mr Phouli as to the scope of her role.

145. I must look at the contract and decide what “the deal” was based on the usual rules of construction and interpretation. The contract is clear. The offer letter describes her duties as “*BYB training 4 days a week + 1 Day salon work*”. That was what the Respondent contractually offered to the Claimant. In fact, that was what she had asked for in her email of 2 January 2019. However, that email had been sent before the brainstorming session with Mr Phouli on 14 January 2019, which, in my judgment, fundamentally changed the position.
146. Looking at the written contract, on the face of it, by not giving to the Claimant other responsibilities lying outside BYB training, the Respondent acted in accordance with the terms of the contract, and therefore was not in breach of any of the express terms.
147. The Claimant did not plead that there was a collateral verbal agreement on different terms, or that her contract was partially written and partially oral, or otherwise incorporated terms to be deduced from the brainstorming session with Mr Phouli on 14 January 2019.
148. She said she trusted Mr Phouli. She assumed that what she had discussed with him at the meeting would be implemented in her contract. However, that is not sufficient for me to find that a separate oral agreement was concluded at the meeting, and that such oral agreement was not superseded by the written contract signed by the Claimant.
149. In any event, that is not how the Claimant put her case. It would be impermissible for me to find that there was such a binding oral agreement, when it was not one of the issues I was asked to decide.
150. However, in my judgment, the issue does not turn on whether there was a binding oral agreement on a broader scope of the Claimant’s role. The implied duty of trust and confidence is an overarching duty. It exists separately and independently of other express and implied terms of the contract.
151. Therefore, because the Claimant’s employment contract does not contain terms which expressly give her broader responsibilities than BYB training, does not mean that the employer’s conduct in limiting the scope of her role can never amount to a breach of the implied term of trust and confidence.
152. This brings me to the central issue I need to answer, namely whether looking at the totality of the Respondent’s conduct against the relevant background, and assessing that conduct objectively, the Respondent had a reasonable and proper cause to engage in such conduct and, if not, whether the conduct in question was calculated or likely to destroy or seriously damage the relationship of trust and confidence.



153. I take into account that the Respondent was undergoing changes in its business. I also take into account that it operates in a creative business environment. Mr Phouli is a man of vision and strategy, and Ms Wheatcroft was his operation person to put his ideas into practice and run the operational side of the business.
154. I also accept that the Respondent highly valued the Claimant's skills as a stylist and wanted to keep her and indeed "*lock her in*" through the Piccadilly franchise deal. I find that all the conduct complained of was not in any way meant by the Respondent to drive the Claimant out of the organisation.
155. I also find that on some occasions in reacting to certain episodes, such as being uninvited from the meeting on 16 January 2020, or not having a dedicated chair or available handouts, or how Ms Kalsi-Serrao conducted herself in meetings, or worded her update emails, the Claimant simply misinterpreted those events.
156. On the other hand, I find that Mr Phouli during the brainstorming session on 14 January 2019 led the Claimant to believe that her role was going to be a great deal broader and all-encompassing than just creating and running BYB training courses. Mr Phouli acknowledges that in his witness statement (**my emphasis**).

**The Claimant's role had effectively been one of her own making as the Respondent had not had a Head of Salon Development before. I had not issued the Claimant with a job description as I considered her role was to develop and implement the plans, she had discussed with me the previous year as well as any others that we might agree upon in file future.**

157. The plans were those reflected on the whiteboard and the notes from the meeting. They show a much broader remit than just BYB training. That, in my judgment, created a legitimate expectation on the part of the Claimant that the full extent of her role was as reflected on the whiteboard and the notes. It appears it was a shared vision with Mr Phouli.
158. Very unfortunately, that vision was not properly translated into the reality. It was not recorded in her contract, hence her repeated requests for a job description and to clarify her role. It was not implemented in practice. She was not allowed to take on projects outside BYB, and all her future projects were all scoped within the framework of BYB training.
159. I understand and accept that Mr Phouli for personal reasons might not have been available to oversee his vision being implemented in practice. Ms Wheatcroft was not at the 14 January meeting between the Claimant and Mr Phouli. In preparing the Claimant's new contract she might not have appreciated the full extent of what had been discussed and agreed at that meeting. Her offer letter appears to record what the Claimant had asked for in her email of 2 January 2019 before her meeting with Mr Phouli.
160. Nevertheless, I find that the expectations created by the Respondent as to the scope of the Claimant's role and the Respondent's subsequent

conduct of limiting the Claimant's role to essentially creating and running BYB courses and doing additional ad-hoc tasks, viewed objectively, did have the effect of destroying or at any rate seriously damaging the relationship of trust and confidence.

161. I also find that against that background, the Respondent did not have a reasonable and proper cause to engage in such conduct. I do accept that in undertaking changes to the Respondent's operations and business structure, Ms Wheatcroft operated under a genuine belief that the Claimant role was limited to BYB training, as set out in her contract. However, I must look at the Respondent's conduct as the employer of the Claimant, and not just what Ms Wheatcroft's knowledge or intentions were.

162. In the circumstances where Mr Phouli led the Claimant to believe that her role was much broader than BYB, and she was given the commensurate title of Head of Salon Development, in my judgment, the Respondent did not have a proper and reasonable course to limit her role to BYB development and training.

163. I shall now return to the list of matters upon which the Claimant relies in support of her case for breach of the implied duty of trust and confidence. Based on my finding that the true scope of the Claimant's role, as it was offered to her by Mr Phouli on 14 January 2019, was broader than BYB training, the Respondent's conduct complained of, except for:

- (i) Episodes 2, 5, 6 and 8 under issue 1.1.
- (ii) issue 1.2,
- (iii) issue 1.3, and
- (iv) issue 1.5

was conduct which taken together and viewed objectively had the effect of destroying or seriously damaging the relationship of trust and confidence.

164. It follows, that I find that the Respondent was in breach of the implied duty of trust and confidence.

### **Last Straw**

*2. Was the failure to mention the Claimant in the 'Leadership Update' of 2020 and the announcement of Ms Kalsi-Serrao (including the description of such role) in the 'Leadership Update' of 2020 the 'last straw' incident?*

165. I find that by 4 February 2020 the Respondent was already in breach of the implied term of trust and confidence. By that stage, the operational changes were all set in motion, and it was clear that the Claimant's role was not going to be Head of Salon Development, of its full scope agreed with Mr Phouli. She will remain a BYB educator with a fancy title.

166. The announcement of 4 February 2020 sealed that by making that position public. The announcement added to the totality of the events leading up to that position. It was the last straw.
167. The fact that the Claimant was given the opportunity to discuss her concerns with Ms Wheatcroft is not relevant. As the Claimant put it herself, it was “*too little too late*”. Once the contract is repudiated through a breach of the implied duty of trust and confidence the breach cannot be subsequently cured.

### **Causation and Affirmation**

168. The next question I must answer is whether the Claimant resigned in response to the Respondent’s fundamental breach. I am satisfied that the Claimant resignation was for that very reason.
169. I am equally satisfied that the Claimant did not affirm the contract by waiting between the last straw episode on 4<sup>th</sup> February 2020 and her resignation on 28 February 2020. She was first on holiday and then off sick, suffering from a high level of anxiety. She did not act in any way that could cause me to conclude that she was accepting the breach and was happy to proceed on the basis of her role being limited to BYB training.
170. I do not accept Ms Balmelli submission that her email exchange of email of 5 February 2020 and her not saying that she would not attend the meeting, looking objectively, indicate the Claimant’s affirmation of the breach.
171. Her letter of resignation is clear. I do not need to go behind the words in the letter or decide what the Claimant’s frame of mind was when she wrote it, or as Ms Balmelli argues, whether she was thinking objectively or subjectively. The Claimant decided that the Respondent was in fundamental breach contract and resigned in response to that breach. It is crystal clear from reading her resignation letter.
172. I also do not accept that by not resigning earlier the Claimant affirmed individual breaches such as, for example, the Respondent not providing her with a job description. All those prior episodes were part of the same pattern of conduct by the Respondent, which ultimately amounted to a fundamental breach. They cannot be viewed in isolation or have a separate “affirmation clock” running against each of them individually.

### **Unfair dismissal**

173. The Respondent does not advance a potentially fair reason for the dismissal. It follows, that the dismissal was unfair, and the Respondent must pay to the Claimant compensation for unfair dismissal.
174. The Claimant’s compensation for unfair dismissal shall be determined (if not agreed) at a remedies hearing to be listed by the Tribunal on a first available date (now listed for 20 August 2021).

175. For the purposes of assisting the tribunal to determine just and equitable compensation, based on the evidence I heard, on the balance of probabilities, I make the following findings. Considering how highly the Claimant was valued by the Respondent, I find that:

- a. she would have been put on furlough in March 2020 at 80% of pay, subject to the maximum of £2,500, until the salon re-opened in July 2020, at which point she would have been asked to come back to work as a stylist,
- b. she would not have been made redundant in October 2020, and
- c. she would have been put on furlough again on the same terms as in March 2020 when the salon had to close for the second lockdown in November 2020 until the salon reopened in May 2021.

### **Wrongful dismissal**

176. Under her contract of employment, the Claimant was entitled to nine weeks' notice. She was dismissed without notice or pay in lieu. Therefore, the Respondent was in breach of contract and must pay to the Claimant damages equal to her net pay for the notice period, calculated in accordance with the statutory formula (ss 86-89 ERA).

**Employment Judge P Klimov  
27 June 2021**

Sent to the parties on:  
28/06/2021

For the Tribunals Office:

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