Case No: 2302877/19

EMPLOYMENT TRIBUNALS

Claimant: **Ms Jasmine Stunell**

Respondent: **Leo Bancroft Salon Ltd**

By CVP On: **14-16 July 2021**

Before: **Employment Judge Martin**

Representation
Claimant: **In person assisted by her mother Ms Lisa Whiteside and a family friend Mr Ian Whitfield**

Respondent: **Mr Alev - Counsel**

REASONS

Oral reasons were provided at the end of the hearing. These written reasons are provided at the request of the Claimant.

1. By a claim form presented on 24 July 2019, the Claimant claims age discrimination, constructive unfair dismissal, and wages.

The hearing

2. The Tribunal had before it an agreed bundle of documents comprising 211 pages and witness statements from the Claimant, her mother Mrs Whiteside and for the Respondent from Mr Leo Bancroft and Ms Amy Frith.

3. The Claimant was assisted by her mother and a family friend as set out above. Mr Whitfield cross examined the Respondent's witnesses and gave submissions on the Claimant's behalf.

4. During the hearing there were several times when the Claimant's mental health was raised. The Tribunal reminds itself that despite the many references to the Claimant's mental health that disability discrimination is one of the claims the Claimant has brought.

The Issues

1. The issues were discussed at a preliminary hearing on 14 December 2019 and the list of issues was set out in a list prepared by the Respondent and supplemented by additional information provided by the Claimant.

The relevant law

Equality Act 2010

Direct discrimination

13 Direct discrimination

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

Burden of Proof

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) – (f) . . . .

2. In considering the claim of direct discrimination, the first task of the Tribunal is to decide whether on the primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, there is sufficient evidence from which the Tribunal could (but not necessarily would) reasonably conclude that there had been unlawful discrimination. If the Claimant can prove such facts, then the burden of proof passes to the Respondent to show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010. In each case, the matter is to be determined on a balance of probabilities. The fact that a claimant has a protected characteristic and that there has been a difference in treatment by comparison with another person who does not have that characteristic will not necessarily be sufficient to establish unlawful discrimination. In all cases the task of the Tribunal is to ascertain the

reasons for the treatment in question and whether it was because of the protected characteristic.

3. An appropriate comparator is someone in same situation as the Claimant but who does not share the Claimant's protected characteristic

Constructive unfair dismissal

4. s95 Employment Rights Act 1996 provides that an employee is dismissed by his employer if the contract under which he or she is employed is terminated by the employer (whether with or without notice) or the employee 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.

5. ***Western Excavating (ECC) Ltd v Sharp*** **[1978] ICR 221 CA**, held that an employee would only be entitled to claim that he or she had been constructively dismissed where the employer was guilty of a 'significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract'. It was not sufficient that the employer was guilty of unreasonable conduct - he must be guilty of a breach of an actual term of the contract, and the breach must be serious enough to be said to be 'fundamental' or 'repudiatory'

6. ***Woods v WM Car Services (Peterborough) Ltd*** **[1981] IRLR 347** held that to constitute a breach it is not necessary that the employer intended any repudiation of the contract: the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

7. ***Lewis v Motorworld Garages Ltd*** **[1985] IRLR 465** held that significant breaches by an employer of express terms of an employment contract, although waived by the employee, can still form part of a series of actions which cumulatively breach the implied obligation of trust and confidence**.**

Unauthorised deductions from wages

Section 13 of the Employment Rights Act 1996 states an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction

Findings of fact and conclusion

8. The Tribunal found the following facts and come to the following conclusions on the balance of probabilities having heard the evidence, considered the documents taken to and the submissions made by both parties. These reasons are limited to matters which are relevant to the issues set out above and necessary to explain the decision reached. All evidence was heard and considered even if not specifically recorded here.

9. The Respondent is a hairdressing salon which at the time the Claimant was employed, employed approximately 30 staff. Of these, 10 were apprentices

studying for a NVQ qualification with ITS being the external apprenticeship provider.

10. The Claimant was introduced to the Respondent by Ross, her social worker, who wanted to give the Claimant stability as she had issues both at home and at school. His wife was a stylist working for the Respondent and he asked Mr Bancroft if he would take the Claimant on. Mr Bancroft agreed, and the Claimant started working on Saturdays from 7 January 2017. She was 16 years old.

11. In June 2017, the Respondent agreed to take the Claimant on as an apprentice from August 2017. It was a precursor for the formal apprenticeship agreement to be entered into, that the Claimant would be employed by the Respondent on a 3-month probationary period. This was something that ITS (the external course provider) required so that both parties could see if it was working out to reduce the dropout rate during the apprenticeship agreement. The Claimant understood this was a requirement. The probation period started on 15 August 2017. The three months probationary period was therefore due to end on 15 November 2017.

12. Even though the Claimant was not officially an apprentice during her probationary period, she was treated by the Respondent as if she was and received the on-the-job training that all other apprentices and would be apprentices had.

13. The Claimant's performance was monitored in the same way as the other apprentices. Mr Bancroft held Performance Development Meetings (PDM) with them which were recorded and signed by the employee. At the end of the probationary period there were some performance issues as set out in the record of the PDM held on 18 November 2017. These included the Claimant hiding in day, her lateness, her general attitude, her use of her mobile phone and her attitude to clients.

14. The record records that Mr Bancroft asked the Claimant if she wanted to be a hairdresser and records her reply that she did, but she had difficulties at home. The Claimant acknowledged the performance issues by promising to try harder and said that despite her performance she did want to be hairdresser. An action plan was put in place in order that the Claimant could improve. It was agreed that the Claimant and the Respondent would revisit the question of the Claimant starting her apprenticeship in New Year. ITS did not visit the Respondent as part of the apprentice sign up until January 2021.The Claimant's performance did improve and on 12 February 2018 her apprenticeship formally started, and a formal agreement signed.

15. From 15 August 2017 to 12 February 2018 the Claimant was paid at the apprentice rate when she should have been paid the national minimum wage which was higher. The Respondent accepts it made a mistake. At the time there was no complaint made and it was only after the Claimant left the Respondent's employment and contacted ACAS that she raised this.

ACAS notified the Respondent who immediately investigated and realised the mistake it had made. The Respondent quickly made a payment of what it believed was the correct amount. We accept the Respondent's evidence that this mistake happened because Mr Bancroft filled out the new starter form for the Claimant (and also for the other would-be apprentices) incorrectly saying that they were apprentices rather than on probation pending an apprenticeship agreement. The bookkeeper took the information from the starter form which said they were apprentices and paid them at the apprentice rate.

16. It was identified during the hearing that the key dispute relating to payment was about how many hours the Claimant worked. As set out above, the Respondent trains apprentices on the shop floor during working hours, and on some Mondays when the salon is shut. The Claimant says she was given training every Monday when the salon was shut, and no hours were given back meaning she was working 46 hours per week. Her working hours should be 39 hours per week which are the hours the salon was open.

17. The Respondent's evidence is that training was not done every Monday and that when apprentices attended training on a Monday the hours spent training were given back by altering the start and finish time by 30 minutes each. If the Claimant arrived later than her adjusted start time, then she would have to make up the time at the end of the day so may leave work later than other apprentices who had been on training and had their finish time adjusted to finish earlier.

18. The Tribunal was shown print outs from the Respondent's computer system showing that time had been booked out for the Claimant at the start and end of the day. Mr Bancroft explained that this meant that the Claimant was coming in later as he had booked this time out. His evidence is that he has had this system in place for about 10 years. The Claimant said that this computer system was not in place during her employment.

19. On balance Tribunal accepts the Respondent's evidence and find that the computer system was in place at the time the Claimant was working for the Respondent and that Mr Bancroft used a system of booking out apprentices when they had their hours adjusted. The Tribunal finds that time spent training on a Monday was given back to the Claimant during the week by adjustment to the start and finish times.

20. Having established that the Claimant was given time back for the hours she worked on a Monday, the Tribunal accepts the explanation given by Mr Bancroft about the amount he paid to the Claimant to compensate her for the underpayment in this period. Mr Bancroft went through his calculations very clearly and gave good, detailed, and cogent explanations of his spreadsheet showing his calculations. The Tribunal accepts his evidence. The Tribunal find that the Claimant worked 39 hours per week and has now been paid for these hours. This part of the Claimant's claim is therefore dismissed.

21. As part of his investigation into this matter, Mr Bancroft realised that although he had booked the Claimant out on the system, she had still been paid for this time. In effect it meant that although the Claimant did not work when booked out, she was still paid, thus resulting in her being overpaid. This affected all the apprentices, and the overpayment was in the region of about £500 each. Mr Bancroft said he did not raise this with the apprentices or try to claw the money back as he recognised that they were on a low wage already and it would be hard for them to pay it back.

22. Another reason why the Tribunal accepts the Respondent's evidence is that the Claimant's contracted hours matched the salon opening hours. The Claimant complained that she had to stay at work when the other apprentices were allowed to leave work. Mr Bancroft said this is because she came in late in the morning and had to make the time up. This accords with Mr Bancroft's explanation about the hours being given back as if the salon was open when the Claimant had to work later, it follows that the Claimant had been given an adjusted finish time to finish earlier.

Discrimination on the protected characteristic of age

23. At the time the Claimant was employed by the Respondent, there were about 30 members of staff. On the floor were about 10 apprentices with about 8 of them aged between 18 and 20 and the remainder aged between 16 and 18. There were 10 Stylists who were typically aged between 20 and 30. There were three receptionists who were aged between 30 and 40. In addition, there was Mr Bancroft and his wife who were over 40. Of the stylists employed around 70% of them had been fully trained by the Respondent via an apprenticeship scheme.

24. The Claimant set out her comparators in additional information and has identified them as senior stylists and Kirsty (who is Mr Bancroft's wife and is not a hairdresser), Amy and Lucy. Appropriate comparators are those who are in the same position as the Claimant but who do not share her protected characteristic. These would be other apprentices who were older. For example, those aged 18-20. The senior stylists are not appropriate comparators as they are not apprentices undergoing training and Kirsty is not even a hairdresser.

25. However, the Tribunal then considered the allegations on the basis that it had found that the comparators were correct comparators. The allegations are:

    a. The Claimant was denied breaks when comparators took theirs.

        i. The Tribunal heard evidence that breaks are not taken at the same time every day and are taken as and when the work allows. The Tribunal finds that it is inevitable that breaks would differ between apprentices and stylists and even between apprentices themselves, depending on what clients

are present and what services the clients were having. This is to do with age but the management of the salon.

b. That deductions were made from the Claimant's wages

i. This has been dealt with already and the Tribunal finds that this was not to do with age but because the Respondent made a genuine mistake.

c. That the Claimant was talked down to and called "dimlow" and sworn at.

i. The agreed definition of the word "dimlo" is stupid. Even if this was said (which is denied by the Respondent, it is not related to age. The Tribunal heard evidence from Ms Frith who described salon and the working environment. The Claimant did not put to her or to Mr Bancroft her allegation that she was sworn at. In her evidence the Claimant said she '*felt'* it was because of her age but accepted that she had no evidence to support this. There was also no evidence that the Claimant was called 'dimlo' or sworn at because of her age.

d. That Amy Frith told the Claimant to 'grow up' and pull herself together. This was translated in the Claimant's submission to being told she was childish but that word not in the issue for Tribunal to determine as it is not the allegation in the list of issues.

i. The Claimant says this was said to her through a toilet door when she was being sick. This was put to Ms Frith who said she as a phobia about people being sick and that if the Claimant had been being sick then she would have been "*out of the door*". She denied saying these words.

ii. The Tribunal does not find the words 'grow up' and 'pull yourself together' in themselves are related to age and can be said to anyone and particularly to someone older who is acting in a childish way.

iii. The Tribunal found Ms Frith's evidence to be credible and does not find that the Claimant has proved this aspect of her claim.

e. That in a group chat it was said that the Claimant should be replaced by someone more reliable.

i. The group chat included the other apprentices who are still friends with the Claimant. Ms Frith said that they had become annoyed because the Claimant was often late, and often left

the salon during working hours which meant that they had to pick up her work in addition to their own.

ii. The Tribunal finds that this is not related to age but to the Claimant's conduct in being late and disappearing from work at various times during the day and would have been said about any member of staff who was late and disappeared without explanation during the day.

26. Therefore, even if the Tribunal had found that the senior staff were appropriate comparators, then the Claimant's claims would have failed in any event.

Constructive unfair dismissal

27. To succeed in a claim of constructive unfair dismissal the Claimant must show that she resigned in response to a fundamental breach of contract by the Respondent which showed the Respondent no longer wished to be bound by the contract. She must show that she resigned in response to that breach and did not affirm the breach.

28. The Tribunal has considered the reasons for resigning put forward by the Claimant in turn and then looked to see whether taken together they formed a fundamental breach of contract. The reasons were set out by the Claimant in additional information provided following the preliminary hearing held on 14 December 2020.

29. *That the Claimant had to work 46 hours per week*

a. As set out above the Tribunal has found that the Claimant was not required to work 36 hours a week and that any time spent training on a Monday was given back by way of adjusted start and finish times on the other days of the week.

30. That the Claimant was not allowed to take breaks which were missed

a. As set out above, there is no evidence that his happened. As already found above, breaks were taken at different times

31. That the Claimant was required to work past finishing time

a. The Tribunal has already found only did this only happened when the Claimant arrive at work late in the morning. Given that the Claimant was normally working the salon hours, it follows that if she had to work past her finishing time then the salon must have been open later which confirms the Tribunal's view already reached, that there was an adjustment to her working hours.

32. Breach of the minimum wage

a. The Respondent has agreed that it did not pay the Claimant correctly from August 2017 to February 2018. However, the evidence was that the Claimant did not know of this at the time she resigned so this not in her mind as a reason for resigning.

33. That the Respondent breached the Claimant's apprentice contract

a. The Claimant has said that the breach was that she was not given an apprenticeship contract in August 2017 when she was told that she would be. However, if the contract not in place, then there can be no breach of it. If she means that there was a breach of an agreement made in June 17 that she would be offered an apprenticeship agreement, the C agreed that the agreement would be subject to a three-month probationary period before the formal NVQ apprenticeship agreement was entered into. This three-month probation would have ended in November 2019, however there were issues with the Claimant's performance and ITS did not visit the Respondent in December 2019. The Claimant accepted in her review with the Respondent that her performance needed to improve. There was no complaint about this during her employment. In any event this happened a long time before her employment ended and she then entered into the agreement and carried on working without any complaint. If there had been a breach the Tribunal find that she had affirmed that breach.

34. That the Claimant was not provided with training

a. It was accepted that the Claimant was only 9% behind on her training indicating that training was given. This deficit was mainly to do with her self-study particularly in English and Maths as mentioned ITS visit log dated 11 Feb 2019.

35. There were many examples in the bundle of Mr Bancroft being very supportive of the Claimant. He knew she had a difficult home life, and it is clear he wanted to help the Claimant. For example, after the Claimant walked out on her last day of employment, he sent her a WhatsApp message:

"Hi Jas,

I understand you may be frustrated today, We all have bad days, but please remember WHY I chose you to be part of my team. You have HUGE potential and a very bright future ahead of you which is why I have such high expectations of you.

Please don't throw it all away. I would love to hear from you why you walked out today.

I hope your ok.
Leo"

36. Before this, in response to a text from the Claimant explaining why she had walked out of work on another occasion which she said was to do with family issues at home and her not sleeping, (I have not set out this message in full as it contains some personal information) Mr Bancroft sent the following message:

"Okay, take a deep breath everything will be fine. I will explain to Kristen and Hannah today how we first met and I have no doubt it will really help them and everyone truly understand what happened today. It will be fine x

I know when things get really tough for you Jas you walk away but when it comes to work you really can't do that. Those girls love you - like family - they need you.

I will take today as a blip - a moment of madness but your reliability is absolutely key to your future success. I really hope you understand that.

I will tell the girls your situation and that you will return to work tomorrow. Please rest xxxx"

37. The Claimant walked out of work on 17 April 2019. Mr Bancroft sent her this message in response:

"Jasmine,

I have been informed that you walked out of work again today.

I would like to give you an opportunity to return to work with a parent or elder if you so wish and and explain to me your poor attendance record, Your social Media posts and reasons for walking out today and why you consitantly fail to follow our company rules of calling in when sick.

Your sickness record alone makes it abduntly clear you are not currently dedicated enough to complete your NVQ and If you do not wish to return to work and attend this meeting I will make the nessary arrangements with ITS to keep/ pass on your NVQ folder to another Salon or College of you choice.

I look forward to hearing from you.
Regards
Leo" (sic)

38. The Tribunal finds these messages, and others in the bundle, were supportive. Mr Bancroft was very clear about what he wanted to talk to the Claimant about, and she chose not to attend a meeting with him. The inference is that she did not want to account for her actions.

39. Even had these matters happened as alleged by the Claimant did happen, the Claimant affirmed those breaches by continuing work and accept pay and training without complaining about them. The Tribunal find them not to individually be breaches of contract or cumulatively when looked at together. The Tribunal find that the Claimant resigned and was not constructively dismissed by the Respondent.

General comments

40. This is a case where the Claimant's evidence and the Respondent's evidence differed and where there was little or no documentary evidence to help resolve the differences. In these situations, the Tribunal must decide whose evidence it finds more likely to be correct on the balance of probabilities.

41. The Tribunal found Mr Bancroft's evidence to be consistent, credible, and reliable. Similarly, the Tribunal accepted the evidence of Ms Frith on the same basis. The Tribunal were taken to various messages from the Claimant that indicated that issues at work arose not from bullying or discrimination, but because of personal matters at home.

42. The Tribunal finds that Mr Bancroft is committed to training and working with young people as has an ongoing apprenticeship programme and 70% of his stylists had been fully trained by him. This is a very good retention record. The Claimant did not dispute her sickness record when referred to it and this was much higher than other staff who did not take much time off sick at all. In her evidence the Claimant referred to the Respondent taking staff, but not her, on holidays. There was a Redkin Symposium which all stylists went to. This was before the Claimant joined the Respondent. I am satisfied that the decision about who attended was not to do with age but to do with the qualification of the stylists. The Claimant alleged that Mr Bancroft was not on the salon floor much. Mr Bancroft disagreed. Ms Frith said he was regularly on the shop floor. On balance the Tribunal find that he was regularly on the shop floor and would help out, when necessary, by sweeping up, and assisting the staff generally.

43. Mr Whitfield cross examined the Respondent's witnesses. In one question he gave an explanation for the treatment the Claimant says she received when asking Mr Bancroft, a question. He asked***, "****Other members of staff were jealous of the attention you gave to the Claimant which was not given to them and this was the underlying reason she was bullied and treated so badly."* (This is taken from the notes of Employment Judge Martin). This question gives an explanation about why the Claimant says she was treated as she says she was, which is not to do with age.

44. The Claimant criticised the Respondent for not calling other staff to give evidence. However, she also did not call other apprentices who had worked with her, some of whom are no longer working for the Respondent and with whom she said she was still friends. She talked about other messages which she said were discriminatory on the grounds of age, which she did not have as she said she had changed her phone and it was not backed up. However, she also made no effort to obtain them from the other apprentices with whom she is still friends. When asked about this, she said she had not asked them either to give evidence or if they still had the messages. She also did not call her social worker, Ross, who could have given evidence on her behalf. It would be surprising if she did not mention any bullying or

discrimination to him as he had introduced her to the salon. The Tribunal has not made any inferences for either party about them not calling other witnesses. The Tribunal's decision has been made based on the evidence that was before it.

45. Given that the Tribunal has found the Claimant was given hours back during the week in lieu of training on a Monday, the Tribunal finds that Mr Bancroft was correct in his evidence that the Claimant and her colleagues were overpaid. Again, Mr Bancroft accepts he made a mistake in the way he recorded the time given back and that as a result the Claimant and her colleagues were paid for the time they were given in lieu. He did not attempt to claw this money back as he was legally entitled to do as he said he did not want to as it was his mistake, and they were on a low wage. This is a further example of the care he has for his staff and to his credibility as a witness.

46. In all the circumstances, the Tribunal finds that the Claimant's claims are not well founded and are dismissed.

_____
Employment Judge Martin
Date: 3 August 2021

Sent to the parties on:
Date: 9 August 2021

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Michael Chandler
For the Tribunal Office