EMPLOYMENT TRIBUNALS

Claimant: Ms S Bennett

Respondent: Sandra Nelson T/A Salon 22

Heard at: via Common Video Platform **On:** 14th May 2020, 21st June 2020

Before: Employment Judge AEPitt

Representation
Claimant: in Person
Respondent: Mrs. G Kyle, HR Consultant

JUDGMENT having been sent to the parties on 30 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim by Sarah Bennett, the claimant date of birth, 24th April 1995. She was employed by the respondent as a hairdresser from 1st July 2001 until 6th September 2020. The claimant claims unfair, constructive dismissal pursuant to section 98 Employment Rights Act 1996.

2. The claimant represented herself, and Mrs Kyle, an HR Consultant, represented the respondent. I was provided with numerous documents, including invite letters to meetings, minutes of meetings, a dismissal letter and Facebook posts. I read witness statements and heard evidence from Sandra Nelson, the owner of Salon 22, Andrew Skinner, a Business Consultant; Nikki Riley, who owns Reillys Hair Boutique, where the claimant now works and Lindsay Simmons, a friend of the claimant who accompanied her to meetings.

<u>The Facts</u>

3. The respondent is a small hairdressing salon in the town of Redcar. It is owned by Ms Nelson, although her partner Ms Richardson has assisted with finances. At the time of these events, she employed the claimant and one

other person as hairdressers. There was also an apprentice working under an apprenticeship contract.

4. The claimant did not have a written employment contract or any terms and conditions as required under Section 1 Employment Rights Act 1996. She worked 21 hours a week across three days. In addition, she claimed benefits. She had to work a minimum of 16 hours per week to be entitled to make a claim. She required certainty in her working hours because of her childcare arrangements. The respondent was aware of these issues.

5. The Salon was struggling prior to Covid 19 restrictions being imposed. The imposition of restrictions and the opportunity for grants from the Government allowed the Salon to continue trading throughout the pandemic under the Government restrictions. Following the initial lockdown period, it became apparent to the respondent that it could not continue to trade in the way it had, and it needed to change working practices. Mr Skinner was instructed in a consultative position to advise on matters going forward.

6. He undertook a full review of the business and advised the respondent on the best course of action. His conclusion was the business would not survive in its present format. He advised Ms Nelson that the alternatives were for her employees to rent a chair or give them a zero-hours contract. He advised that if these models were not followed, the respondent would be in financial difficulties, probably insolvent and having to close.

7. He ultimately proposed staff become self employed and 'rent a chair'. That is to say, an individual rents space, namely a chair, in a salon to carry out their own business. Practices vary in terms of who pays for products and who advertises. It is essentially a change from being employed and a guaranteed income to becoming self employed with no guaranteed income. This is a common practice in the hairdressing industry.

8. The staff first became aware of issues on 20th May 2020 when a meeting was convened with them to discuss the future of the business. Present at this meeting were the two employees, Sandra Nelson, the owner and her partner Ms Richardson. I am satisfied during this meeting the employees were informed how the company operated was to change. The proposal was that the employees rent a chair instead of being employed. I am satisfied on the evidence I have heard that this was presented to the employees as a fait accompli insofar as there was no other option presented to the employees at this meeting in May.

9. A second meeting was held with the claimant, Mr Skinner, Ms Nelson and Ms Richardson to discuss the benefits of renting a chair and how she could potentially increase her income. The claimant expressed concern that she would be unable to meet her commitments concerning childcare because her income may drop. The claimant was told it would be for a six-month trial; if unsuccessful, she could leave the respondent and seek employment elsewhere. The discussion was sufficiently detailed to include the probationary period and the cost of the chair at £115 at per week. This led

me to conclude that no other options were being put forward or discussed at this time.

10. On 8th August 2020, the claimant indicated that she did not want to rent a chair. She was the only member of staff who declined. Miss Nelson advised her to contact HMRC to see how they could help her. The claimant felt like Ms Nelson was not considering her concerns and she felt guilty and pressurised.

11. On 1st September 2020, the respondent sent a formal letter to the claimant, advising her that costs in the business needed to be reduced. It goes on, 'I'm sorry to tell you that it is proposed that your role of salon stylist may cease to exist.' The letter advises the claimant she will be redundant unless alternatives can be found to reduce overheads. The claimant was invited to a meeting on 3rd September 2020. She was informed Mr Skinner would be present. She was also advised she could bring a work colleague or trade union representative with her. As a small Salon, the claimant did not wish to bring a colleague and she was not a member of a Trades Union. It was agreed she could be accompanied by her friend, Ms Simmons. Miss Simmons worked in a different sector but had experience in dealing with disciplinary and grievance matters. Mr Skinner attended by way of Zoom. The table and chairs were set out in such a way so that everybody could see him on the screen, whilst I accept that the claimant was sat between Ms Nelson and Ms Richardson, I do not think there was any ill intention, it was, however, unfortunate.

12. I accept the account of the meeting given by the claimant and Ms Simmons. I accept that Ms Richardson, whose role in the meeting was not clear but who had no legal responsibility within the respondent, was not happy with the claimant's decision not to rent a chair. She cross-examined the claimant concerning the benefits, and she became angry at the her refusal to rent a chair. Ultimately, she stood up and came close to the claimant, saying words to the effect of we are not a charity. Neither Ms Nelson nor Mr Skinner intervened. It was not until Miss Simmons intervened to ask who was running the meeting and query why Miss Richardson was there that Miss Richardson's tirade ceased. Ms Richardson left the meeting. It appears she was angry. She stormed out of the Salon slamming the door. The meeting continued; there was a discussion regarding reducing hours for the claimant; she rejected this as she could not work fewer than 16 hours. The meeting concluded with the claimant being told she would be informed of Ms Nelson's decision. The claimant believed there would be a further meeting to inform her of the decision.

13. Following the meeting, Mr Skinner and Ms Nelson discussed the best options for the business. Mr Skinner's advice was that the zero hours contract option was the best for her. I accept that Ms Nelson did not want to go down that route because of the possible impact on the claimant. Ms Nelson concluded that she should offer the claimant a sixteen-hour contract.

14. A further meeting was held on 24th September 2020 with the claimant, and again Miss Simmons attended on her behalf. I do not accept any assertion that the respondent was trying to set up the meeting so that Miss Simmons was unavailable. As a result of the behaviour of Ms Richardson on the last occasion, the claimant recorded this meeting, and I have seen her transcript of it. The focus of this meeting was a discussion concerning a zero hour contract. At one stage, the claimant became upset and had to leave the meeting to compose herself. There was then a further discussion concerning a 16 hour contract. The claimant pointed out that the zero hours contract was not workable for her because she could not be flexible with her childcare. The claimant also commented tensions in the workplace and there had been a bad atmosphere in the Salon.

15. I am satisfied that at no point during this meeting did the claimant agree to drop eight hours from her contract and work only 16 hours. The respondent made it clear to the claimant that she may be redundant if all options were exhausted. I accept the claimant's account that Mr Skinner said voluntary redundancy was not available because there was no employment contract in writing. That is not necessarily correct, the respondent could have offered voluntary redundancy to the claimant but it was not obliged to. I am also satisfied comments were made that if the claimant did not accept changes, the company would be insolvent. The meeting concluded; the claimant indicated she would think about it.

16. On 29th September 2020, the claimant was handed a contract and a letter from the respondent. The contract, which was a lengthy document, indicated that her hours would be for 16 hours per week on Thursdays and Saturdays, her wage would be £8.72 p per hour, she could be required to work further hours as required by the needs of the business. Clause 32 states: 'that the employee shall not for a period of one year after the end of her employment engage in any business that is in competition with the respondent within the geographic area around Redcar'. Clauses 33 to 36 refer to confidential information; Clause 31 stipulates the employee will not directly or indirectly engage or participate in any other business activities that the employer, in its reasonable discretion, determined to be in conflict with the interests of the employer without the written consent of the employer.

17. The claimant texted the respondent to say that she had read the contract and she was going to speak to a lawyer. She was disappointed that the respondent was seeking to reduce her hours and she felt the process was making her ill. She advised she only wished to receive written communications about the situation.

18. On 4th October 2021, the claimant raised a grievance concerning the respondent's actions in making changes to her contractual terms and felt she had been forced to make changes. Immediately following the grievance, the claimant submitted her resignation. The letter stated, 'your recent conduct confirms that you will be making fundamental changes to my employment which I simply can't afford, and which would have such an

impact upon me, and I will have to work elsewhere. I also feel I no longer have trust in my employer and of recent feel I've been pressurised and bullied into a corner which has caused a breakdown in the working relationship.'

19. The claimant gave one weeks notice intending to work her usual three days, the final day being Saturday10th October 2020. On her next working day, 6th October 2020, Ms Nelson believed that the claimant was taking confidential client information. Ms Nelson approached the claimant, told her to leave her keys, log out of the system and go. The claimant did that. She understood she had been dismissed.

20. The claimant contacted her friend, Ms Riley, who ran a salon nearby, they had already discussed employment opportunities, but Ms Riley was unable to assist. However, Ms Riley offered to allow the claimant to 'rent a chair' with her. I am satisfied that this conversation took place after the claimant was told to leave the Salon by Ms Nelson. I can see no reason why the claimant could not work for Ms Riley as soon as possible.

21. The grievance was dealt with, and an outcome letter was sent to the claimant on 12th October 2020 rejecting the grievance. The claimant also received a letter dated 13th October informing her she was to be subject to a disciplinary process. The hearing was scheduled to take place on 19th October. The letter does not set out the allegations of misconduct. The claimant declined to attend the hearing, which went ahead in her absence. On 19th October, the claimant was summarily dismissed for gross misconduct. The reasons for the dismissal were: she advertised her new position at Reilly's while still working for Salon 22; Clients booked in for the week commencing 6th October did not attend; the claimant was going to commence a position and rent a chair at Reilly's when she had not taken the option of renting a chair at Salon 22. The letter concluded 'in summary, you contacted clients of Salon 22 whilst you are still employed by us, telling them to cancel and rebook with you at Reilly's Hair Boutique, resulting in a significant loss in revenue. Your unprofessional behaviour has damaged a sound reputation. You had no intention of working to your stated leave date on Saturday 10th as you had already announced via social media you are starting work at the other Salon on the same day.'

22. The claimant did appeal the outcome of the grievance but not until 27th October 2020. The respondent responded by saying it was out of time and would not, therefore, would not accept the appeal. The claimant did not appeal the decision to dismiss.

The Law

23. Section 94 Employment Rights Act 1996, The Act, gives an employee the right not to be unfairly dismissed. Section 95 of The Act defines constructive dismissal as; circumstances where the employee terminates the contract under which he is employed in circumstances in which he was entitled to terminate without notice by reason of the employer's conduct.

24. Section 98 of The Act sets out the law concerning Unfair Dismissal. It is for the respondent to show the reason or principal reason for the dismissal and that it is a reason falling within Section 98(2) of the Act or is some other substantial reason for dismissal. Misconduct may found a fair dismissal. The Tribunal must then apply Section 98(4) of The Act and consider whether the dismissal was fair or unfair, which depends on:-
'Whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and it shall be determined in accordance with equity and the substantial merits of the case.'

25. In relation to constructive dismissal, the following guidance is given by the case law:-

> Western Excavating v Sharp [1978] ICR 121 – there must be a repudiatory breach which is a fundamental breach of the contract on the employer's part. This must have caused the employee to resign and the employee did not delay in resigning.
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> Malik v BCCI [1997[ICR 606 HL. The House of Lords indicated there is may be an implied term into an employment contract that an employer should not, without reasonable or proper cause, conduct himself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence.
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> Omilaju v Waltham Forest London Borough Council [2005] ICR 481 confirms the position that there may be a number of other breaches that lead to a culmination in last straw cases. However, the last straw need not be blameworthy of itself, although usually it is, and it must contribute to the breakdown in the relationship.

26. If it is concluded that the claimant was entitled to resign, the Tribunal has to consider fairness under the general principles in section 98.

27. The correct approach for an Employment Tribunal to follow in misconduct cases was formulated by Arnold J in British Home Stores Ltd v Burchell [1980] ICR 303. If the reason for the dismissal was misconduct of an employee and potentially fair, the Tribunal must ask itself the following questions.:-
    i) Did the respondent act reasonably in treating the employee's conduct as sufficient reason for dismissal in accordance with equity and the substantial merits of the case?
    ii) Did the respondent have an honest belief in the misconduct of the claimant?
    iii) Did the respondent have reasonable grounds to sustain that belief?

iv) Did the respondent undertake as much investigation into the misconduct as was reasonable in all the circumstances?
v) Did the respondent follow a fair disciplinary procedure?

28. In determining the fairness of a dismissal, the Tribunal must consider if dismissal fell within the range of reasonable responses. The Tribunal must not impose its view on the dismissal but consider whether a reasonable employer could have dismissed on the facts of the case. Iceland Frozen Foods Ltd v Jones 1982 IRLR 439.

The Issues

29. What was the reason for the claimant leaving the respondent's employment?
Was she dismissed for misconduct?
Did she resign in circumstances where she was entitled to resign and claim constructive dismissal?
Did the words on 6thth 20th October amount to a dismissal?

If the dismissal was for misconduct: -
Was it fair under the Burchell principles?
Did the claimant's actions, the allegation of taking customer information on 6th October and joining a rival hairdresser, amount to misconduct?

If the dismissal was a constructive dismissal: -
Did the claimant resign as a result of the breach implied term of mutual trust and confidence and /or the imposition of new terms and conditions?

Submissions

30. The claimant's case is the behaviour of the respondent between May 2020 and September 2020 was such that she was entitled to resign. The behaviour included the pressure to become self-employed, the atmosphere in the Salon itself, how the new contract was given to her, the new contract itself.

31. The respondent's case is that the claimant resigned because she was going to work for a rival firm. This was a breach of contract. Further on 6th October, the claimant attempted to steal client information and persuade clients to leave the respondent. Ms Nelson was therefore entitled to dismiss the claimant for misconduct.

Discussion and conclusions

32. I concluded that the only option discussed with the claimant during the meeting of 20th May 2020 was renting a chair. This is clear, because following this meeting, there were further discussions with the claimant to outline the benefits of this option. In addition, it was only after she had

indicated to Miss Nelson on 8th August 2020 that this was not an option for her that the respondent looked at alternatives and ultimately went through a formal redundancy process with her.

33. Whilst it is clear the respondent did attempt to consult with the claimant, I have concerns about how it was carried out. First, although Miss Richardson may well be financially supporting Ms Nelson in her business endeavours, there appears to be no legal basis for her to attend the meetings. It was not explained to the claimant why she was present in any event or even as a courtesy. Her behaviour in the meeting on 3rd September was disgraceful, and it is understandable why the claimant became upset.

34. I concluded claimant did not agree that she would work for 16 hours; her indication was it could be no less than 16 hours following the second meeting. I further concluded that Ms Nelson attempted to persuade the claimant to accept a zero hours contract, even though she indicated that she needed some regularity to meet her childcare commitments. Again, she does not agree to any changes in her contract of employment. She anticipated a further meeting when she would be given the decision.

35. This did not happen. The claimant was simply handed a contract that fundamentally changed her terms and conditions of employment. Not only did it reduce her hours from 21 to 16, but it also contained restrictions upon her future employment if she left the business. This included a restriction not to work in competition in the Redcar geographic area, nor could she work for herself anywhere. There were also clauses relating to confidential information

36. Considering the claimant's circumstances, that is to say, to prevent a woman with childcare commitments from working in her home town which meant her travelling further to work, was unreasonable. It was also imprecise as to the geographic location.

37. I did not hear much evidence regarding the atmosphere in the Salon. I concluded that the claimant would have felt pressurised and perhaps even bullied by the respondent's attempt to persuade her to take a chair during May to August. This will have coloured the claimant's view of the workplace. However, I do not accept that there was a deterioration in the atmosphere in the Salon.

38. I asked myself whether or not there was a fundamental breach of contract. I considered how the proposed changes within the business were handled; I concluded that they were mismanaged. In particular, the insistence on renting a chair, the suggestion being there was an attempt to circumvent a redundancy process; how Ms Robinson conducted herself. Although not in the respondent's employ, her behaviour was unchecked by Ms Nelson and Mr Skinner. The changes to the employment contract were not discussed with the claimant, nor was she given the option to sit down and talk them

through with her employer. She was simply handed it. Whilst Ms Nelson now says she was open to discussing the contract; this was not made clear to the claimant when she was handed it or when she resigned. I accept that the main concern for claimant was if she only worked 16 hours, she would be unable to top up her wages by working for herself without the permission of Miss Nelson.

39. I concluded there was a breach of the implied term of trust and confidence of the contract for the following reasons: the attempt to persuade the claimant to accept the option of renting a chair, the forceful persuasion used to get her to accept zero hours contract during the meeting on 24th September. The behaviour of Miss Richardson on the meeting of 3rd September which Ms Nelson did not challenge. Miss Bennett was bullied and harassed by this behaviour and because Ms Nelson did nothing to stop it was reasonable for the claimant to assume that Ms Nelson agreed with it.

40. I also concluded a fundamental term of the employment contract was being changed without agreement, namely the reduction of hours from 21 to 16, the insertion of the confidentiality clauses, the insertion of the restriction on trade. Regarding the latter, there were two aspects of the prohibition: first, working in the Redcar geographic area secondly, the prohibition on working at all in any other capacity without permission. Regarding the former, I considered it unreasonable for there to be a 12-month prohibition on working in the Redcar geographic area. I heard no evidence of the necessity for the restraint of trade clause why such a term needed to be imposed. Although I have heard from the claimant that not being able to work in Redcar was difficult for her because of transport. In addition, prohibiting the claimant from working for herself to top up her 16 hours at the Salon was also unreasonable. I also consider that the new contract was sent to the claimant given to the claimant on 29th September and was to take effect from 1st November 2020. The claimant was in effect dismissed and re-employed; the claimant was entitled to 12 weeks notice because of her length of service. The claimant was entitled to reject the new contractual terms.

41. Regarding the implied term of trust and confidence, I accept the behaviour of the respondent outlined above broke the implied term of trust and confidence. I have considered whether the respondent had a reasonable and proper cause for which this behaviour. The respondent was attempting to carry out a proper procedure to reach an agreement with the claimant, but the manner in which they carried it out was inappropriate. I considered that this also breached the implied term of trust and confidence.

42. I am satisfied that this directly led to the claimant resigning. I concluded that whilst the claimant spoke to Ms Reilly about employment opportunities, she did not discuss renting a chair until after leaving the respondent's employment.

43. I also went on to consider the impact of what happened on 6th October. The claimant was still under contract with the respondent and was working her

notice to the end of the week. The words used by Ms Nelson were that she wanted the claimant to hand over her shop keys sign out of the appointment calendar at that she would be paid to the end of the week, and she didn't need to come back to the Salon again. I asked myself whether this was a dismissal.

44. Although the claimant was working her notice, it is clear that the intention of Miss Nelson at this time was to dismiss the claimant. This is supported by the fact that after the dismissal and after the grievance the claimant was put through a disciplinary procedure. The disciplinary outcome letter states that her last working day was 6th October 2020. The final two days pay were withheld from the claimant. I, therefore, went on to consider whether or not the dismissal for misconduct was carried out in accordance with the principles set out in Burchell above.

45. First, were there are reasonable grounds for believing the claimant had committed an act of gross misconduct. The claimant had not signed the new contract and was not bound by its terms. However, I am satisfied that it may be implied into her employment contract, as custom and practice, that she would not use confidential information in the client database to inform clients of her move. At the time of the dismissal, that is to say, 6th October, Ms Nelson believed that the claimant was trying to obtain client information.

46. Secondly, At the time the belief was formed, had the respondent carried out a reasonable investigation? At the time, the investigation had not been completed. Ms Nelson had a chat with her other staff member, but she had not spoken to the claimant to find out her account.

47. Thirdly, did the respondent otherwise act in a procedurally fair manner. The claimant was sacked on the spot in effect that there was no investigation until after the dismissal. Disciplinary proceedings were not instigated until 13th October, some seven days after the dismissal, by which time the claimant had obtained new employment. The letter she sent telling her about the disciplinary proceedings did not explain why she was dismissed or the reason for the disciplinary proceedings. It wasn't until the letter of dismissal was received that the claimant was aware of the reason for her dismissal.

48. Fourthly was dismissal within the range of reasonable responses? Considering the letter sent to the claimant, I concluded that many of the matters relied upon could not constitute gross misconduct. In particular, it is not a breach of contract to leave the Salon and commence a position elsewhere. The fact that the respondent found out via a colleague is not a breach of contract. The fact that the claimant took the option of renting a chair when she decided not to do that at Salon 22 is not a breach of contract. Neither of them may be considered gross misconduct. I considered whether there was a breach of contract by advertising. I concluded it was not because the claimant was not bound by the contract she had been sent. The fact that clients did not attend the week of 6th October and may well

have had nothing to do with the claimant. There was no evidence of the losses alleged to have been sustained. Finally, there was no evidence that she had obtained confidential information from the respondent's database.

49. I concluded the claimant was entitled to resign because of the behaviour of the respondent, which breached the implied term of trust and confidence. There was also a breach of the verbal employment contract when the respondent attempted to impose unilateral changes in the terms and conditions of employment. The claimant resigned and was entitled to resign because of these breaches.

50. The claimant was, however, still employed when the respondent dismissed her summarily on 6th October 2020. This dismissal, therefore, overtakes the resignation.

51. The reason for the dismissal was conduct, which may found a fair dismissal. I concluded, however, that the dismissal was unfair because the respondent did not follow the guidance in Burchell.

52. In relation to remedy and for the guidance of the parties. The basic award is one week's gross pay for every year of employment. The claimant is also entitled to an additional sum because she had not been given her terms and conditions of employment under Section 38 Employment Act 2002, which means I must increase the award by at least two and up to 4 weeks.

53. In terms of remedy, I must consider whether there is an uplift under the ACAS code of conduct for failure to comply. This can be anything from 10 to 25 %.

54. Separate orders are issued concerning the Remedy Hearing.

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Employment Judge AEPitt

Date: 16th September 2021