EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss D Mincheva	**V**	**Barbering Management LTD**

Heard at: London Central (by video) **On**: 19 March 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: in person

For the Respondent: Mr S. Crew (director)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 19 March 2021 and reasons having been requested by the Claimant on 19 March 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 06 June 2020 the Claimant brought claims for unfair dismissal, redundancy pay, and breach of contract (notice pay). At the case management hearing on 21 January 2021 Employment Judge Smailes explained to the Claimant that because she had not been employed by the Respondent for a continuous period of two years she was not entitled to bring complaints of unfair dismissal and for redundancy pay.

2. At the start of this hearing, the Claimant confirmed to me that she wished to withdraw her complaints of unfair dismissal and for redundancy pay. Therefore, the only remaining claim was for breach of contract (notice pay).
3. The Respondent accepts that it has dismissed the Claimant without notice but contends that in the circumstances it was entitled to dismiss the Claimant summarily by reason of gross misconduct.
4. The Respondent counterclaims for losses in the total amount of £4,550, it says it has suffered because of the Claimant's breach of contract.
5. At the hearing the Claimant represented herself, and the Respondent was represented by Mr Crew (director). There were no witness statements, however, both the Claimant and Mr Crew gave oral evidence to the Tribunal and were cross-examined. I was referred to the following documents the parties introduced in evidence:
    a. ET1,
    b. ET3,
    c. the Respondent's Schedule of Loss,
    d. a copy of online review by Mr Alexander Czulowski,
    e. a copy of the Claimant's Time sheet,
    f. copies of the Claimant's payslips
    g. a copy of Metropolitan Police Service Memo with the incident number
    h. WhatsApp messages between Mr Crew and Ms Edyta
    i. A WhatsApp messages from the Claimant
6. The Respondent also submitted a print-out of text messages between the Mr Crew and the Claimant, in which they were negotiating settlement of her claim. I decided that those exchanges were covered by the without prejudice rule and therefore did not read them.
7. The following issues fell to be determined in this case:
    a. How much notice of the termination the Claimant was entitled to receive?
    b. Did the Claimant commit an act of gross misconduct, or was otherwise in fundamental breach of contract, so to entitle the Respondent to terminate her employment without notice?
    c. Does the Tribunal have jurisdiction to consider the Respondent's counterclaim?

d. Has the Respondent suffered the claimed losses, and, if it has, were they caused by the Claimant's breach of contract?

e. Are the damages claimed by the Respondent properly recoverable in law?

Findings of Fact

8. The Respondent is a barber shop, and the Claimant was employed as a barber from 11 February 2020 until her dismissal on 14 March 2020. Prior to joining the Respondent as an employee, she had done a 4 hours' trial on 5 February 2020 and two days on 6 and 7 February 2020 as a self-employed contractor and had been paid by the Respondent £300 for that work.
9. The Respondent did not provide the Claimant with particulars of her employment before her dismissal.
10. Mr Crew was the Claimant's direct line manager.
11. During her time working for the Respondent, the Claimant had some conflicts with her co-workers and Mr Crew. They were caused by her not wanting to participate in certain duties, such as cleaning, answering telephone or booking clients, her coming late to work, and by the way she spoke with her co-workers and Mr Crew.
12. On 10 March 2020, Mr Crew warned the Claimant that the Respondent would not tolerate abusive behaviour towards co-workers.
13. On Saturday, 14 March 2020, the Claimant was due to start her shift at 9am. She came late and her client, Mr Czulowski, had to wait 15 minutes. Mr Czulowski was not satisfied with the Claimant's service because of the "*snidey comments*" she was making while cutting his hair. He subsequently posted an on-line review complaining about the service and saying that he would not be coming back because of the disrespectful treatment he had received from the Claimant.
14. The Claimant's next client was a child. The mother of the child was unhappy with how the Claimant cut the child's hair, and a loud argument started between her and the Claimant. Mr Crew asked another barber to finish the child's hair and not to charge the client. He then asked the Claimant to come with him downstair to the office to discuss what had happened.

15. The Claimant blamed the child's mother for not telling her how to cut the hair and said that the mother was a foreigner and could not properly speak English.
16. Mr Crew said to the Claimant that it was not her day and asked her to go home and come back the following day. He said he would pay the Claimant for her full shift. The Claimant refused to leave and started shouting abuses at Mr Crew. In particular, she called Mr Crew "*fucking arsehole*" and said: "*If I go, I will smash your fucking window*". She waved her handbag at Mr Crew in a threatening manner.
17. Mr Crew told the Claimant that she was dismissed with immediate effect and must leave the shop at once. She refused.
18. Mr Crew called the police. The police arrived and escorted the Claimant off the premises. Mr Crew says that it took two policemen two hours to persuade the Claimant to leave. She refused to leave voluntarily, and they put handcuffs on her and escorted her off the premises.
19. Because of the police presence in the shop Mr Crew decided to close the shop and cancel all clients' appointments from 12 noon until the end of that day.

The Law

20. Section 86 of the Employment Rights Act 1996 ("ERA") sets minimum statutory notice period to terminate a contract of employment. It provides that:

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

21. To determine the question of whether the dismissal was wrongful, that is in breach of the employee's contract, the tribunal should be not concerned with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*).

22. In determining whether an employee has repudiated the contract of employment, factors such the nature of the employment and the employee's past conduct will be relevant.
23. A refusal to obey lawful and reasonable instructions of the employer or other wilful disobedience or insubordination may amount to a repudiation, even if it is a single act (*see Kempster v Cantor Fitzgerald (UK) Ltd, unreported 19.1.95, CA*).
24. The relationship of employer and employee is regarded as one based on a mutual trust and confidence between the parties. The implied term of trust and confidence is formulated by case law as the duty not "without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties" (see *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL*).
25. It is a long-established legal principle (see *Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*) that any breach of the implied term of trust and confidence is a fundamental breach of contract amounting to a repudiation because such breach necessarily goes to the root of the contract destroying the essential element of trust and confidence fundamental for and upon which the employment relationships are based.

26. Article 4 of Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 gives employment tribunal jurisdiction to consider certain types of employers' contract claims provided:

    a. the employer's contract claim must arise or be outstanding on the termination of the employee's employment and must relate to: (i) damages for breach of the contract of employment or other contract connected with employment, (ii) a sum due under such a contract, or (iii) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,
    b. the employee against who the counterclaim is made must already have brought tribunal proceedings by virtue of the Order against the employer, and

c. the employer's contract claim must arise out of a contract with that employee, and the type of the counterclaim must not one to which one of the exclusions set out in article 5 of the Order applies.

27. Damages payable following a breach of contract have one basic purpose — to put the innocent party into the position it would have been in had the contract been performed according to its terms (*Robinson v Harman 1848 1 Exch 850, Court of Exchequer)*.
28. It is for the innocent party ("claimant") to prove its loss. The test of causation is known as "but for" test, that is to say that the claimant must prove, on the balance of probabilities, that but for the breach it would not have suffered the claimed losses, i.e., to show both the position the claimant is actually in after the breach, and the hypothetical position the claimant would have been in 'but for' the breach. The measure of loss for breach of contract is the difference between the two positions. Therefore, the claimant cannot recover losses that it would have sustained in any event (see *Tiuta International Ltd (in liquidation) v De Villiers Surveyors Ltd [2017] UKSC 77*).
29. Not all losses that in fact flow from a breach are recoverable in law. Losses that are too remote, i.e., those that were not reasonably in contemplation of the parties when the contract was made, are not recoverable in law (*see Hadley v Baxendale [1854] EWHC Exch J70)*.
30. Further, losses caused by some independent, supervening cause for which the party in breach is not responsible are not recoverable, because such intervening acts or events break the chain of causation (see *Corr v IBC Vehicles Ltd [2008] UKHL 13*).
31. Finally, the innocent party has a duty to mitigate losses. If it unreasonably fails to act to mitigate (avoid or reduce) its loss, or unreasonably acts so as to increase its loss, damages are assessed as if it had instead acted reasonably (*BPE Solicitors v Hughes-Holland [2017] UKSC 21*).

32. Rule 76 of the Employment Tribunals Rules of Procedure provides:

76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

33. The following key propositions relevant to costs orders may be derived from the case law:
34. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (*Oni v Unison ICR D17*).
35. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden [2012] IRLR 648*).
36. A refusal of a settlement offer did not by itself inevitably mean that an order for costs should be made against the refusing party. However, such an offer is a factor which a tribunal could take into account when considering whether there was unreasonable conduct by that party (*Kopel v Safeway Stores plc [2003] IRLR 753*).
37. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in *AG v Barker [2000] 1 FLR 759*:

> "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (Scott v Russell 2013 EWCA Civ 1432, CA)

38. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (*Dyer v Secretary of State for Employment EAT 183/83*).

39. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — (*McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA*)

40. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In *Yerrakalva v Barnley MBC [2012] ICR 420* Mummery LJ said:

    "*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

41. Under Rule 79 of the Rules a tribunal must decide the number of hours in respect of which a preparation time order should be made. This assessment must be based upon:

    (a) information provided by the receiving party in respect of his or her preparation time, and

    (b) the tribunal's own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required.

42. The current hourly rate is £40 (Rule 79(2)).

43. The amount of preparation time order shall be the product of the number of hours assessed under Rule 79(1) and the current hourly rate (Rule 79(3)).

44. Rule 77 of the Rules provides that: "*No [preparation time order] order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*"

Conclusions

<u>Conflicting evidence</u>

45. The Claimant disputes Mr Crew's account of the events on 14 March 2020. In particular, she denies being late for work. She says that she did not have any argument with the mother of the child. She says the mother was in fact happy with her work and that it was Mr Crew who did not let her finish the child's hair.
46. She says the argument was with M Crew about him accusing her of making changes in the computer booking system, which, she says, she did not do. She also claims that there is no proof that Mr Czulowski complained about her, as her name is not mentioned in his on-line review.
47. She accepts that she refused to leave the premises. She says that it was because she wanted to be paid as she needed money to pay her rent and outgoings.
48. She denies being abusive or threatening towards Mr Crew or co-workers. She says she did not say: "*fucking arsehole*" to Mr Crew and did not say: "*If I go, I will smash your fucking window".* She denies waving her handbag at Mr Crew. She accepts that the police were called, however, she disputes that it took them two hours to escort her off the premises. She says she left herself and not in handcuffs. She says she was not arrested.
49. She claims that there are CCTV in the shop, and the Respondent failed to produce video evidence to prove that she acted in the way the Respondent alleges. She says that she is running seven other court cases and knows how to do that.
50. Finally, she says that everything that Mr Crew said to the Tribunal was "*bullshit*" and "*fake stories*".

51. Because Mr Crew's and the Claimant's account of the events are vastly different, to find facts, to which I can then apply the law and make my conclusions, I must first decide, on the balance of probabilities, whose version of the events on 14 March 2020 is more probable. I find that it is of Mr Crew. I find that for the following reasons.

52. While being on occasions emotional and more arguing his case than giving evidence, overall, Mr Crew gave cogent and clear evidence to the Tribunal. His evidence are supported by contemporary documents, such as Mr Czulowski on-line review, Whatsapp message from Ms Edyta, the Police note recording the incident number.
53. I also find that if the Claimant had not had an argument with the mother of the child there would not have been any reason for Mr Crew not to let the Claimant to finish the child's hair.
54. Further, I find that Mr Crew would not have called the police and shut the shop on the busiest trading day (and the Claimant herself said in her evidence that Saturdays were when the shop was busy) unless the situation were very serious, and he genuinely feared for his and his staff safety and the reputation of the business.
55. The Claimant, on the other hand, blankly denied any wrongdoing but could not cogently explain why she had refused to leave the shop when she was asked to go home by Mr Crew. She dismissed Mr Crew's evidence as "*bullshit*" and "*fake stories*", however, when cross-examining him she did not put to him any alternative facts.
56. She refused to accept that Mr Czulowski's online review was about her on the basis that her name was not mentioned there and put the Respondent to prove that it was her who cut his hair. However, she did not offer any evidence as to what had happened when she was cutting her first client's hair, which she accepted was a man.
57. In her WhatsApp message (it appears the message was to Ms Edyta or another Respondent's employee) she calls Mr Crew "*a Fucking liar*" and writes: "*he did that because he doesn't want to pay me the money I worked for*". The Claimant's daily rate was £100, and I find it is improbable that Mr Crew would have closed the shop and called the police just to avoid paying the Claimant for her day work, when he had paid her for all her previous days of work.
58. For these reasons I preferred the evidence I heard from Mr Crew, and that is reflected in the facts, as I found them.

<u>Length of Notice</u>

59. The Claimant was not given a written contract of employment, and there were no evidence to show that her contractual notice was longer than the minimum statutory notice. Therefore, I find that at the date of her dismissal she was entitled to receive the minimum statutory notice of one week. That was the length of notice she claimed.

Wrongful Dismissal

60. Based on my findings of fact, I have no difficulty in concluding that the Claimant was in repudiatory breach of contract. Not only she disobeyed lawful and reasonable instructions of her manager, her actions, in shouting abuse and acting in a threatening manner, clearly breached the duty of trust and confidence. She had already been warned by Mr Crew on 10 March 2020 that the use of the abusive language towards co-workers was unacceptable. Even if it had been the first incident, in my judgment, it was very serious and amounted to gross misconduct. Therefore, the Respondent was entitled to dismiss the Claimant without notice.
61. It follows, that her claim for breach of contract (notice pay) fails and is dismissed.

Counterclaim

62. Turning to the Respondent's counterclaim. I find that the contract claim the Respondent brings is within the Tribunal's jurisdiction pursuant to Article 4 of Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623.
63. The Respondent says that the Claimant's breaches on 14 March 2020 caused it to suffer the following losses:
    a. Loss of clients' business
        i. Mr Czulowski – 13 average haircuts a year x £30 (price of haircut) x 5 years of average client "lifeline" = £1,950.
        ii. The Child – 7 average haircuts a year x £20 (price of haircut) x 5 years of average client "lifeline" = £700
    b. Loss of trade on 14 March 2020 - £700
    c. Time spent by Mr Crew dealing with the case: £60 x 20 hours = £1,200

64. In reply the Claimant says that the Respondent cannot positively prove that it was her who cut Mr Czulowski hair, or that the child's mother was unhappy with her work. She further submits that the five years' projection is irrelevant, and anyhow there is no prove that neither of the two clients would return in the future. She points out that the shop had to close on 24 March 2020 due to the lockdown.
65. She says because of the lockdown she could not find another job and had to apply for Universal Credit, and because the Respondent had sent wrong information to HRMC her Universal Credit payments were affected.

66. Although I find that the Claimant was in breach of contract by not treating her clients with due care and skill, I find that the Respondent failed to prove that "but for" the Claimant's breach it would have gained further business from Mr Czulowski and the child in the amount it claims. The Respondent's calculations are speculative and not supported by any real evidence. Furthermore, in my judgment, the intervening event of the national lockdown, clearly breaks the chain of causation. Finally, I find the claimed losses are too remote to be recoverable in law, as they could not have been in reasonable contemplation of the parties when the contract was made.

67. With respect to the claim for loss of trade on 14 March 2020, I accept that the Claimant's repudiatory breach, for which she was dismissed, caused the Respondent to close the shop and cancel clients' appointments on that day. However, the Respondent failed to provide any evidence to show that it had actually suffered the claimed loss of £700 or any other loss.
68. At the hearing, Mr Crew accepted that £700 was an overstated estimate, but could not provide any alternative figures. Further, he did not provide any evidence to show what steps the Respondent had taken to mitigate the loss, for example, by rebooking the cancelled appointments for another day. In short, the burden of proof is on the Respondent, and in my judgment, it has failed to discharge it.

69. Finally, with respect to Mr Crew's time. Mr Crew did not make a specific application for preparation time under Rule 76 of the Employment Tribunal

Rules of Procedure. It is not a criticism, and, not being a lawyer, he is not expected to know the relevant procedural rules.

70. I accepted his submissions and the Schedule of Loss as making such an application. I also considered whether in the circumstances it would be appropriate for the Tribunal to make a preparation time order on its own initiative, as the Rule 76(5) allows it to do.
71. Mr Crew in his evidence said that on 15 May 2021 he had offered the Claimant to pay her the full amount of her notice claim, £600, as a goodwill gesture, because he wanted to avoid further unnecessary expense and wasting the Tribunal's time and resources. The Claimant refused the offer and said that she wanted more money. The Claimant did not dispute that.
72. I find that by refusing to accept the full amount of her claim and continuing with the proceedings the Claimant acted vexatiously and unreasonably. Even leaving aside the apparent weakness of her claim, there were simply no good reasons for her to continue with it in the circumstances when the Respondent had offered her to pay the full amount she was claiming. Therefore, I find that Rule 76(1)(a) is engaged.
73. I also find that the nature, gravity and effect of her vexatious and unreasonable conduct were such that a preparation time award could be made against her. However, taking into consideration her financial circumstances and the fact that she is a litigant in person (though based on her own evidence, someone who is not a stranger to litigation), I have decided not to make a preparation time award against the Claimant.

74. For these reasons, the Respondent's counterclaim fails and is dismissed.

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Employment Judge P Klimov
London Central Region

Dated: 25 March 2021

Sent to the parties on:

26/03/2021

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For the Tribunals Office

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