EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107156/2023

Held in Edinburgh on 3 and 4 June 2024
and members' meeting on 5 June 2024

Employment Judge M Sutherland
Tribunal Member S Downie
Tribunal Member L Grime

M McKay	**Claimant** **Represented by** **A Buchanan, Solicitor**
Jet2.com Limited	**Respondent** **Represented by** **C Ashiru, Counsel** **Instructed by** **Bird and Bird LLP**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the complaints of discrimination do not succeed and are accordingly dismissed.

E.T. Z4 (WR)

REASONS

Introduction

1. The claimant made complaints of direct discrimination and discriminatory constructive dismissal on grounds of sex. The complaints were denied by the respondent

2. The parties lodged a joint bundle of documents. The Claimant gave evidence on her own behalf and called Martin McKay (her husband) and Kim Masterton (ex-Senior Cabin Crew) to give evidence. The respondent called Stewart McKenzie (Deputy Cabin Crew Base Manager) and Kelly Bolton (Cabin Services Regional Manager) to give evidence.

3. By separate order the names of the comparators were redacted.

List of Issues

4. By agreement of the parties the issues to be determined in this case were as follows –

<u>Time limits</u>

a. Are any of the claims of discrimination relied upon submitted out of time?

b. Are the alleged acts of discrimination relied on part of a continuing course of conduct to allow the Tribunal to have jurisdiction under section 123 (3) (a) of the Equality Act 2010 to preside over the matters alleged?

c. Failing that, is it just and equitable for the Tribunal to extend time to allow the Claimant's claim to proceed under section 123 (1) (b) of the Equality Act 2010?

<u>Direct discrimination</u>

d. Did the Respondent treat the Claimant less favourably on account of her sex contrary to section 13 (1) of the Equality Act 2010? In particular:

   i) Did the Respondent require the Claimant to alter her hairstyle to comply with its Uniform Policy and advise her that otherwise she would not be allowed to fly?

   ii) If so, does such treatment amount to a detriment in the circumstances?

   iii) If so, are AB and CD appropriate comparators there being no material difference between their circumstances?

iv) If so, was the Claimant treated less favourably than her comparators in this respect?

v) If so, was such treatment because of the Claimant's sex?

Constructive dismissal

e. If so, did the matters referred to at para.(d.) above amount to a repudiatory breach of contract on the Respondent's part entitling the Claimant to resign?

f. If so, did the Claimant resign in response to said breach so as to amount to a constructive discriminatory dismissal under section 39 (2) (c) and 39 (7) (b) of the Equality Act 2010?

Remedy

g. If the Claimant was discriminated against by the Respondent, did she suffer financial loss in terms of loss of earnings as a result of such discrimination?

h. If the Claimant was discriminated against by the Respondent, did she suffer an injury to feelings as a result of such discrimination?

i. If the claimant is successful what is the appropriate amount of compensation for the loss sustained by the Claimant in consequence of the discrimination?

j. Did the Claimant unreasonably fail to follow the ACAS code of Practice in that the Claimant did not raise a grievance before or at the time of resignation?

k. If so, should any award of compensation be reduced by up to 25% for failure to follow the ACAS Code of Practice on Grievance and Disciplinary Processes in that the Claimant did not raise a grievance before or at the time of resignation?

l. Should the declaration sought be granted?

Findings in fact

5. The Tribunal makes the following findings in fact:

6. The respondent is a commercial passenger airline and package holiday operator. The respondent is a large employer with a dedicated HR function.

7. The claimant was employed by the respondent from 20 June 2022 to 13 August 2023 as a member of cabin crew working out of Edinburgh Airport.

The claimant was a very able employee who was held in high regarded by the respondent. The Claimant had previously worked for Police Scotland from 2014 until she took early retirement.

8. The respondent has a uniform policy which applies to staff who work in customer facing roles which includes cabin crew. The policy sets presentational standards relating to uniform and personal grooming including hair. The claimant had tattoos which she covered in compliance with that policy. The uniform policy states "No extreme styles, extreme layers, intense unnatural colours or dark regrowth from dying…Shaved styles like Mohicans, tramlines and undercuts are not allowed". Staff who have long hair are required to tie it back. The uniform policy applies to both male and female staff. Staff receive equality and diversity training annually. The respondent employed some male staff who have long hair including hair worn in a bun and some female staff who have short hair including shaved which is considered compliant with the policy.

9. The claimant always attended work well-groomed and smartly dressed in the company uniform. During her employment the claimant's haircut was as follows: her hair was shaved to 0.5mm with the exception of a section of hair on the top of her head that was narrower than her temples. The sides were shaved weekly. The top section was relatively long (at just above ear length) but was worn swept up and back and formed a v-shape at the back of her head. She had an "undercut" in that there was no graduation or blend between the long top section and the shaved sides. The top section was a different colour to the sides: the shaved sides were "salt and pepper" and the top section was bleached "white" blonde. The claimant could style the top section in different ways to reveal more or less of the shaved sides. Although her haircut remained broadly the same over the period of her employment, the top section became marginally narrower and the claimant styled the top section upwards so that it revealed more of the undercut.

10. At interview the claimant was informed that she required to cover her tattoos in compliance with the dress code but no mention was made of her haircut.

11. When the Claimant started work she was advised by Elizabeth McGarry ('EM') (then Deputy Cabin Crew Base Manager) that she may need to grow her hair at the sides as it was extremely short.

12. The respondent holds annual "Red Hot Days" to assess staff compliance with the policy. Staff are given advance notice of these assessment days. Staff who do not pass assessment days are given time to meet the uniform standards. Issues have previously been raised with both male and female members of staff on account of non-compliant hairstyles. Staff have adapted their hair in response and no member of staff has been disciplined for failure to meet the uniform policy.

13. The claimant passed the annual assessments held in July 2022 and again on 7 July 2023. During Red Hot week in July 2023 the Claimant made a brief comment to Zac Wilson, Trainer ('ZW') about her hair, noting that she was "not part of the bun brigade" (intended as a reference to a number of female staff who wore buns) and asking "I take it that's ok". Stewart McKenzie, Deputy Cabin Crew Base Manager ('SM') became aware of this. SM and Rachel Shannon ('RS') discussed with each other their concerns that the claimant's hairstyle was not compliant.

14. On 10 July 2023 SM called the claimant into a private room where he advised the claimant that she needed to grow out her undercut in order to comply with the uniform policy. He said her hairstyle just needed tweaked. The meeting was brief, polite and amicable. The claimant indicated in the meeting she was willing to change her hair.

15. After the meeting the Claimant became upset because she felt she was being asked to change who she is as a person. She understood that if she was unwilling to change her hair she wouldn't be allowed to fly. She phoned her husband and said to him that she was told change her hair or she wouldn't be allowed to fly. The claimant then composed herself such that she was no longer visibly upset and was fit to fly shortly after the meeting.

16. On 11 July 2023 the claimant emailed SM and noted "yes my hair is different to others but that is part of who I am and it part of my identity. It has been like this more or less since I joined and definitely for 10 months. At no point have any concerns regarding my appearance been raised…I would not be

comfortable in changing the style or as suggested growing out my undercut". She asked who made the decision and what the outcome would be if she didn't change her hair and sought a meeting.

17. SM replied on 11 July noting that: she was a great asset to the team; she is always very presentable; when she joined she was advised by the then deputy that her hairstyle was fine but she need to ensure the sides remained at a certain length; she had previously approached a trainer regarding her hairstyle; "your hair is Mohican style and is shaved into the sides. The uniform policy states this is not allowed. At no point do we ever want to lose who you are…The uniform policy has a wide range of acceptable hairstyles that you could probably adapt your current hairstyle easily with not a huge amount of change"; and he was happy to arrange a further meeting.

18. The claimant replied on 11 July stating "I fully understand the uniform policy and that my choice of hairstyle may infringe slightly on aspects but in saying that, it's not offensive…I have taken on board what you have said and I will experiment with a flatter style although I will point out I don't agree with it. Until there is a change in policy I will adapt".

19. On 12 July the claimant advised SM that she tried unsuccessfully to style her hair, that she has booked a hairdresser's appointment, and that she will fly on 14 and 15 July with her usual hairstyle.

20. On 13 July the claimant called the crew room to advise of her intention to hand in her notice. She spoke with Jennifer Howlieson, Deputy Cabin Crew Base Manager who encouraged her not to make a rash decision and to think about it.

21. The claimant was off sick from 14 to 16 July 2022 due to work related stress and accordingly did not fly.

22. On 22 July the claimant intimated her resignation with notice to SW in writing stating "I would like to take this opportunity to thank you all for the opportunity to work with a fantastic company and the memories made. I have thoroughly enjoyed my time working with Jet2, however the time is now right for me to move on". Although she did not state this in her resignation, the claimant resigned because of the request to change her hair. Until then the claimant

had very much enjoyed working for the respondent and was upset at leaving their employment.

23. SM replied on 22 July noting that he was sad to see her leave but respected her decision and wished her well. He praised her dedication and hard work and described her as "an invaluable member of the team" who "has made the most positive impressions."

24. The claimant continued to fly during her notice period and her employment ended on 13 August 2023. During that time the Claimant had positive conversations with SM where she reiterated that there was no bad blood between them.

25. At her exit interview on 25 August 2023 the Claimant stated that she had "loved" the culture of the company and "for the last 14 month it has been a pleasure to come to work". She indicated that she had left because of issues raised with her hair and she wished to raise a formal grievance. She sought for the following questions to be answered "1. had same look since I started Jet2, why did it take 14 months to decide my look didn't conform? 3. why I passed 2 red hot days, 4. why there are other Jet2 employees in both EDI and other bases who have similar or more extreme styles than me? 4. Why was nothing mentioned at interviews or training which was face to face?"

26. The respondent employed two male cabin crew (AB and CD) who worked out of Edinburgh Airport whom the claimant considered had the same or similar haircuts. The respondent also employed a female cabin crew member (EF) who worked out of a different Airport whom the claimant considered had a similar hairstyle but "more extreme". Neither AB, CD or EF were asked to change their haircuts.

27. AB's haircut was as follows: his hair was shaved at the sides of his head which started around 0.5mm and graduated to a longer section on the top of his head that was wider than his temples. The back and sides were the same length. He did not have an undercut. The top section was the same colour as the sides.

28. CD's haircut was as follows: his hair was shaved at the sides of his head which started around 0.5mm and graduated to a longer section on the top of his head that was the same width as his temples. The back and sides were

the same length. He did not have an undercut. The top section was the same colour as the sides.

29. After her resignation, the claimant worked for Marks and Spencer as a Service and Safety Assistant from 20 August until around 1 September 2023 when she resigned because her hours did not align with her caring responsibilities. She earned £747.59 (net) from that employment.

30. On 28 August 2023 the claimant raised a formal grievance on the grounds that "I had no choice but to resign due to sex discrimination… I have a very gender neutral haircut that is essentially a short back and sides... I was employed looking like this..."; her hair passed the assessment day on 7 July 2023; "on 10 July 2023 SK...informed me that my look did not conform to Jet2 standards and that I had to change my hair. If I did not grow or change my hairstyle, then I would be refused to fly or I would not be able to fly. He said that they understood... that any tweak or growth would not happen overnight"; "there are male cabin crew with identical hairstyles, and they have not been asked to change how they look to remain employed. I feel directly discriminated against because I am a female who does not look like the majority of females in Jet2 and if I was a male, I would not be asked to change"; "I feel that I have been discriminated against and was forced into a position where I have had to resign from a role I both loved and was very good at."

31. Kelly Bolton, Cabin Services Regional Manager was appointed to investigate the claimant's grievance. She held fact finding meetings with 7 employees including the claimant, SM, ZW, Sarah Bishop ('SB'), RS and EM. During these meetings KM noted that: SM considered that her hair was the highest it had ever been; SB (who conducted her red hot assessment in July 2023) considered that the sides had got shorter but her hairstyle had been like that for a long time (since after her first season in 2022) and no one had addressed it so she assumed it was ok but she didn't believe it was company standard.

32. On 10 October 2023 KB provided the claimant with a written outcome to her grievance which noted that: her hair had "become shorter at the sides to the extent it was now in breach of our policy in a "Mohican" style"; this issue ought to have been raised at assessment but was raised only 3 days later; other

colleagues are held to account; "I haven't found any evidence to suggest you were treated any differently to other colleagues;" she was given an opportunity to reconsider her resignation. She was thanked for her hard work and dedication and advised that should she wish to reapply for a role she would welcome her application.

33. The claimant worked for Hays Travel as a Travel Consultant from 11 December until 14 February 2024. She earned £2,446.68 from that employment.

34. The claimant has been employed by LNER since 7 March 2024. Her earnings with LNER are higher than her earnings with the respondent.

35. Had she remined in employment with the respondent until 7 March 2024 she would have earned £12,561.51 (31 weeks x £405.21).

36. The claimant engaged in ACAS early conciliation from 13 September to 25 October 2023 under her married name. She also engaged in early conciliation under her maiden name of Fraser starting and finishing on 24 November. A claim was lodged under her maiden name on 24 November which relied upon the ACAS certificate in her maiden name. A second claim was lodged under her married name on 28 November which relied upon the ACAS certificate in her married name. The first claim was withdrawn but not dismissed in light of the second claim.

Observations on the evidence

37. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

38. The claimant and the respondent witnesses gave their evidence in a measured manner that was broadly consistent with the documentary evidence and with each other. The main area of dispute was whether there was a material difference between claimant's haircut and that of her comparators.

39. We heard oral testimony about the Claimant's hairstyle and we were shown some photographs of her hair at social events and at work. The claimant's comparators did not attend to give evidence but we were shown various photographs of their hairstyles outside of work and heard oral testimony about their hairstyles at work. The claimant stated in evidence that her haircut was similar to those of her comparators and it was not in dispute that the claimant and her comparators all had short haircuts with shaved sides and a longer section on top. The claimant accepted that she had an undercut in that there was no graduation or blend between the long top section and the shaved sides. She initially asserted in evidence that her comparators also had an undercut but she ultimately accepted in cross examination that they did not have an undercut. It was apparent from the evidence that the Claimant had an undercut whereas her comparators did not (their shaved sides graduated to the longer section whereas hers did not).

40. The claimant said in evidence that Stewart McKenzie ('SM') had asked her to change her hair otherwise she would not be able to fly "or words to that effect". SM said in evidence he had asked her to adapt her hairstyle slightly to comply with the uniform policy but he did not state that she would otherwise be unable to fly. The claimant advised her husband that she had been told to change her hair or she wouldn't be allowed to fly. In her detailed follow up correspondence with SM, she did not refer to this alleged statement but instead stated "Can I also ask what the outcome will be if I continue to wear my hair in the style I have as this time I do not feel comfortable essentially changing who I am". Issues with hairstyles have previously been raised with other staff who have adapted their hair in response and no-one has been disciplined for failure to meet the uniform policy. In the meeting with SM the claimant herself indicated her willingness to adapt. In these circumstances, it is considered more likely that SM did not advise her that she would otherwise be unable to fly and the claimant instead understood that if she was unwilling to change her hair she wouldn't be allowed to fly given the terms of the policy.

The law

Discrimination at work (Equality Act 2010)

41. Under section 30 an employer must not discriminate against an employee as to their terms, etc, by dismissal or by subjecting them to any other detriment. Dismissal includes constructive dismissal.

42. A detriment is construed widely and arises where a reasonable worker might take the view that they had been disadvantaged by the acts complained of.

Direct Discrimination

43. Section 13(1) EA 2010 provides: "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."

44. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

45. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. "It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why" *(Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337*)*

Less favourable treatment

46. The claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.

47. Under Section 23 EA 2010 there must be no material differences between the relevant circumstances of the claimant and their comparator. The comparison must be like with like (*Shamoon*).

48. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

The reason why

49. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In "reason why" cases the matter is dispositive upon determination of the alleged discriminator's state of mind. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).

50. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred (*Shamoon*).

Burden of Proof

51. Section 136(2) EA 2010 provides that "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".

52. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).

53. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935)

Stage 1 – prima facie case

54. It is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case).

55. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of "something more".

56. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport* [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.

57. At Stage 1 proof is of a prima facie case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining

an order from the Tribunal" (*Efobi v Royal Mail Group* [2019] EWCA Civ 19, CA).

58. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Madarassy*). All relevant facts should be considered but not the respondent's explanation, or the absence of any such explanation *(Laing v Manchester City Council* [*2006] ICR 1519, EAT and Efobi)*. (The respondent's explanation for its conduct provides the reason why he has done what could be considered a discriminatory act.) "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts" (*Madarassy*). "In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts" *(Igen; Hewage)*.

Stage 2 – rebutting inference

59. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).

60. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The treatment must be "in no sense whatsoever" because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).

61. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Time Limit

62. Under Section 123 a complaint of discrimination may not be made after the end of the period of three months starting with the date of the act to which the complaint relates or such period as the tribunal thinks just and equitable. The three-month time limit may be subject to an extension of time to facilitate ACAS Early Conciliation.

63. The time limit for discriminatory constructive dismissal begins from the date of termination and not from the date of the repudiatory breach (*Meikle v Nottinghamshire County Council 2005 ICR 1, CA)*.

64. Under sub-section 123(3) failure to do something is to be treated as done when the person in question decided on it. In the absence of evidence to the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

65. A distinction is made between a continuing act and an act with continuing consequences. A continuing act may arise where a series of acts are linked (e.g. same perpetrator) such as to amount to an ongoing situation or continuing state of affairs (*Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*). It may arise where an act is in application of a regime, rule, practice or principle, etc without exercise of discretion (*Parr v MSR Partners LLP and ors 2022 ICR 672, CA*).

66. The tribunal has a broad discretion in deciding what is a just and equitable period of time. However the exercise of discretion is the exception rather than the rule. The tribunal must consider all the circumstances including the prejudice to each party in granting or refusing the amendment. Relevant factors may include the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; and the steps taken by the claimant once they knew of the relevant facts (*British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*).

Constructive dismissal

67. 'Dismissal' is defined in s 95(1) ERA 1996 to include ‘constructive dismissal’, which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).

68. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: *(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221).*

69. There must be a breach of contract by the employer which is “a significant breach going to the root of the contract” *(Western Excavating).* This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties *(Malik v Bank of Credit and Commerce International Ltd [1998] AC 20).*

70. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively, there may be a continuing course of conduct extending over a period and culminating in a “last straw” which considered together amount to a repudiatory breach. The “last straw” need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy *(London Borough of Waltham Forest v Omilaju [2005] IRLR 35).*

71. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence*: "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy*

or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…" (Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT).

72. Discriminatory conduct may well amount to a breach of the duty of trust and confidence but this is not inevitable (*Amnesty International v Ahmed 2009 ICR 1450, EAT*).

73. The breach must be a factor (i.e. have played a part) in the Claimant's resignation. The Claimant must not have affirmed the breach by any delay in resigning. It is open to the employer to establish that the reason for conduct amounting to breach was potentially fair and if so to consider whether the employer acted reasonably in all the circumstances.

Submissions

Claimant's Submissions

74. The claimant's submissions were in summary as follows:

a. The claimant had a gender neutral haircut that was essentially a short back and sides. She maintained the same haircut throughout her employment. She passed two red hot assessments without issue. There was inconsistent evidence about why SM had raised it with her.

b. AB and CD had the same or similar hairstyle to the claimant and were not told change their hairstyles and advised otherwise they would not be allowed to fly. It can be inferred that she was told she would not be allowed to fly because SM failed to answer that answer that question in the follow up email. The uniform policy is a matter of interpretation.

c. The claimant's hairstyle is important to her identity and self-esteem

d. The request to change her hairstyle or otherwise not fly was less favourable treatment because of her sex. The claimant has a prima facie case and has therefore discharged the burden of proof.

e. The detrimental treatment of her amounted to a repudiatory breach of the implied duty of trust and confidence. The claimant resigned in response to that breach. The respondent discriminated against the claimant by constructively dismissing her.

f. The claimant engaged in ACAS conciliation from 13 September to 25 October and lodged her claim on 28 November. The direct discrimination on 10 July 2023 and the dismissal effective on 13 August 2023 are a continuing act and her claim was accordingly in time. Whether there is a continuing act should be considered in the round (*Pugh v The National Assembly of Wales (2006) UKEAT/0251/06)*. In the alternative there should be a just and equitable extension of time on the basis that had the first claim been lodged in reliance upon the first certificate her claim would have been in time. This failure was that of her advisors and no fault of the claimant. The delay of 3 days causes no practical prejudice to the respondent. It causes prejudice to the claimant who loses the right to claim direct sex discrimination (albeit she retains the right to claim a discriminatory dismissal).

g. She was deeply upset by her treatment which caused her significant stress. She was unable to work in a role she had previously enjoyed. She seeks an award for injury to feelings at the top of the first *Vento* band. She seeks compensation for her loss of earnings (including pension contributions).

Respondent's submissions

75. The respondent's submissions were in summary as follows:

a. The claimant was not at a disadvantage in the circumstances in which she had to work by being asked to adapt ("tweak") her hairstyle slightly. The claimant was not told she would not be allowed to fly and she in fact continued to fly.

b. There are material differences between the claimant's haircut and those of AB and CD. She had an undercut whereas they did not. Theirs is graduated whereas hers is not. They are not appropriate comparators. A man with the same hairstyle would have been treated in the same way. At exit interview the claimant referred to a woman employed by the respondent whom she considered had a more extreme style.

c. The claimant was asked to adapt her hairstyle because it was in breach of the uniform policy and not because of her sex. The claimant herself admits that she had an undercut which infringed the uniform policy. AB and CD were not asked to do so because their hairstyle was not in breach. She was asked

to do so because her hairstyle breached the uniform policy which policy applied to both men and women. Others also considered that the claimant was in breach.

d. Any complaint of direct discrimination arising prior to 18 July is time barred. There is no continuing act and it would not be just and equitable to extend time.

e. The respondent had reasonable and proper cause for asking the claimant to adapt her hairstyle because it was in breach of the uniform policy and its actions were not calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. SM politely asked her to adapt her hairstyle slightly to achieve compliance with the uniform policy. He offered a further meeting to discuss and was at pains to emphasise she was a great asset to the team. The claimant joked with him about it in correspondence.

f. In failing to raise a grievance the claimant unreasonably failed to comply with the ACAS code.

g. The claimant's resignation did not cite this as the reason and it can be inferred that she resigned for personal reasons.

Discussion and decision

76. The claimant submitted that she was required to alter her hairstyle and advised that otherwise she would not be allowed to fly; that this detrimental treatment amounted to direct discrimination because of her sex; and that this detrimental treatment amounted to a repudiatory breach entitling her to resign and claim constructive dismissal.

Time bar

77. The request to change her hairstyle was made on 10 July 2023 and the claimant resigned with notice effective on 13 August 2023. The claimant engaged in ACAS conciliation from 13 September to 25 October 2023 and lodged her claim on 28 November 2023.

78. The claimant submitted that this request and her resignation should be considered together as a continuing act such that her complaint of direct discrimination is not time barred. Alternatively she submitted that there should be a just and equitable extension of time. Given the assertion of a continuing act is it considered appropriate to determine the substantive complaints first before considering whether or not they were lodged in time.

Direct discrimination

79. The Claimant submitted that the requirement to alter her hairstyle amounted to detrimental treatment. The claimant was asked by her manager SM to change her hairstyle. Although she was not expressly told this, the claimant understood that she would not be allowed to fly if she did not do so. The claimant's hairstyle is an expression of herself as a person and she was unwilling to change her hair. The request to change her hairstyle amounted to a detriment in these circumstances.

80. The Claimant submitted that this detrimental treatment amounted to direct discrimination because of her sex. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of the protected characteristic. The tribunal may consider how an real person has been treated in the same circumstances or how a hypothetical comparator would have been treated.

81. The claimant relied upon male comparators who also worked as cabin crew. She submitted that they had the same hairstyle which they were not required to change. The claimant and her two comparators all had short haircuts with shaved sides and a longer section on top. However the claimant had an undercut whereas the comparators did not (their shaved sides graduated to the longer section but hers did not). There were accordingly material differences between their relevant circumstances.

82. The claimant also submitted that it could reasonably be inferred that a man with the same hairstyle would not have been asked to change his hair. The claimant's haircut was similar to that of her male comparators who also had shaved sides and a longer section on top but they had not been asked to

change their hair. The claimant had an undercut whereas her comparators did not. The claimant's haircut was different to a number of female staff who wore their hair in buns. The uniform policy provides that shave styles like Mohicans, tramlines and undercuts are not allowed. The respondent employed some male staff who have long hair including worn in a bun and some female staff who have short hair including shaved sides, both of which hairstyles were considered compliant with the uniform policy. Issues have previously been raised with both male and female staff on account of non-compliant hairstyles. In the circumstances there was no reasonable basis upon which it could be inferred that a man with the same hairstyle as the claimant would not have been asked by SM to change his hair.

83. The respondent submitted that in any event the reason for her treatment was that her hairstyle was not compliant with the uniform policy and had nothing to do with her sex. SM considered that the claimant's hair was not compliant with the uniform policy because it was a Mohican style or undercut i.e. there was no graduation between the longer top section and the shaved sides. There was a reasonable basis for his belief. Although her haircut remained broadly the same over the period of her employment, the top section became marginally narrower and the claimant styled the top section upwards so that it revealed more of the undercut. A number of staff considered that the claimant's hairstyle was no longer compliant with the uniform policy. The explanation for his request to change her hairstyle was sufficiently adequate and cogent namely that it was not compliant with the uniform policy. The reason she was asked to change her hairstyle was not consciously or subconsciously because she was female.

84. The request to change her hairstyle did not amount to direct discrimination.

Constructive dismissal

85. The claimant resigned because she was asked to change her hair but that request was not discriminatory. There was accordingly no discriminatory conduct which amounted to a breach of the implied duty of trust and confidence. The respondent did not discriminate against the claimant by constructively dismissing her.

Conclusion

86. In conclusion the complaints of discrimination do not succeed and are accordingly dismissed.

Employment Judge:	**M Sutherland**
Date of Judgment:	**05 July 2024**
Entered in register:	**08 July 2024**
and copied to parties	08/07/2024