Case Number: 1400275/2018

EMPLOYMENT TRIBUNALS

Claimant Ms. Sasha Tafreshi

Respondent Mr. Ayhan Demirdeg t/a Cellys

Heard at: Southampton **On: 7th and 8th January 2019**

Before: Employment Judge Walters
Ms J. Ratnayaka
Mr. J. Evans

Appearances:
For the Claimant: In person assisted by Mrs. Assadi
For the Respondent: In person

JUDGMENT

(1) The Claimant is entitled to a declaration that she has sustained an unlawful deduction from wages in the sum of £411 and the Respondent is ordered to pay the said sum to the Claimant

(2) The Claimant is entitled to a declaration that she is entitled to holiday pay amounting to three weeks pay in the sum of £1,012.50 and the Respondent is ordered to pay the said sum to the Claimant

(3) The Claimant was wrongfully dismissed and the Respondent is ordered to pay the Claimant damages in the sum of £527.50

(4) The Respondent is in breach of contract and is ordered to pay the Claimant the sum of £160

(5) The Respondent sexually harassed the Claimant contrary to section 26(1)(2) and (3) of the Equality Act 2010 and is ordered to pay the following compensation:
Injury to feelings in the sum of £12,500

REASONS

1. The Claimant has brought proceedings alleging unlawful deductions from wages, breaches of contract, a failure to pay holiday pay under the Working Time Regulations 1998 and sexual harassment contrary to s.26 of the Equality Act 2010.

2. The Tribunal heard this matter over two days and considered the pleadings, the case management orders, the documents provided and the witness evidence both written and oral. The Claimant called herself and her mother to give evidence. The Respondent called himself and three of his employees. He chose not to rely on a fourth witness who did not appear to give evidence. The parties made oral submissions at the close of the evidence on liability and on the wages and holiday pay claims.

3. After delivering judgment on the sexual harassment claims and the wages claims/breach of contract claims we proceeded to deal with the remedy hearing for the wrongful dismissal and sexual harassment claims. The Claimant was recalled to give evidence about mitigation of loss and to afford an opportunity for cross-examination on remedy generally but there was no cross-examination of the Claimant. Neither party wanted to make any further submissions on remedy.

4. The parties had not fully complied with the various case management orders by the time of the hearing in that they had not agreed a single bundle nor had there been a proper exchange of witness evidence. Indeed, the Respondent had failed to provide a witness statement from himself. Instead, he was permitted to rely upon his ET3 and the written accounts situated at Tabs 6 and 7 of the main hearing bundle. Notwithstanding these unfortunate failings and after giving the parties time to consider their respective positions and to ensure that they were fully sighted on each other's documents the hearing proceeded.

THE ISSUES

5. These had been identified by means of two preliminary hearings. The Claimant has set out the value of the claims she makes in her written statements of evidence as ordered to do at the last preliminary hearing although it would have been more helpful had she done so by way of a schedule of loss as ordered by the Employment Judge. The issues are as follows:

a. were there unlawful deductions of wages? In this regard the Respondent admitted that he had unlawfully deducted £50 from the Claimant's wages. Secondly, the Claimant's unchallenged evidence is that at some time after a burglary had occurred she was required to attend at a salon in order to clean and facilitate the police attendance and she has not been paid for three hours attendance in respect of it. She also claims that the Respondent had unlawfully withheld the last week's wages of the Claimant. However, there was an issue as to what the wages of the Claimant actually should have been. The Claimant claimed she worked 45 hours a week and that the hourly rate of pay was the National Minimum Wage of £7.50. The Respondent asserted that the Claimant worked 16 hours a week in accordance with her written contract and he agreed the hourly rate of pay.

b. Was the Claimant entitled to holiday pay and, if so, how much? The Respondent admitted that he owed 1.7 weeks in respect of unpaid holiday pay. The Claimant alleged that the true figure was three weeks and that she should be paid at the weekly rate of £337.50 (being 45 hours at £7.50 per hour). The Respondent asserted that she should only be paid at the weekly pay rate contended for by him i.e. at the rate of £120 per week

c. Did the Claimant suffer breaches of her contract of employment? These were threefold. Firstly, was there an agreement that she should undertake an eyelash extension course which the Respondent would pay for? Secondly, was the Claimant wrongfully dismissed and therefore entitled to notice pay? And thirdly, if so, what was she entitled to be paid?

d. Was the Claimant the victim of sexual harassment by the Respondent? The particulars of which were set out concisely in the preliminary hearing order of the 3rd July 2018 as follows:

- Incident in or about February or March 2017 when in his motor vehicle he asked her personal questions and also touched her hair
- An incident shortly thereafter when in his motor vehicle the Respondent touched her leg
- Incidents from about March 2017 until November 2017 where the Claimant was subject to offensive remarks about her appearance, her complexion and her weight.

6. In the preliminary hearing order of the 3rd July 2018 the Employment Judge had identified that this was a claim under s.26(1) of the Equality Act 2010 (hereinafter referred to as EQA 2010) but on any view of it the Claimant's concerns were that she was the subject of unwanted sexual behaviour and having rebuffed sexual advances she was subjected to unfavourable treatment by the Respondent which is a claim under s.26(3) EQA 2010. Her claim form and her evidence makes this abundantly clear. The Respondent was not disadvantaged by the Tribunal considering the matter under ss.26(1) (2) and (3) as his case has always been that the first three incidents simply did not occur at all i.e. he made no sexualized comments and he did not act in a sexual manner towards the Claimant and he has been fully aware of the facts alleged by the Claimant for a considerable period of time.

7. The Respondent did not raise any issues about time limits in respect of the sexual harassment claims. In any event in our judgment the claim was brought in time as we are quite satisfied that the actions of the Respondent as alleged by the Claimant extended over an eight-month period and right up until the time at which the Claimant resigned in November 2017. We note the text message sent by her to the Respondent as late as 6th November 2017 complaining about this treatment. We are satisfied that the allegations formed part of a series of continuing acts and that time did not run until November 2017.

LEGAL PRINCIPLES

UNLAWFUL DEDUCTIONS

8. This is straightforward factual dispute but for the sake of completeness section 13 of the Employment Rights Act 1996 is directly engaged. The Respondent admits he has made a series of unlawful deductions and the only live issue was the extent of the deductions.

HOLIDAY PAY

9. Again, this is a straightforward factual dispute. The Respondent admits that he has failed to pay the Claimant her full holiday pay entitlement in accordance with the provisions of the Working Time Regulations 1998 and the only issue is the extent of that failure.

BREACH OF CONTRACT

10. These claims are brought pursuant to the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994. In the first claim, the Claimant alleges there was a breach of the agreement to pay for her eyelash extension course. The Respondent disputes any such agreement. The alleged agreement relates to a contract connected to the contract of employment and in light of section 3(2) of the Employment Tribunals Act 1996 the Tribunal has jurisdiction to hear it. The dispute is a factual one.

11. Secondly, implied into every contract of employment is a duty of trust and confidence. If that implied term is breached by the employer then, in our judgment, that would amount to a breach of contract by the employer so serious that it entitles the employee to resign and claim constructive dismissal

12. If, therefore, there was a fundamental breach of the implied term of the contract then the employee is entitled to accept the repudiatory breach and resign without giving notice. As that would amount to a dismissal the terms of the contract of employment as to notice are engaged.

13. An employer can only justify not paying contractual notice if the employee has committed gross misconduct. That has not been contended in this case.

14. However, in assessing the damages payable for the wrongful dismissal a tribunal must have regard to the true loss and if the employee obtains alternative employment within the contractual notice period then credit must be given for the sums earned (subject to any costs incurred) by way of set off against the damages claimed.

SEXUAL HARASSMENT

15. At the direction of the Employment Judge at the preliminary hearing this is a claim contrary to section 26(1) of the Equality Act 2010 (EQA 2010). However, the claims are clearly also made under sections 26(2) and 26(3) as follows:

"26 Harassment
"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if— (a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if— (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex, (b) the conduct has the purpose or effect referred to in subsection (1)(b), and (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—
age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation."

16. The burden of proof in the non-discrimination claims is on the Claimant. As to the burden of proof in discrimination cases then s.136 EQA 2010 is engaged. We observe that this is a case where the Respondent flatly denies any inappropriate conduct took place. He does assert, however, that any comments he made were not of a sexual nature and that they do not amount to sexual harassment.

17. Finally, we have reminded ourselves of the standard of proof in civil cases i.e. the balance of probabilities. In other words we only find a fact proven if we are satisfied that the event or incident occurred on the balance of probabilities.

FINDINGS OF FACT

18. The Client is a young female hair stylist. She commenced employment with the Respondent on the 4th of January 2017. The Respondent owns a number of hair dressing salons in the Bournemouth area and he employs a number of staff in those salons.

19. We found the Respondent to be a wholly disingenuous and unconvincing witness both in respect of his financial affairs and his behaviours generally. For example, we note his assertions in the ET3 that he had paid the sums he concedes are owing when that was clearly not true.

20. The contract of employment is contained in the bundle. There are no set hours provided for in that contract.

21. The pay-slips are a work of fiction. They record a solid 16 hours a week worked by the Claimant each week when in fact even on the Respondent's own evidence the Claimant sometimes worked more than those hours and sometimes less. We consider that the pay-slips (and the P45) are so framed in order to avoid income tax and National Insurance responsibilities. It is a transparent but unlawful attempt by the employer to avoid his financial obligations to HMRC. Furthermore, the Respondent's case is that after one or two weeks no record is kept of the hours his staff worked. That in itself is a wholly unacceptable practice and we consider it is designed to ensure that his actual payment practices are not open to scrutiny.

22. We accept the undisputed evidence of the Claimant that in fact she was entitled to be paid £7.50 an hour and we also accept her evidence that the rotas she has disclosed demonstrate that she worked considerable hours. We also note that in paragraph 5 of the preliminary hearing order of the 3rd July 2018 that at that time the Respondent was agreeing that the rotas would be determinative of the hours of work undertaken by the Claimant. His attempt to resile from that position was unimpressive and we rejected his evidence. We note that the hours of the staff in the rotas are not all uniform as contended by the Respondent and are bespoke to certain individuals thereby giving the lie to the suggestion that they simply record times when staff may be required to work. We also accept the Claimant's evidence that she was paid £250 in cash per week which is in itself a wholly dubious practice designed to thwart scrutiny of the true state of affairs. If the Claimant was intending to mislead the Tribunal about the value of her claim we doubt whether she would have asserted she was in fact being paid twice as much as the Respondent is prepared to accept. He, of course, has a very particular motive for suppressing the alleged levels of payment.

23. Accordingly, on the basis that the Claimant is likely to have worked 45 hours a week at the rate of £7.50 an hour we find that the Client should have been paid £337.50 per week gross by the Respondent and from that figure there should have been income tax and National Insurance deductions.

24. We find on the evidence we have heard that the Respondent suggested to the Claimant that she should undertake an eyelash extension course. He admits to doing so. Such an admission runs entirely contrary to his case and evidence that he did not operate such a business and that he didn't need the Claimant to be so qualified. He gave the Claimant time off to do the course. We are satisfied that he did promise that he would pay

for the course. He has failed to do so and refuses to do so. We consider he is in breach of the contract to do so.

25. The Claimant's unchallenged evidence is that at some time after a burglary had occurred at a salon she was required to attend at the salon in order to clean and facilitate the police attendance and she has not been paid for three hours attendance in respect of it. This amounts to £23.50.

26. The Claimant commenced her employment with the Respondent on the 4th of January 2017. We are satisfied that the Claimant took only one day's leave prior to the end of the contractual leave year i.e. the end of March 2017. We are not surprised by the above as she was still in a 'probationary' phase. We are, however, satisfied on the balance of probabilities that she discussed the question of her leave with the Respondent and that it was agreed that she should be allowed to carry over the untaken leave entitlement to the following leave year. Otherwise she would have simply forgone all her leave entitlement for the period January -March 2017 and we find that to be highly unlikely.

27. We are also satisfied that the Claimant did in fact take two weeks leave in the leave year April 2017-March 2018 and that that leave constituted the untaken leave from the year 2016-2017 which had been agreed by the Respondent.

28. Therefore, at the time of the termination of her employment she had accumulated the right to three weeks untaken leave in the leave year April 2017-March 2018 and she was entitled to a compensation payment in respect of that leave. The rate at which she should have been paid her leave payment is her weekly pay which we find was the figure she should have received had the Respondent not breached her contract of employment by underpaying her. i.e. £337.50.

29. We turn now to the sexual harassment findings of fact. We are, of course, mindful of the seriousness of the allegations of sexual harassment. We were nevertheless impressed by the Claimant's evidence and there were a few factors which pointed in favour of her allegations being credible. Firstly, we were impressed by the evidence of the Claimant's mother who corroborated the fact that during early 2017 the Claimant had sought her advice on issues of sexual harassment without divulging that the victim of the unwanted conduct was herself. If the Claimant's account of being harassed by the Respondent is fabricated there would have been no need for her to have sought that advice as far as we can discern. We also accept the Claimant told her manager, Ms. Lidia about what had happened to her and that she was told to record it if it ever happened again. We accept that evidence because notwithstanding her denial of being told about the matters Ms.

Lidia told us that if anything untoward was to happen to herself that is precisely what she would do and that would be the advice she would give and it is, therefore, no coincidence that the Claimant volunteered that that was the advice given to her by Ms. Lidia. We also note the failure of the Respondent to dispute the suggestions contained in the text message from the Claimant dated 6th of November 2017 that he had made offensive comments to her.

30. We make the following findings:

i. At some time in February 2017 whilst travelling between salons with the Claimant in his vehicle the Respondent started to ask the Claimant personal questions such as whether she had a boyfriend and when she said no he asked why not and he told her "you're a beautiful girl" and, "shouldn't be alone." He continued with the unwelcome compliments despite the Claimant trying to change the subject.

ii. On a further occasion shortly thereafter the Respondent was again transporting the Claimant in his vehicle when he started to compliment the Claimant about her hair and when she thanked him he started to touch her hair. She tied up her hair to stop it happening. He told the Claimant she was "shy."

iii. On another occasion during this period they were again travelling in the Respondent's vehicle to a salon when he put his hand on her upper leg and told her she was "so sweet". The Claimant told him to have some respect and not to touch her at all. At this the Respondent became angry and that he didn't mean it "that way" and he was just trying to be friendly. The Claimant reminded him of his marital status and that he was old enough to be her father but the Respondent remained angry.

iv. On the Respondent's return from holiday in about March 2017 the Claimant plucked up the courage to address the matter with the Respondent. She told him not to touch her, to respect her and be professional. The response from the Respondent was to give an unpleasant smile and to tell her that she was "chatting shit" and he told her, "you're ugly without make up and fatty, you need to lose weight."

v. Thereafter, and on and off throughout the remainder of her employment the Respondent made a number of deeply unpleasant comments as follows: "you are too slow, you are so fat you can't move fast enough, you are so big, why don't you have make-up you're so ugly without it, you look like you just rolled out of bed, such a puffy swollen face."

vi. We find this change of attitude towards the Claimant was because of the rejection of his advances.

31. Therefore, we find that the Respondent did inappropriately question her about her love life, did touch her hair and did touch her leg on another occasion in a sexual manner. We are also satisfied that she did tell him

to stop the behaviour in March 2017 and that thereafter she was subjected to unpleasant and offensive comments about her weight, her appearance and her complexion as set out above. We are satisfied that the Respondent told her to wear more make-up when in fact there was no requirement ordinarily to wear a lot of make-up as confirmed by his own witness, Ms. Lidia.

32. We are entirely satisfied that the behaviours alleged by the Claimant were unwanted conduct of a sexual nature and we accept her evidence as set out in her statements about the detrimental effect it all had upon her. In our judgment it created an intimidating, hostile, degrading, humiliating and offensive environment for her. We are also satisfied that having engaged in unwanted conduct of a sexual nature the conduct had the effects set out above and because of the Claimant's rejection of the conduct, the Respondent treated her less favourably than he would have treated her if she had not rejected or submitted to the conduct. It is significant that his behaviour towards her became hostile after her rejection of his advances.

33. In all the circumstances of the case we are not surprised that the Respondent's conduct had the effect of causing upset and anxiety and we find that it had the effect of causing the proscribed effects under s.26(1)(b) EQA 2010 and it was a wholly reasonable for the Claimant to feel that it did: it was wholly inappropriate behaviour from a man in a position of power and authority many years older than a relatively inexperienced young female employee. We confirm that in reaching our findings in respect of the above that we have had in mind the factors in section 26(4) of EQA 2010.

34. The effect of the Respondent's behaviours was to seriously undermine the duty of trust and confidence. Indeed, the Claimant raised her concerns again by text on the 6th November 2017 which assertions the Respondent acknowledges went unchallenged.

35. The effect of the Respondent's unpleasant behaviours rendered the Claimant's already fragile medical condition much worse. We accept her evidence and that of her mother that it caused her considerable distress and anxiety. She had suffered from anxiety for some time previously but prior to commencing employment with the Respondent she had been weaning herself off the medication.

36. The Claimant proceeded to look for alternative employment by October 2017. By mid-November 2017 the Claimant was back at her GP seeking support but on the 28th of November 2017 she reported sick by text message at 1.16 a.m. This led to the Respondent inviting her to resign by text message. He told us that perhaps he had been unwise to write what he did but that he felt that the Claimant had, for some time, not wanted to work for him any longer. In response to the text the Claimant resigned

forthwith. We find that, in fact, contrary to her recollection she had been successful in obtaining a job offer of alternative employment in a London salon on Sunday the 26th November 2017 and that she was intending to give in her notice in any event. We note that she commenced new employment on the 4th of December 2017.

37. However, we find that the sending of the text message to the Claimant on the 28th of November 2017 was in itself a serious breach of the duty of trust and confidence entitling the Claimant to believe that the trust and confidence existing between her and the Respondent had entirely broken down. She stated she had had enough by that time and that she was "done." Even if the text was not of itself sufficient it was clearly a final straw and we find that the behaviours of the Claimant towards the Claimant about which she now complains i.e. sexual harassment and the text amounted to a repudiatory breach of contract entitling her to resign and that she did resign in response to the fundamental breach of contract. She was, therefore, constructively dismissed and entitled to two weeks' notice pay which she has not received.

38. We now consider the position of the Claimant in the two weeks from the 28th November 2017. On the 4th December 2017 the Claimant commenced new employment but in London. Her gross pay is £300 per week. However, in order to obtain that employment the Claimant has expended £212.50 as follows: one week's accommodation at £162.50 per week, one return bus fare at £30 and one week's food at £20. The true loss to her is, therefore, £527.50

CONCLUSIONS

39. The Claimant suffered unlawful deductions from her pay. Firstly, the £50 agreed deduction and, in addition, the £23.50 in respect of the attendance at the salon after the burglary and also her last working week's wages which amounts to £337.50 and which is also unpaid.

40. Furthermore, the Claimant is entitled to three weeks holiday pay bearing in mind the duration of her service during the leave year April 2017-March 2018. We reject the contention that this was limited to 1.7 weeks holiday pay. This amounts to £1012.50.

41. The Respondent was in breach of the agreement to pay her for the eyelash extension course. She is entitled to recover the £160 she paid.

42. The Claimant was constructively dismissed and is entitled to two weeks' notice but of course she has received £300 per week since starting new employment on the 4th December 2017. In order to obtain that employment the Claimant has expended £212.50 as follows: one week's accommodation at £162.50 per week, one return bus fare at £30 and one week's food at £20. The true loss is, therefore, £527.50

43. The Respondent sexually harassed the Claimant as set out above under ss 26 (1)(2)(3) of EQA 2010. As her evidence reveals the Claimant was

very upset about her treatment at the hands of the Respondent. She felt worse from a medical perspective and her distress was real and prolonged. We consider that the appropriate level of damages is into the middle Vento Band because the impact of the treatment on her was profound and continues to be so. That treatment continued for some time and it was as a direct result of the rejection of the Claimant's rejection of the Respondent's advances that he acted as he did and it was therefore deliberately penalising the Claimant. We therefore assess damages for injury to feelings at £12,500. The Claimant expressly disavowed any claim for financial loss arising out of the discriminatory conduct.

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Employment Judge Walters
8 January 2019