EMPLOYMENT TRIBUNALS

Claimant: **Miss. R Simon**

Respondent: **NJUK Hair & Beauty Ltd**

Heard at: **Nottingham**

On: **2nd December 2019**
10th January 2020 (In Chambers)

Before: **Employment Judge Heap (Sitting Alone)**

Representatives

Claimant: **Mr. S Healey - Counsel**
Respondent: **Mr. S Swanson - Counsel**

RESERVED JUDGMENT

1. The claim of wrongful dismissal is well founded and succeeds and the Respondent is Ordered to pay to the Claimant the sum of **£1,007.64** in respect of that complaint.

2. The claim of unfair dismissal is well founded and succeeds.

3. The appropriate remedy is one of compensation and the Respondent is Ordered to pay to the Claimant the sum of **£3,190.95** made up as follows:

   (i) Basic Award: **£2,467.44**

   (ii) Compensatory Award:
   a. Loss of earnings **£Nil**
   b. Loss of employment rights **£Nil**
   c. Pension loss **£41.40**
   d. Adjustment to compensatory award[1] **£10.35**
   e. Additional award[2] **£671.76**

4. The Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349 do not apply to this award.

[1] Under the provisions of Section 207A Trade Union & Labour Relations Consolidation Act 1992
[2] Under the provisions of Section 38 Employment Act 2002

REASONS

BACKGROUND & THE ISSUES

1. By way of a Claim Form presented on 1st August 2019 the Claimant commenced proceedings claiming unfair dismissal and wrongful dismissal.

2. The Respondent defends the claim in its entirety. The key issue between the parties, as agreed with both Counsel at the outset, was the effective date of termination of employment. The Claimant says that this was 5th April 2019 when she was told verbally by Ms. Nicola Clifford, a Director of the Respondent, that she was dismissed. Ms. Clifford denies that that was the case and the Respondent's position is that the Claimant was only suspended at that time and was not dismissed until 3rd May 2019 following an investigation and disciplinary hearing which the Claimant did not attend.

3. There is no potentially fair reason advanced by the Respondent if it was found that the Claimant was dismissed on 5th April 2019. Indeed, Ms. Clifford's evidence was that there was nothing to dismiss the Claimant for at that juncture. However, if it was the case that the Claimant was dismissed on 3rd May 2019 then the Respondent's position is that she was dismissed by reason of her conduct after an appropriate investigation and disciplinary process in which the Claimant refused to engage. It is further said that the Claimant's alleged conduct was so serious that it amounted to gross misconduct and that the Respondent was therefore entitled to terminate the contract without due notice.

4. There is also a dispute as to whether the Claimant received an updated statement of main terms and conditions of employment when there was a change in her job title. The Claimant says that she did not and the Respondent contends that she did but that this had gone missing after the end of the Claimant's employment. That was relevant to the question of, if the Claimant succeeded in some or all of her claim, there should be an additional award of compensation under Section 38 Employment Act 2002.

THE HEARING

5. The hearing of the claim was listed for one day. Unfortunately, that proved insufficient to enable me to deliberate and give oral Judgment after hearing the evidence and submissions which concluded at 4.30 p.m. Accordingly, this Judgment was reserved and I thank the parties for their patience in awaiting the same.

6. Before taking my decision, I have taken into account all the evidence contained within the hearing bundle as agreed between the parties; the witness evidence that I have heard and the helpful submissions from Mr. Healey on behalf of the Claimant and Mr. Swanson on behalf of the Respondent.

7. In terms of the witness evidence, I heard from the Claimant on her own behalf and from Ms. Clifford on behalf of the Respondent. As I have already observed, Ms. Clifford dismissed the Claimant. The real question is when that dismissal occurred.

8. I considered the Claimant to be a credible witness who gave an honest and reliable account to the best of her recollection. Her evidence was consistent with the

limited amount of documentation before me and with the accounts given in her Claim Form and in her witness statement.

9. As to Ms. Clifford, I was less impressed with her evidence than that of the Claimant. I found Ms. Clifford to be prone to exaggeration in respect of making allegations during her evidence that had arisen for the first time and did not even feature in her witness statement. That included suggestions that the Claimant had taken her contract of employment from a filing cabinet where it was kept and sabotaging the Respondent's client list by amending contact details. There was no evidential basis for those allegations and, again, they only came about for the first time during Ms. Clifford's evidence. Moreover, the Claimant had no way of knowing that she would not be returning to work after 5th April 2019 and had she sabotaged the client details before that point on the off chance that that might occur at some stage, she would have been damaging her own ability to contact clients whilst she was still at work. I find those allegations to have been made in order to try to paint the Claimant in a bad light and without foundation and they did little to assist in the credibility of the account that Ms. Clifford gave in other areas. Furthermore, in some areas which I shall come to in my findings of fact below, I also found Ms. Clifford's evidence to be at odds with the documentation before me.

10. I also take into account that there was an inconsistency in the accounts given at various stages by Ms. Clifford. In this regard, her evidence at the hearing was that she had prepared at some stage after the events with the Claimant a note entitled Time Line of Communications which appears at pages 82 to 88 of the hearing bundle. That appears to have been written on 24th April 2019. It sets out that Ms. Clifford thought that the Claimant had resigned because she did not attend work on 6th April 2019 but that was inconsistent with her evidence now that she had suspended the Claimant. Ms. Clifford has not been able to adequately explain that discrepancy.

11. For all of those reasons, unless I have expressly said otherwise I preferred the evidence of the Claimant to that of the Respondent.

THE LAW

12. Before turning to my findings of fact, it is necessary for me to set out a brief statement of the law which I shall in turn apply to those facts as I have found them to be.

Complaints of Unfair Dismissal

13. Section 94 of the Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

14. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is on the grounds of that employee's conduct. The burden is upon the employer to satisfy the Tribunal on that question and they must be satisfied that the reason advanced by the employer for dismissal is the reason asserted by them; that it is a potentially fair reason for dismissal falling under either Section 98(1) or 98(2) ERA 1996 and, further, that it was capable of justifying the dismissal of the employee. A reason for dismissal should be viewed in the context of the set of facts known to the employer or the beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay & Anderson 1974 ICR 323, CA**).

15. It is therefore for the employer to satisfy the Tribunal as to the reason for dismissal. If they are not able to do so, then a finding of unfair dismissal will follow.

16. If an Employment Tribunal is satisfied that there was a potentially fair reason for dismissal and that that is the reason advanced by the employer, then it will go on to consider whether the employer acted fairly and reasonably in treating that reason as a sufficient reason to dismiss.

17. The all-important question of fairness is contained with Section 98(4) ERA 1996 which provides as follows:

> *"(4) Where the employer has fulfilled the requirements of subsection (1),* (in this case that they have shown that the reason for dismissal was redundancy) *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

18. The burden is no longer upon the employer alone to establish that the requirements of Section 98(4) are fulfilled in respect of the dismissal. That is now a neutral burden.

19. In conduct cases, a Tribunal is required to look at whether the employer carried out a reasonable investigation from which they were able to form a reasonable belief, on reasonable grounds, as to the employee's guilt in the misconduct complained of (**British Home Stores v Burchell [1980] ICR, 303 EAT**).

20. An Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. It judges the employer's processes and decision making by the yardstick of the reasonable employer and can only say that a dismissal was unfair if either falls outside the range of reasonable responses open to the reasonable employer.

21. Many employees will be able to point to something the employer could have done differently, or indeed better, but that is not the test. The question for the Tribunal is whether the employer acted within the range of reasonable responses open to it or, turning that question around, could it be said that no reasonable employer would have done as this employer did?

Wrongful Dismissal

22. A different test is to be applied to a claim of wrongful dismissal, that is a dismissal said to be in breach of a contractual right to notice. The Tribunal is seized of jurisdiction to consider such claims under the Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994.

23. The test to be applied in such a claim is not whether the employer had a reasonable belief upon reasonable grounds that the employee had committed an act or acts of gross misconduct but, rather, it requires the Tribunal itself to determine whether the employer has established that the employee acted in repudiatory breach of contract such as to entitle the employer to summarily dismiss him or her. This requires the Tribunal to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place. The Tribunal's obligation to determine this question is not one that is simply parasitic on the employer's findings (see **Phiri v Surrey & Borders Partnership NHS Foundation Trust UKEAT/0025/15 and Cameron v East Coast Mainline Company Ltd UKEAT/0301/17**). The Tribunal has to evaluate the evidence for itself and reach its own conclusions as to what took place.

24. The Tribunal must then go on to consider, having reached conclusions as to what took place, whether that was sufficiently serious as to amount to gross misconduct and to permit the employer to terminate the contract of employment without notice.

25. Remedies for unfair dismissal are provided for by Sections 118 to 126 Employment Rights Act 1996. The provisions relevant to this claim are contained within Sections 119 and 123 Employment Rights Act 1996 which provide as follows:

> ***"119 Basic award.***
>
> *(1)Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—*
>
> *(a)determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
>
> *(b)reckoning backwards from the end of that period the number of years of employment falling within that period, and*
>
> *(c)allowing the appropriate amount for each of those years of employment.*
>
> *(2)In subsection (1)(c) "the appropriate amount" means—*
>
> *(a)one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,*
>
> *(b)one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*
>
> *(c)half a week's pay for a year of employment not within paragraph (a) or (b).*
>
> *(3)Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years."*

"Section 123 Compensatory award

(1)Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2)The loss referred to in subsection (1) shall be taken to include—

(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b)any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5)In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—

(a)calling, organising, procuring or financing a strike or other industrial action, or

(b)threatening to do so,

was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(6A)Where—

(a)the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and

(b)it appears to the tribunal that the disclosure was not made in good faith,

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.

(7)If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

(8)Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113."

26. Also relevant are the provisions of Section 207A Trade Union & Labour Relations (Consolidation) Act 1992 and Section 38 Employment Act 2002 which provide as follows:

"207A Effect of failure to comply with Code: adjustment of awards

(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employer has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employee has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4)In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

(5)Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section."

"38 Failure to give statement of employment particulars etc.

(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2)If in the case of proceedings to which this section applies—

(a)the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

(b)when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3)If in the case of proceedings to which this section applies—

(a)the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b)when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 or under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4)In subsections (2) and (3)—

(a)references to the minimum amount are to an amount equal to two weeks' pay, and

(b)references to the higher amount are to an amount equal to four weeks' pay.

(5)The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."

FINDINGS OF FACT

27. I turn now to my findings of fact based on the evidence that I have seen and heard during the course of this hearing.

28. The Claimant was employed by the Respondent initially as a hairdresser and later as an Assistant Manager.

29. The Respondent salon is owned and managed by Ms. Nicola Clifford. At the time that the Claimant was working for the Respondent, she and Ms. Clifford had a close friendship.

30. The Claimant was provided around the time that her employment commenced with a Statement of Main Terms and Conditions of Employment ("Terms"). I accept her evidence that those were not updated to reflect her amended job title at the time that she was promoted to Assistant Manager. I preferred her evidence over that of Ms. Clifford on that point. The Respondent has not been able to provide a copy of the amended Terms and I do not accept the suggestion that the Claimant had removed them before her employment was terminated. It follows that the Respondent was in breach of the duty to provide updated particulars of employment at the time that these proceedings were commenced.

31. By the time that her employment ended the Claimant had been employed by the Respondent for a period of just over seven years. She had become interested in the possibility of setting up her own business and had been approached by a friend who was selling her own salon. She began to make preparations to purchase that property with a view to opening her own salon. By 10th June 2019 the purchase was complete and the Claimant would have been ready to commence trading. Indeed, that was the date that she commenced working on her own account. At that time, it would have been the Claimant's intention to tell Ms. Clifford that she was setting up her own business and intended to leave employment. Although I accept that the Claimant may well have offered to give her the one month's notice that was contractually required of her at that point, I find it more likely than not that had matters come to that there would have been an agreement to waive the notice period reached between Ms. Clifford and the Claimant. Ms. Clifford would not have wanted the Claimant to continue to work in the Respondent's salon because she would have been concerned about the possibility of losing clients to the Claimant's rival business and I am satisfied that the Claimant would have not objected to waiving her notice on the basis that she would have wanted to commence working in her new venture as soon as she could. I therefore find it more likely than not that the Claimant's employment with the Respondent would have ended by agreement on 10th June 2019 when the Claimant would have told Ms. Clifford that she was ready to commence trading on her own account.

32. The Claimant did not tell Ms. Clifford about her plans to open her own salon. I have no doubt that that was because she planned to open that salon in a reasonable proximity to the Respondent's premises and she had concerns over Ms. Clifford's reaction to that. Although the Claimant and Ms. Clifford were, at that stage, close friends there would have been concern about how the Claimant's plans would impact the Respondent's business and whether clients of the Respondent may elect to follow the Claimant. The Claimant therefore kept her plans secret from Ms. Clifford.

33. However, on or around 5th April 2019 Ms. Clifford became aware that the Claimant was making plans to set up her own salon. I accept the Claimant's evidence that she had only told close family by this point but the matter nevertheless became wider knowledge so that someone came to tell Ms. Clifford about it. Ms. Clifford has never told the Claimant who that person was.

34. I do not accept Ms. Clifford's evidence that the person in question was a client of the salon and told her that the Claimant had given her telephone number to her with a view to "poaching" her as a client and that it was also the Claimant's intention to take other clients with her to her new venture. I find it more likely that she had simply heard about the venture and that sparked concerns for her about the Respondent business.

35. On 5th April 2019 the Claimant was at work as normal when she received a telephone call from Ms. Clifford asking her to meet her at a local coffee shop. I understand that venue to be one where Ms. Clifford undertakes work related meetings such as appraisals and the like. Ms. Clifford did not provide the Claimant with any advance notice as to what the meeting was to be about. The Claimant discovered that her next client had been cancelled and she went to the coffee shop as Ms. Clifford had requested.

36. The parties are at odds on exactly what was said during the course of the meeting. However, it is common ground that Ms. Clifford made the Claimant aware that she knew about her proposed business venture. I accept the Claimant's evidence that she told Ms. Clifford that she was intending to start her own salon but that she was not yet in a position to hand in her notice and leave but that she would be doing so at some point in the future.

37. The Claimant's evidence was that she was told by Ms. Clifford that she could not have her back in the salon and that she should collect her things and that the Claimant interpreted that as a dismissal. Ms. Clifford's evidence was that she had not dismissed the Claimant but had told her to collect her bag only because she would not be working for the rest of the day as her clients had been cancelled and that she needed to take advice on the next steps.

38. I prefer the Claimant's evidence on the events of the meeting for the reasons that I have already given and those which I shall also come to below. I accept that the Claimant was told that she could not return to the salon but that if things did not work out with her business then she would be welcome back at the salon. The Claimant was told to collect her things because both parties were aware that she would not be working there again.

39. There are some aspects of the meeting that the parties are agreed upon. That includes that both the Claimant and Ms. Clifford became emotional and that at some point in the meeting they shared a hug. I find it likely that that happened because of both their previous good level of friendship and the fact that both were now aware that the working relationship was at an end.

40. I have, however, considered that the Claimant accepts that Ms. Clifford said to her that she would be in touch to discuss next steps which may be inconsistent with there having been a dismissal, but I am satisfied that that could have meant any number of things such as finalising outstanding wages or a P45. It is notable in this regard that Ms. Clifford has no prior experience of having dismissed a member of staf.

41. The fact that the intention of Ms. Clifford was that the Claimant would not be returning to work was entirely consistent with what came next. In this regard, Ms. Clifford requested the return of the Claimant's salon keys and on 6th April 2019 she removed the Claimant from the salon WhatsApp group (see page 72 of the hearing bundle). Ms. Clifford's evidence was that that was because the Claimant would not be attending work whilst on suspension, but removing her from the group is much more consistent with the position that her employment had ended. That is particularly because it is clear from the messages that I have seen that clients or arrangements for clients was not the sole topic of conversation in that group. Both the request for return of the salon keys and the removal from the WhatsApp group are consistent with the Claimant having been dismissed on 5th April 2019.

42. Moreover, on the same day Ms. Clifford sent a message to the Claimant wishing her well with her new business venture. That, again, was more consistent with the end of the working relationship between the pair than if Ms. Clifford was simply seeking advice as to how to proceed. It followed on from the hug goodbye that they had shared the previous day.

43. The Respondent did continue to pay the Claimant after 5th April 2019 and I have seen remittance slips to that effect. However, by the time that the next payroll run was due after 5th April 2019 Ms. Clifford had sought legal advice. I find it likely that she had discovered that the correct process for dismissing the Claimant had not taken place and that she put in place at that stage steps to pay the Claimant and to seek to take the steps that she should have taken to investigate matters from the outset. Effectively, she was trying to row back from the events of 5th April 2019.

44. There are a number of other things that point to the Claimant having been dismissed on 5th April 2019. The first of those is that on 11th April 2019 Ms. Clifford sent messages to a client of the Respondent, Sarah, to say that the Claimant had left the Respondent. The relevant part of her message said this:

    "As you may be aware and may have already been contacted by our stylist Rachel who has left our company to move onto another role".

45. Ms. Clifford has not been able to provide a credible explanation as to why she would have referred to the Claimant as having left the company if she was, as she now says, still employed. Her comments were entirely consistent with the Claimant's evidence that her employment was terminated a few days earlier.

46. Sarah was not the only client to be contacted by the Respondent on or around 5th April 2019 indicating that the Claimant was "no longer with them" or "had left". Four other individuals contacted the Claimant via Facebook Messenger to say that they had been told that the Claimant was no longer at the Respondent salon (see pages 106, 108, 111 and 113 of the hearing bundle). Again, Ms. Clifford has not provided any credible explanation for why those clients would have been told that if the Claimant had not in fact been dismissed at that stage. Other individuals also sent messages to the Claimant saying that they were aware that she had left the Respondent salon, although those do not specifically say that they had been informed about that by the Respondent.

47. The Claimant had also been removed from the Respondent's booking system by 13th April 2019 at the latest (see page 119 of the hearing bundle).

48. On 15th April 2019 the Claimant sent a message to Ms. Clifford asking about the next steps to her dismissal. She made it plain in that message that she had been dismissed on 5th April and referred to that dismissal as being on Ms. Clifford's terms. Ms. Clifford replied only to sat that she would be in touch once she had received responses from her advisors (see page 76 of the hearing bundle). Tellingly, what Ms. Clifford did not do is correct the Claimant on the issue of dismissal if she had in fact not terminated her employment. The natural response to that message if there had been no dismissal would have been to have corrected the Claimant and ask her what she was talking about. Later messages from the Claimant went unanswered.

49. Whilst Ms. Clifford tells me that by this time she was in the later stages of pregnancy, I do not find that that would account for not replying to the Claimant to ask her why she was saying that she had been dismissed if she had not. Ms. Clifford clearly was able to respond and was later also able to send letters to the Claimant seeking to instigate a disciplinary process.

50. Indeed, on 18th April 2019 Ms. Clifford wrote to the Claimant. By that time she had received legal advice. The letter purported to suspend the Claimant on full pay. Again, that tied in with the fact that the Respondent continued to pay the Claimant thereafter. The letter indicated that the Respondent was conducting an investigation during the suspension period into allegations that the Claimant had been poaching clients and that she had been working elsewhere. It invited the Claimant to an investigatory meeting and set out that if there was substance to the allegations, there would be a disciplinary hearing. The second allegation regarding working elsewhere whilst suspended related to the fact that the Claimant had gained employment with the then owner of the salon which she was in the process of purchasing. There was, of course, no issue with the Claimant doing so given that she had been dismissed on 5th April 2019.

51. The Claimant sent a further message to Ms. Clifford on receipt of the letter to say that as far as she was aware she had been dismissed and would not be attending the investigation meeting. Ms. Clifford did not reply to that message or otherwise seek to set the Claimant straight if her position was that she had not been dismissed on 5th April.

52. Instead she sent a further letter to the Claimant on 25th April 2019 inviting her to a disciplinary hearing. That letter set out an expanded number of allegations against the Claimant relating to poaching clients, advertising her new salon to the Respondent's clients whilst at work, working elsewhere whilst on suspension, causing the Respondent financial losses, breaches of restrictive covenants said to be contained in her contract of employment and failing to follow a reasonable management instruction by not attending the investigatory meeting.

53. The Claimant emailed Ms. Clifford on 29th April 2019 to say that she would not be attending the disciplinary hearing because she had been dismissed on 5th April 2019. She requested a copy of her contract of employment which further reinforces my finding that she had not taken that document prior to her dismissal.

54. Ms. Clifford replied on 30th April 2019 rescheduling the disciplinary hearing and setting out that the Claimant had not been dismissed on 5th April 2019. That denial was in sharp contrast to earlier occasions when the Claimant had said that she had been dismissed and Ms. Clifford had not sought to correct her and in fact it was the first time that she had ever expressly denied the Claimant's statement that she had been dismissed on 5th April 2019. As I have already observed, I find that most unusual to say the least.

55. The Claimant did not attend the disciplinary hearing. I accept that she did not do so on the basis that she had already been dismissed on 5th April 2019. Ms. Clifford wrote to the Claimant on 3rd May 2019 purporting to dismiss her by reason of gross misconduct (see pages 98 to 100 of the hearing bundle). The letter offered the Claimant a right of appeal against dismissal. On 8th May 2019 the Claimant responded to say that she did not intend to appeal the dismissal because she had been dismissed on 5th April 2019. Again, that was entirely consistent with the Claimant's position all along.

56. On 1st August 2019 the Claimant presented her Claim Form to the Tribunal.

CONCLUSIONS

57. Insofar as I have not already done so, I now deal with my conclusions in relation to each of the complaints before me.

58. As I have already observed, the key question in these proceedings is when the Claimant was dismissed. For the reasons that I have already given, I am satisfied on the basis of the evidence before me that that dismissal took place on 5th April 2019. I am satisfied that the Claimant was told that she could not return to the salon; was told to collect her belongings and asked for the return of her keys; that she was removed from the salon WhatsApp group and the booking system and that clients of the Respondent were told that the Claimant had left. Whilst the Claimant was not expressly told "you are dismissed", what happened was clearly sufficient to convey that her employment with the Respondent was at an end and the events of the following few days reinforce that.

59. The Respondent has not advanced any potentially fair reason for dismissal in respect of the termination on 5th April 2019. However, insofar as that might be said to be conduct then the Respondent has not discharged the burden upon them to show that potentially fair reason given that the evidence of Ms. Clifford was that she did not consider that there was anything to dismiss the Claimant for on 5th April 2019 and that she had wished her well for her future endeavours and offered to welcome her back if things did not work out. It is clear that the concerns of Ms. Clifford were to protect clients of the Respondent salon opting to follow the Claimant to her new salon when word got out that she was leaving.

60. Moreover, even had I found there to have been a potentially fair reason for dismissal then the Respondent did not act fairly and reasonably in treating that as a fair reason to dismiss. There was nothing by way of investigation into the allegations that the Claimant had been attempting to poach clients nor was the Claimant given the opportunity to attend a disciplinary hearing or given a right of appeal in respect of the dismissal on 5th April 2019. Whilst the Respondent attempted to row back on that position at a later stage and engage with a

disciplinary process, it is entirely unsurprising that the Claimant elected not to participate.

61. Moreover, it is clear that given the only issue at that stage was the Claimant setting up her own business and Ms. Clifford's evidence to which I have already referred, dismissal was clearly not within the band of reasonable responses open to a reasonable employer.

62. I am therefore entirely satisfied that the Claimant was unfairly dismissed.

63. I turn then to the wrongful dismissal complaint. I must firstly be satisfied in this regard that, on the evidence before me, the Claimant acted as the Respondent contends as at 5th April 2019. At its highest that was that Ms. Clifford had been told by some unidentified individual that the Claimant had been trying to poach clients. I did not accept her evidence in that regard and the sole issue was that the Claimant was setting up her own business. There is nothing before me in respect of the Claimant's actual Terms that prohibited that position, less still that it amounted to gross misconduct. It follows that the wrongful dismissal complaint is also well founded and it succeeds.

REMEDY

64. I turn then to the appropriate remedy in this case. I begin with the complaint of wrongful dismissal. It is not in dispute that the Claimant was entitled to 7 weeks' notice of termination of employment given that she had at the point of her dismissal been employed by the Respondent for seven full years. Therefore, she was entitled to be given notice which would have expired on 24th May 2019. It is not in dispute, however, that the Claimant continued to be paid in full by the Respondent until the purported dismissal on 3rd May 2019.

65. Therefore, that period must be taken into account in calculating her losses as to award her in full for those seven weeks would therefore otherwise amount to a double recovery. The Claimant earned the sum of £335.88 net per week with the Respondent. Compensation for wrongful dismissal, which would place the Claimant back into the position that she would have been in if she had been given notice of termination of employment on 5th April 2019, is the sum of 3 weeks' pay between 3rd May 2019 and 24th May 2019 equating to the net sum of £1,007.64.

66. I turn then to the complaint of unfair dismissal. It is clear that the relationship between the Claimant and Respondent is now very poor and that the Claimant is engaged running her own business such that reinstatement or re-engagement are not appropriate remedies in this case. The appropriate Order is one of compensation.

67. As the Claimant was unfairly dismissed she is entitled to a basic award calculated by reference to her age and length of service. It is not disputed that the Claimant's gross weekly wages were in the sum of £411.24. Her entitlement to a basic award is therefore in the sum of £2,467.44. Although Mr. Healey sought to update the figure to £2,878.68 during the course of the hearing, the original figure is in fact correct given the Claimant's age at commencement of employment with the Respondent. She would therefore be entitled to 6 weeks gross pay equating to £2,467.44.

68. I turn then to the compensatory award. As I have already set out above, by 10th June 2019 the Claimant would have been in a position to commence trading on her own account. Whilst she tells me that she would have then offered her notice, I find it more likely than not that the parties would have agreed to a parting of the ways at that stage. Ms. Clifford would not have wanted the Claimant to work her notice given that she was setting up in competition and I am satisfied that the Claimant would have been more than happy not to work her notice so that she could begin her new venture and that she was would only have been giving notice on the basis that she was obligated to do so. Indeed, her evidence was that she would delayed telling the Respondent until the very last moment when she was already ready to start trading. As such, the Claimant has no losses after 10th June 2019 because at that point the employment relationship would invariably have ended anyway by agreement to leave at that point and effectively waive the notice period.

69. However, I would observe that even had I not made that finding I would nevertheless not have considered it just and equitable to award the Claimant any sum after 10th June 2019 as a result of the lack of any proper evidence, and particularly documentary evidence, about how the Claimant had reached the figure of £241.18 which she says that she earned and now earns from trading on her own account. I take into account in this regard that at all times the Claimant has been legally represented yet there are no wage slips, accounts or any other documentation setting out what the Claimant has earned/drawn since 10th June 2019. The Claimant's evidence did not particularly assist as to the basis on which that sum had been arrived at but without any documentation, and taking into account her evidence that figures in the Schedule of Loss for earlier periods of mitigation were "an average", I cannot properly calculate any further period of loss since the Claimant commenced self employment. As such, even if I had found that the Claimant would have given and been happy and prepared to work her notice, I would not have awarded her any further period of loss after 10th June 2019 because there is nothing to properly support the claimed losses and it would not have been just and equitable to do so.

70. For all of those reasons, the Claimant is entitled to recover any losses between 25th May 2019 (given the award made for wrongful dismissal up to that date) and 10th June 2019. That equates to 2 weeks losses in the sum of £335.88 per week and loss of earnings therefore of £671.76. However, from that I must deduct the sums that the Claimant earned from temporary employment from 24th May 2019 to 8th June 2019 when that employment ended and she opened the same salon on her own account. The Claimant in fact earned more - £350.00 net per week – from that employment. Whilst the Claimant's evidence was that she believed in fact that she earned less than that, that is the figure in the Claimant's schedule of loss and I have no documentation to suggest some alternative lesser figure. As that was more than the Claimant was earning with the Respondent, it follows that during that period she did not in fact have any loss of earnings.

71. I make no award in respect of the loss of employment rights given that the Claimant would have left on her own account shortly after her dismissal to take up self employment in all events. There is therefore nothing realistically to compensate the Claimant for in that regard.

72. The Claimant was also a member of the Respondent's pension scheme. That was not challenged nor were the amount of contributions claimed on the Claim Form in the sum of £8.22 per week. The Claimant suffered losses in that regard from the cessation of her pay on 3rd May 2019 until 10th June 2019. That is a period of 5 weeks and equates to a loss of £41.40.

73. I am satisfied that I should adjust the compensatory award to take account of the Respondent's failure to comply with the ACAS Code of Practice on Disciplinary & Grievance Procedures with regard to the Claimant's dismissal. Pursuant to Section 207A Trade Union & Labour Relations (Consolidation) Act 1992, that adjustment may be between 10% and 25%. I do find it to have been an unreasonable failure to follow any appropriate form of fair process. Whilst I take into account the fact that this is a relatively small employer and Ms. Clifford had no experience of conducting disciplinary proceedings, that cannot in my view outweigh the complete failure to operate any form of process whatsoever. This was a serious failure. The Claimant was never given proper details of the allegations against her with regard to the client who it is said told Ms. Clifford that she was poaching clients and so the Claimant never had the opportunity to defend herself. She was not afforded a disciplinary hearing nor a right to appeal until the later attempts to row back from the earlier dismissal. By that point the Claimant was not prepared, understandably, to participate in what was at best a sham process. There was a complete and unreasonable failure to comply and as such it is appropriate to adjust compensation by 25%.

74. Finally, I consider an additional award under Section 38 Employment Act 2002. The Claimant has succeeded in her complaints of wrongful dismissal and unfair dismissal which are both listed at Schedule 5 to that Act and thus engage consideration of Section 38. I am satisfied, for the reasons that I have already given, that at the point that these proceedings commenced the Respondent was in breach of their duty to the Claimant under Section 4(1) of the Employment Rights Act 1996 because of the failure to provide her with a written statement of particulars of change when she was appointed to the role of Assistant Manager and therefore I am satisfied that an additional award should be made.

75. Unless there are exceptional circumstances which would make an award unjust or inequitable, I **must** (my emphasis) make an award of at least the lower amount of two weeks' pay. There is nothing before me to properly suggest that there are such exceptional circumstances or that to make such an award would be unjust or inequitable. I am therefore satisfied that I should award the lower amount. Given the extent of the failure and the relatively small size of the Respondent, I do not consider it just and equitable to award the higher amount. The additional award therefore equates to £671.76.

76. The Respondent is therefore Ordered to pay to the Claimant the total sum of £4,198.59 in respect of compensation for wrongful dismissal of £1,007.64 and compensation for unfair dismissal of £3,190.95.

77. I should observe on a final note that it is very unfortunate that matters have come to this. Until the events that led to these proceedings the Claimant and Ms. Clifford were very close friends. This litigation and the allegations made within it have invariably not assisted that position but I would hope in time that both parties are able to put these matters behind them and move forward with a view to repairing their relationship.

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Employment Judge Heap

Date: 28th January 2020

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE