THE INDUSTRIAL TRIBUNALS

CASE REF: 10253/19

CLAIMANT: **Beverley Gibson**

RESPONDENT: **SoftwareOne UK Ltd**

COSTS JUDGMENT

The unanimous judgment of the tribunal is that the respondent's application for costs is refused.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Orr**

Members: **Mr T Carlin**
Mr I McCarroll

APPEARANCES:

The claimant appeared and was self-representing.

The respondent was represented by Mr R Fee, Barrister-at-Law, instructed by Stewarts Solicitors.

BACKGROUND

1. The claimant presented a claim form to the tribunal office on 5 June 2019 claiming constructive unfair dismissal and sex discrimination (harassment and direct discrimination).

2. The case was subject to normal case management and was eventually listed for hearing on 24-28 May 2021 after postponement and delays arising from the Covid-19 pandemic.

3. A Deposit Hearing took place on 12 May 2021 at which the claimant was ordered to pay two deposits in respect of her claims of sex discrimination. The tribunal declined to make a Deposit Order in respect of the claimant's constructive unfair dismissal claim.

4. The Deposit Order was issued to the parties on 19 May 2021. The claimant withdrew her claims of direct sex discrimination and harassment on 20 May 2021.

5. The claimant withdrew her constructive unfair dismissal claim by email on 24 May 2021 at 8.53 am.

6. The respondent's representative submitted an application for costs to the tribunal office by letter dated 8 June 2021.

7. A Preliminary Hearing for the purposes of listing the costs application for hearing and issuing case management orders took place on 7 July 2021. The claimant appeared and was self-representing. The tribunal directed the parties to exchange and submit written submissions and relevant legal authorities for the purposes of the Costs Hearing.

RELEVANT LAW

8. The tribunal's power to award costs is contained in Part 13 of Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 ("the Rules").

> "*73 – (1) A tribunal may make a costs order or preparation time order, and shall consider whether to do so, where it considers that –*
>
> *(a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) All or part of any claim or response has no reasonable prospect of success."*

9. ***Harvey on Industrial Relations and Employment Law, Division P1 Practice and Procedure*** at paragraphs 1044-1120 sets out the tribunal's jurisdiction in relation to costs.

10. The EAT in ***Ayoola v St Christopher's Fellowship [2014] UKEAT0508/13*** summarised the relevant principles on the exercise of the discretion to award costs.

> *"17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see Gee v Shell UK Ltd [2002] IRLR 82 at page 85,* ***Lodwick v London Borough of Southwark [2004] ICR 884*** *at page 890,* ***Yerrekalva v Barnsley MBC [2012] ICR 420*** *at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see* ***Robinson and Another v Hall Gregory Recruitment Ltd UKEAT/0425/13*** *at paragraph 15.*

*18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in **Criddle v Epcot Leisure Ltd [2005] EAT/0275/05** identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs. In Criddle there was no indication in the Tribunal's Reasons that the Tribunal Chairman had carried the second stage of the requisite exercise and the EAT was not satisfied, in the absence of such indication, that the Chairman had in fact done so. The appeal was thus allowed against the costs order.*

*19. The extension of the Tribunal's costs jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering of the threshold for making costs awards, see Gee v Shell UK Ltd per Scott Baker LJ. In such cases the question is not simply whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised, see **Scott v Inland Revenue Commissioners [2004] ICR 1410 CA** per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see **Barnsley MBC v Yerrekalva** per Mummery LJ at paragraph 41".*

11. Cost Orders are exceptional in the tribunals; unlike the Civil Courts, costs do not normally follow the event. As per LJ Sedley ***Gee v Shell UK Ltd [2003] IRLR 82***:-

> *"It is nevertheless a very important feature of the Employment Jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK – losing does not ordinarily mean paying the other side's costs".*

12. In ***McPherson v BMP Parabas [2004] EWCA Civ 569*** Mummery LJ stated that in circumstances where a claim is withdrawn at the start of a hearing the question is not whether the withdrawal was unreasonable, but whether the proceedings had been conducted unreasonably. He specifically stated:-

> *"28. In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Ms McCafferty, appearing for Mr McPherson, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LG observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation decisions.*
>
> *29. On the other side, I agree with Mr Tatton-Brown, appearing for **BMP Parabas**, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to*

pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.

30. The solution lies in the proper construction and sensible application of the rule. The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable …".

13. In the Court of Appeal, in ***Sud v London Borough of Ealing [2013] EWCA Civ 949,*** LJ Fulford reviewed the legal authorities on the tribunal's costs jurisdiction, specifically the relevance of Calderbank letters in Employment Tribunals:-

*"69. As described by the Court of Appeal in **Lodwick v Southwark London Borough Council [2004] ICR 884**, as a general proposition it is undoubtedly the case that orders for costs are only made exceptionally in the Employment Tribunal, and that the reason for and the basis of any such orders should be clearly specified (Per Pill LJ, at para 26).*

*70. In **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR420** it was emphasised that the tribunal has a broad discretion, and it should avoid adopting an over analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate hearings such as "nature", "gravity" and "effect". The words of the rule should be followed and the tribunal needs "to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in so doing to identify the conduct, what was unreasonable about it and what effects it had" (paras 39-41).*

71. The Court of Appeal in that case made it clear that although causation was undoubtedly a relevant factor, it was not necessary for the tribunal to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Furthermore, the circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, risking the court losing sight of the totality of the relevant circumstances (para 41).

*72. In **McPherson v BMP Parabas (London Branch) [2004] ICR 1398** it was emphasised that it would be wrong to make a finding of unreasonable conduct leading to an Order for costs whenever a claimant withdraws a claim. Similarly, it would be wrong for tribunals to follow a practice on costs which might encourage speculative claims, when the claimant hopes to secure whilst never intending to proceed to trial. Instead, the "crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably." (see 30).*

…

> *82. As the tribunal accepted, the consequences of* ***Calderbank*** offers *to settle that can have consequences for costs in civil proceedings do not apply in the Employment tribunal. However, in certain circumstances, the failure by a party to respond to or consider a reasonable offer of settlement can amount to unreasonable conduct (see* ***G4S Services v Rondeau UKEAT/0207/09/DA****), a case in which it took five months for an offer of settlement to be accepted). In* ***Kopel v Safeway Stores PLC [2003] IRLR753*** *Mitting LJ observed;*
>
> > *"18 … It does not follow that a failure by an appellant to beat a* ***Calderbank*** *offer should, by itself, lead to an order for costs being made against the appellant. The Employment Tribunal must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before rejection becomes a relevant factor in the exercise of its discretion (under Schedule 1, Rule 14(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001) …"*

14. As per the authorities set out above, the tribunal must go through a three stage procedure when considering an application for costs. The first is to decide whether the power to award costs has arisen under Rule 73; if so, the second stage is to decide whether to make an award, and if so, the third stage is to decide how much to award.

15. The tribunal reminded itself of the comments of Sir Hugh Griffiths in the case of ***Marler ET v Robertson [1974] ICR 72***;

> *"Ordinary experience of life frequently teaches us that what is plain for us all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms."*

SOURCES OF EVIDENCE

16. The claimant submitted a written statement to the tribunal for the purposes of this hearing and was cross-examined on its content. In her statement the claimant made reference to a number of documents including WhatsApp messages, however these were not included in the bundle or provided to the tribunal.

17. The tribunal was also presented with a bundle of documents containing the respondent's written submissions, copy requests for Additional Information and Responses, Records of Proceedings, inter-party correspondence, copy Deposit Orders and costs warning letters dated 19 February 2021 and 8 April 2021. The tribunal had regard only to the documents to which it was referred to during the hearing.

RELEVANT FINDINGS OF FACT

18. The tribunal made the following findings of fact relevant to the determination of the costs application, based on the claimant's evidence and the documents referred to in the respondent's tribunal's trial bundle.

19. The claimant was legally represented, at various times throughout these proceedings and received advice and assistance from a number of sources.

20. The claimant applied to the Equality Commission for assistance in December 2019 and was unsuccessful.

21. From January 2020 to September 2020 the claimant was in receipt of advice and assistance from the University of Ulster Law Clinic.

22. In September 2020 the claimant instructed by Mr Foote, an employment solicitor who represented her until January 2021 after which she was self-representing until 14 April 2021.

23. The claimant instructed Mr T Sharkey, Barrister-at-Law to represent her from 14 April 2021.

24. The claimant withdrew her sex discrimination claims on Thursday 20 May 2021 on advice of Mr Sharkey, Barrister-at-Law, on foot of two Deposit Orders issued by the tribunal.

25. The claimant was advised to withdraw her claim of constructive unfair dismissal on Saturday 22 May 2021 by her Barrister, Mr Timothy Sharkey and the claimant agreed to do so on Sunday 23 May 2021. The claimant signed a form of authority as follows:-

> *"Confirmation of Authority*
>
> *In the matter of Beverley Gibson v Softwareone Ltd*
>
> *Ref: 10253/19IT*
>
> *Unfortunately in this case we have been operating in large part one step behind my advices. We didn't amend the claim until too late. We did not withdraw the sex discrimination earlier enough, and as you know my firm advices last week were to withdraw this claim in full due to cost exposure. Following receipt of the full hearing bundle and therefore the full evidence available in this case it has become clear that the claim has zero prospect of establishing a serious enough breach of contract on the part of her employer as to amount to a repudiation of the contract and the implied term of trust and confidence. Constructive dismissal claims must satisfy a rigorous test with a very high threshold to succeed. It is my view that this case falls so far short of this high threshold that pursuing this claim will be seen as unreasonable, that pursuing the claim has no merit but will lead to cost exposure and potentially cost penalties. It is therefore my firm advice that this claim should be withdrawn in full.*
>
> *T SHARKEY BL*
>
> *By signing this the Claimant, Ms Gibson, agrees to withdraw her case.*

26. The tribunal rejects the claimant's evidence that she *"simply wanted a fair hearing with a view to getting answers and a fair outcome"*, this contradicted the fact that she made various attempts to negotiate a settlement, both as a litigant-in-person and through her appointed Solicitor and Barrister. The tribunal in its capacity as an industrial jury is aware that negotiated settlements may include terms unrelated to or in addition to monetary settlements. There is no evidence before the tribunal to suggest that the claimant's primary objective was a monetary award. The tribunal concludes that the claimant, who is a professional person, was clearly negotiating with a view to reaching settlement of her claims, which may have included terms unrelated to monetary settlement and finds that she had not brought her claim merely with a view to "getting answers".

27. The tribunal accepts the claimant's evidence that she was informed that it is 'nearly impossible' to prove a constructive unfair dismissal claim.

The Respondent's Application for Costs

28. The respondent's costs application was contained in its solicitors' letter to the tribunal dated 8 June 2021, the relevant extracts of which are set out below:-

> *"The respondent avers that the Claimant acted vexatiously and/or reasonably in the bringing of the Claimant's claims.*
>
> *The Claimant's were claims for sexual harassment, sex discrimination and constructive unfair dismissal, all of which the Respondent avers were without merit.*
>
> *Accordingly, the Respondent had – prior to the final hearing made numerous and repeated attempts to resolve this matter amicably and was prepared, in the interests of doing so, to make a settlement payment and/or not pursue the Claimant for costs if she were to withdraw her claims.*
>
> *By way of example, the Respondent's representative wrote to the Claimant on 19 February 2021 (a copy of which we enclose) setting out the basis on which the Claimant was bringing her claims and explaining clearly why the Respondent considered that the Claimant's defence [sic] had no reasonable prospects of success. This letter contained a costs warning as follows:-*
>
> > *"Under Rule 72 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 the Employment Tribunal has the power to make a costs order (Rule 72(1)).*
> >
> > *A costs order may be made by the Employment under Rule 73(1) where a party has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either the bringing of the proceedings (or part) or way that the proceedings (or part) had been conducted; or (all or part of) any claim or response had no reasonable prospects.*
> >
> > *As set out above based upon the full evidence available to the parties we remain of the view that your claims for unfair dismissal and discrimination have no reasonable prospects of success and are*

entirely vexatious claims. There is no disputing the fact that the true reason for your resignation on 30 May 2019 was to commence your new job role with GolfNow the following day (31 May 2019).

In addition to the above you will have now had the opportunity to review the Respondent's witness statements. As set out in the former part of this letter it is abundantly clear that there had not been any discrimination on the grounds of sex or any other grounds for that matter. It is evident that any treatment and behaviours exhibited my [sic] Mr Thiago Menezes were borne out of frustration in your performance and working manner.

We are further of the view that you have conducted this matter unreasonably and disruptively in your pursuit of these vexatious claims which has led to significant delays to the management of this case and increased costs incurred.

As such, we do not doubt that the Employment Tribunal will not hesitate to make a costs order in favour of the Respondent and the Respondent will be applying for the costs order prior to the final hearing

…..

Notwithstanding the above, we invite you to withdraw your claim. If you agree to withdraw your claim before further time and expenses are incurred in this matter, then we can confirm that the Respondent will not proceed to make any of the above costs applications to the Employment Tribunal."

The claimant elected to continue in the vexatious pursuit of her claim. As such the Respondent's representative wrote a further letter on 8 April 2021 (a copy of which we enclose) which was headed "Without Prejudice and Subject to Contract/Save as to Costs." The offer was made in accordance with ***Calderbank v Calderbank*** *and set out the lack of merit in the Claimant's position before making an offer as follows:-*

"Notwithstanding the above, we also aver that if there were any breaches that you had accepted such breaches through continuing to work for the respondent and carrying out the internal processes. It was only when you received a role that you decided to resign. You did not resign in a response [sic] to a fundamental breach of your contract.

As a result of the above, there is no doubt that your claim for constructive unfair dismissal has no prospects of success and the Employment Tribunal will not find in your favour for this claim and the Respondent remains confident that the Tribunal will strike out the claim in the forthcoming preliminary hearing.

Having considered the above, we are of the view that no parts of your claim have prospects of success and that your claims are being brought and pursued vexatiously against the Respondent. Our client is confident that

they will be successful in defending your claims.

Nothwithstanding the above and being aware of the obligation to try and resolve this dispute, our client makes the following offer in full and final satisfaction of your claims:-

1. *Our client pays your client the sum of £100 inclusive of interest and any VAT.*

2. *Our client will agree not to pursue you for costs.*

This offer is made in accordance with ***Calderbank v Calderbank [1975] ALL ER 333*** *and our client considers it to be fair and reasonable. If this offer is not accepted and you fail to do better than this settlement offer at trial, we will rely on this letter in an application that you pay our client's costs on an indemnity basis.*

This offer is open for acceptance until 4.00 pm on Friday 16 April 2021. We look forward to your response."

The Claimant did not respond and has continued to pursue her vexatious claim against the respondent.

Had the Claimant withdrawn her claims in respect of the letter of 19 February 2021 or accepted the Without Prejudice offer of 8 April 2021 within the deadline specified the Respondent would not have had to incur the costs of conducting Employment Tribunal proceedings through to withdrawal.

The letter of 19 February 2021 and the email of 8 April 2021 both contained clearly worded costs warnings.

<u>Withdrawal of Claims</u>

"…..

…..

On 20 May 2021 the Claimant made the decision to withdraw her claims to which the Deposit Order was made. Despite her constructive dismissal claim arising from the same facts and allegations as the withdrawn claim and also being without merit, as set out by the Respondent in their correspondence to the Claimant, the Claimant continued with this claim. With the final hearing to take place on 24 May 2021 the Respondent's counsel began their preparations and incurred their brief fee. On 24 May 2021 at 8.53 am just hours before the final hearing was due to commence the Claimant made the decision to withdraw her claims in full. The Respondent avers that the Claimant waiting to withdraw until the final hours before her claim commenced was further unreasonable behaviour of the Claimant which has resulted in unnecessary costs being incurred by the Respondent.

…

…

Legal Representation

The tribunal will be aware that during the course of this matter the Claimant had primarily acted as a litigant-in-person. The Respondent is aware the Claimant is likely to rely upon this in resistance to any cost award being made. To the Respondent's knowledge the Claimant has had the benefit of legal advice of several solicitors as well as the University Legal Advice Clinic during the course of the matter and as such would have been provided with advice on her claim and the merits therein.

Costs Order

Accordingly, for the reasons set out above, we respectfully invite the Tribunal to make an Order that the Claimant shall make a payment of £57,257.50 plus VAT to the Respondent in respect of the Respondent's costs incurred in conducting the Employment proceedings to conclusion either on the basis that the Claimant's claim had no reasonable prospects of success or that the Claimant acted vexatiously and unreasonably in the conduct of the proceedings.

We enclose a schedule of costs for the Tribunal's reference."

29. At hearing, the respondent narrowed the basis of its application for costs. Mr Fee confirmed that the application for costs was being advanced on the following grounds:-

    (1) The claimant's unreasonable conduct in waiting to the 'last minute' before withdrawing her case.

    (2) The claimant's unreasonable conduct in continuing with her claims after receipt of the costs warning letters dated 19 February 2021 and 8 April 2021.

    (3) That the claimant's case had no reasonable prospects of success.

30. At hearing the respondent did not proceed with an application for costs on the basis that the claimant's conduct was vexatious or that she was bringing a vexatious claim; nor did the respondent advance any application for costs in respect of 'unreasonable behaviour in the preparing of the hearing bundle' or 'pursuit of irrelevant information'.

31. Mr Fee confirmed to the tribunal that the application for costs was confined to counsel's fees as set out in the schedule of costs.

32. The respondent relied on the following in its costs application;-

    (1) The fact that the claimant had the benefit of legal advice on the merits of her claims as she received legal advice from the Ulster University Law Clinic, Mr Foote, an Employment Solicitor and Mr Sharkey of counsel. The respondent argues that the claimant, by reason of this advice, was fully aware that her claims had no reasonable prospects of success.

(2) Furthermore, the claimant is an intelligent professional person, who after receiving the costs warning letters was on notice and fully aware that her claims had no reasonable prospects of success and to proceed, with this knowledge and understanding, was unreasonable conduct.

The Claimant's Submissions

33. The claimant's submissions in summary are as follows:-

(1) That monetary award was never her primary objective in bringing these proceedings.

(2) That at no point did the University Law Clinic or Mr Foote, Employment Solicitor indicate that her case was malicious or made up.

(3) That she simply wanted a fair hearing with a view to gaining answers and a fair outcome.

CONCLUSION

No Reasonable Prospects of Success

34. The tribunal does not find that the claimant's claims had no reasonable prospects of success or that the claimant ought reasonably to have known and understood that her claims had no reasonable prospects of success. The tribunal has reached this determination taking into consideration the following:-

(1) The tribunal accepts the claimant's evidence that she was advised of the evidential difficulties in a constructive unfair dismissal case. However, the tribunal determines that knowledge of evidential difficulties does not equate to having knowledge of no reasonable prospects of success.

(2) At the Deposit Hearing on 12 May 2021 an Employment Judge determined that the claimant's claims of sex discrimination had "little reasonable prospects of success"; and on foot of this determination the claimant withdrew her sex discrimination claims, which the tribunal considers to be reasonable in all the circumstances.

(3) The Employment Judge at the Deposit Hearing on 12 May 2021 declined to order a deposit be paid in respect of the claimant's claim for constructive unfair dismissal; the Employment Judge determined that the threshold of 'little reasonable prospects of success' had not been met and this is a lower threshold than the test of "no reasonable prospects of success". *(tribunal emphasis)*

(4) The tribunal is acutely aware that the evidence in this case has not been tested. In all cases it is for the tribunal to determine, as a matter of fact, after full consideration of all the evidence, whether or not the claimant resigned in response to an employer's breach rather than for some other reason. The authorities are clear that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. See - ***Nottingham County Council v Meikle [2005] ICR*** as per

Keene LJ in the Court of Appeal -*"there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job …"*.

Unreasonable Conduct

35. The tribunal does not find that the claimant's conduct was unreasonable. In looking at the entire picture, as the tribunal is required to do, we are not satisfied that the claimant acted unreasonably in the bringing of these proceedings or the continuation of these proceedings after receipt of the respondent's letters dated 19 February 2021 and 8 April 2021 taking into account the following:-

(1) The costs warning letters asserted that the claimant's claims of unfair constructive dismissal and sex discrimination had "no reasonable prospects of success", that the claimant was "vexatiously pursuing her claims" and that the claims were "vexatious". As per the tribunal's findings above, the tribunal does not accept that the claimant's claims had no reasonable prospects of success or that she ought reasonably to have understood this for the reasons set out above. At the costs hearing, the respondent (quite properly in the tribunal's view) and contrary to its assertions in its costs warning letters, did not proceed with a costs application on the basis that her claims were vexatious or that she was vexatious in her conduct.

(2) The claimant at the time of receiving these letters was a self-litigant. As per ***AQ Limited v Holden [2012] IRLR*** –

> *"A tribunal cannot and should not judge a litigant-in-person by the standards of a professional representative … Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life"*.

Whilst the tribunal accepts the claimant had at various stages legal representation and/or advice, at the date of receipt of these letters she was a litigant-in-person.

(3) As per the authorities set out above ***Calderbank*** letters and the ***Calderbank*** regime do not apply to Employment Tribunals.

(4) Withdrawal of a claim is not of itself unreasonable behaviour. The tribunal takes into account that the claimant withdrew her claims of sex discrimination promptly on receipt of Deposit Orders. This was two working days prior to the full hearing, during which the claimant was taking advice from her barrister - Mr Sharkey. The tribunal recognises the very short time frame between the issuing of the Deposit Orders and the hearing date. The tribunal concludes that the claimant's withdrawal of her claim on the morning of the hearing, in all the factual circumstances of this case, does not constitute unreasonable conduct on the part of the claimant.

(5) As per the tribunal's findings set out above, claims of constructive unfair dismissal are fact specific. The question of whether or not the claimant was

constructively unfairly dismissed required consideration of all the evidence and there was no determination of the facts in this case as it did not proceed to full hearing.

(6) At the deposit Hearing, the Employment Judge did not determine that the claim of constructive unfair dismissal had little reasonable prospects of success, never mind the higher threshold of no reasonable prospects of success. (*tribunal emphasis)***.**

36. Taking into consideration all of the above, the tribunal is satisfied that the threshold test of acting unreasonably has not been met in this case.

37. Furthermore, had the threshold been met in this case, the tribunal would not have exercised its discretion to award costs in this case, taking into account the fact that costs are exceptional in tribunals and that the withdrawal of the claim prior to the hearing undoubtedly saved costs. The tribunal concludes in all the circumstances of this case, to make a costs order against the claimant would be to penalise her for the sensible step of withdrawing her claim on the morning of the hearing. There was no evidence before the tribunal that the claimant was pursuing her claims in circumstances where she never intended to run her case. The claimant withdrew her claim on foot of advice received in the week/days prior to the hearing which the tribunal does not find to be unreasonable in all the circumstances of this case.

38. Accordingly the tribunal unanimously determines that this not an appropriate case to exercise its discretion to award costs and the respondent's application for costs is refused.

Employment Judge:

Date and place of hearing: 27 September 2021, Belfast.

This judgment was entered in the register and issued to the parties on: