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EMPLOYMENT TRIBUNALS

Claimant: **Miss M E Clark**

Respondent: **Dealmaker Ltd**

Heard at: **East London Hearing Centre** **On: 17 November 2017**

Before: **Employment Judge Jones (sitting alone)**

Representation

Claimant: Mr N Williams (Counsel)

Respondent: Mr R Kulen (Manager)

JUDGMENT

The judgment of the Employment Tribunal is that:-

1 The Claimant was unfairly dismissed.

2 The Respondent unlawfully deducted the Claimant's wages.

3 The Claimant is entitled to the following remedy:

Constructive Unfair Dismissal

Basic Award:	**= £7,610.75**
Compensatory Award: 4,680.00 + £500	**= £5,180.00**
Unlawful Deduction of Wages	**= £ 250.00**
This makes a total of	**£13,040.75**

The Respondent is also to pay the Claimant's legal costs of £2,930.40.

The total amount due to the Claimant is £15,971.15

REASONS

Claims

1 The Claimant has worked for the Respondent for 24 years. She started in February 1993 and left after her resignation with her effective date of termination being 14 April 2017. The Claimant worked as a Telesales and Administration clerk.

2 The Respondent is a wholesale provider of fruit and vegetables to various businesses.

3 The Claimant complains that she was constructively dismissed by the Respondent by its decision to unilaterally reduce her wages from February 2017. The Respondent accepts that it did reduce her wages but claims that if she is found to have been dismissed, it was for some other substantial reason and was therefore a fair dismissal. The Respondent also challenges the reason for the Claimant's resignation and submits that she left because she got a better paid job nearer to her home.

Evidence

4 The Tribunal heard from the Claimant in evidence. Mr Thakrar, a director and Mr Kulen the general manager, gave evidence for the Respondent.

5 The Tribunal had a bundle of documents provided by each party. The Respondent failed to comply with the order for disclosure and only provided some documents to the Claimant yesterday. Disclosure had been ordered for dates in September. The Respondent also failed to provide the Claimant with all the documents in its bundle which meant that the Claimant's Counsel had not had sight of all the documents, prior to today. Not all those new documents were relied on by the Respondent in the Hearing.

6 From this evidence, the Tribunal made the following findings of fact.

Findings of fact

7 The Respondent's business was subject to the needs of various suppliers and customers in the restaurant business. The Claimant was employed as a Telesales and Administrative Clerk. She prepared details of individual sales to customers, of purchase and sale prices of each item sold and the net gain on each sale; for Mr Thakrar, the main director. She sent those to him regularly by email. I find it likely that through her job she would have been aware of the Respondent's sales and of clients. However, it is unlikely that in preparing those records she would have had a full understanding of the company's finances.

8 The Claimant had been employed for a considerable period of time but she was not a director of the company and was not privy to profit and loss accounts or other such company financial information.

9 The Claimant was aware of the loss of some of the EC Soft accounts held by the Respondent at the beginning of 2017. It was unclear what percentage of the Respondent's business this represented but it was enough to alert the Claimant and Mr Kulen that they should make efforts to get new clients. The Claimant confirmed that around this time she helped with sending out flyers as marketing to attract more clients. She asked Mr Kulen whether there would be redundancies but he was not able to answer her.

10 I find it unlikely that Mr Kulen had conversations with the Claimant and other staff about a reduction in pay to tide the company over some financial difficulties. The Claimant denies that he had such a conversation with her. If he had, it is unlikely that she would have forgotten it as it would have had an impact on her as the proposal was to reduce her pay. The Tribunal did not have evidence from any other member of staff to confirm that there had been any discussion with them. Also, if he had such a conversation with the Claimant, I would have expected Mr Kulen to have made a note of the date when the meeting happened or to remember what had been said or what response the Claimant made. He was unable to give those details in his evidence today.

11 Mr Thakrar's evidence was that he and Mr Kulen had discussed how they were going to get the business through this time and that they had discussed reducing staff wages as one option. The Claimant had not been party to that discussion.

12 I therefore find that the first the Claimant knew of the proposal to reduce her hours and her wages was on 13 February when she came back to her desk and saw a memo on it, which was unsigned. It informed her that she was no longer expected to work on Tuesdays. It stated that *"Since we lost Bushey and Richmond we are trading at heavy loss now. In order to carry on we have to cut down the hours from all the staff. Possibly we can save £500/week."*

13 The Claimant was surprised at this. When Mr Kulen approached her later in the day she stated that she could not accept the Respondent's proposal and that she needed all her income in order to meet her financial commitments. She stated that she could not agree to it. Mr Kulen did not discuss other options with the Claimant or give her an indication of how long she was being asked to take the proposed reduction in wages.

14 On the following day, there was another note which indicated that she did not have to work on Thursdays instead of Tuesday as originally proposed. The Claimant had another conversation with Mr Kulen in response to this note. The Claimant stated that she really could not afford to lose £50 per week of her wages – which was the proposed deduction. He still could not give her a time scale as to when he expected the proposed deduction to end. By this time the Claimant had obtained some legal advice which meant that she was able to state to Mr Kulen that she was not accepting the proposed variation of contract but that she would continue to work her contracted hours. The Claimant worked her contracted hours up until the end of her employment.

That meant that she did not take either Tuesdays or Thursdays off but continued to work as her original contract.

15 The Respondent continued to pay the Claimant in accordance with her contract up until the end of February. The practice at the Respondent was that it would deduct tax and national insurance and would give staff their net pay in cash on a Thursday or Friday of the week.

16 On 3 March the Claimant was told that from then on she would only be paid for 4 days a week. Mr Kulen told her that her colleagues had noticed that she was still being paid for 5 days while their wages had been reduced. The Tribunal has had no evidence of the wages paid to other staff.

17 The Claimant continued to work 5 days a week but her wages were reduced so that she was paid for 4 days during the weeks ending 10/3, 24/3, 31/3, 7/4 and 14/4. She suffered a £50 deduction each week. Her wages were usually £270.00 per week net but for these weeks she was paid £220.00 net. Although she claimed for the week ending 17 March in her ET1, she confirmed in evidence today that she was paid the correct wage for that week. Her claim is therefore for £50 deduction over 5 weeks. Her claim is therefore for (£50 x 5 = £250) £250.00.

18 It is the Claimant's case that she submitted a written grievance to Mr Thakrar by email on either the 14 or 19 March. However, I did not have any evidence of the sent email in either party's bundle today. The Respondent denied receiving the email. Mr Thakrar remains a director of the company. However he has handed over the day-to-day running of the company to Mr Kulen partly because he has some serious physical health challenges. In particular, he is no longer able to read and today had to have his witness statement and the oath read to him. He was assisted today by his daughter. He used to look at the figures the Claimant sent him by email but recently he has been unable to do so for some time due to his illhealth. The Claimant did not give a copy of her grievance to Mr Kulen, with whom she worked on a daily basis. It was her case that she only sent it by email to Mr Thakrar. She did not refer to her grievance in her conversations with Mr Kulen.

19 I find it likely that if Mr Thakrar had received the grievance that this would have been something he might have spoken to the Claimant about. I therefore find it likely that even if she did send the grievance letter by email to his email address, Mr Thakrar did not receive it. No one else in the company knew about her grievance. It was never addressed.

20 Around the end of March the Claimant decided that this was an untenable situation which could not go on. She did not know how long the Respondent would continue to pay her reduced wages and her attempts to get some idea of the time scale from Mr Kulen was unsuccessful. I find that this was the motivating factor that caused the Claimant to look for work on the ASDA website.

21 The Claimant had worked for the Respondent for 23 years and if the distance away from home was an issue of her, I find it highly likely that she would have looked for alternative work long before these events occurred. I had no evidence that the distance from work was the motivating factor that led her to apply for another job.

22 The Claimant submitted an application to ASDA for work through their website and went to one of their consultation evenings. A few days later, she was informed that she had got the job. The Claimant resigned from the Respondent's employment on 7 April. She gave the Respondent one week's notice which was agreed with Mr Kulen. As there was no written contract I have no evidence that the Claimant should have given one month's notice to terminate her employment.

23 Mr Kulen's evidence was that the Claimant was paid £200.00 at the time of her leaving her employment in addition to her reduced wage of £220.00 for that week. The Claimant denies receiving any additional money from Mr Kulen or from the Respondent. The Respondent failed to provide any evidence to support its contention that it paid the Claimant money that would have almost reimbursed the Claimant for the deductions made from her salary over the previous month. The Respondent failed to pay her £50 for 5 weeks which makes the total deduction £250.00. I find that it would have been simple enough for the Respondent to have produced some accounts, or a letter from its accountant or a signed receipt from the Claimant showing that she had been paid this additional amount. A cash book was produced today, a copy of which had not been previously disclosed to the Claimant. I looked at the book. It showed calculations which Mr Kulen admitted he had written in himself. I have not relied on this document as it was unclear, inconsistent and difficult to tell what the figures related to or when they were written. For example, all payments out were written in red yet the figure of £200 the Respondent relied on was written in black ink which suggested that it was not a payment that had been made. I find it highly unlikely that any additional money was paid to the Claimant at the end of her employment. However Mr Kulen did give her a leaving gift.

24 The Claimant was not the only person to leave the Respondent at that time. Mr Kulen's evidence was unclear but I find that it is likely that at least 2 others left the Respondent's employment around the same time as the Claimant and it is likely that they had also had their wages reduced in a similar fashion to the Claimant.

25 At the date of this Hearing the Claimant continues to be employed by ASDA as an ASDA Colleague and where her basic wage is now £8.50per hour and her contracted hours are 21 per week. She was initially contracted to work 22.5 but that was inclusive of breaks which became unpaid after 8 October 2017. This is lower than her wage with the Respondent. The Claimant has to work overtime which earns her an additional job premium of £2.82 and/or £1.05 location premium to make up her wages so that she can cover her bills. She is able to work overtime at night to do so. This entails her working long, unsociable hours (10pm - 6am) to get the wage she used to get at the Respondent. As the store she works at in South Ruislip is local to her home address, the Claimant saves money on travel. The Claimant's contract of employment with ASDA and some payslips were in the bundle of documents.

26 I find that the Respondent continues to be in business. It was impossible to gauge the health of the business from the Respondent's evidence today. Mr Thakrar's evidence was that he was pleased with the way Mr Kulen had turned things around and that it was unlikely that he would have to put any more of his own money into the business in the near future. Mr Kulen's evidence was that the company is now in full employment and the company is on its way to recovery. At the same time, it was also

his position that ongoing difficulties at the company have prevented the Respondent from engaging legal representation for this case.

27 During today's Hearing, the Tribunal was given some company and financial documentation. As already stated, some of these documents had not been disclosed to the Claimant's representatives prior to today's hearing and some had been disclosed yesterday. There is a bank statement, which the Claimant's Counsel, Mr Williams had not seen. There was no evidence to show that this was the business' sole bank account. It is likely that there were/are others. There were other company accounts documents in the bundle which I was not taken to during the Hearing. There was a list of other EC Soft branches and it was agreed that the Respondent lost a few of those prior to reducing the Claimant's wages but that it also retained the business of other branches of EC Soft. It was also Mr Thakrar's evidence that the two branches of EC Soft that had been lost, may well be on their way back to the Respondent although it was not clear when that was likely to be.

Law

Constructive Unfair Dismissal

28 The Claimant's complaint is of constructive unfair dismissal. Section 95(1)(c) of the Employment Rights Act 1996 states as follows:-

> "*The employee terminates a contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers' conduct".*

29 The circumstances in which an employee would be entitled to terminate his contract would be where the employers' conduct amounted to a repudiatory breach of contract.

30 The Claimant's complaint is that the Respondent breached the implied term of trust and confidence which is in each employment contract. The tribunal need to conclude that the employer had acted without reasonable cause in such a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the employee. Also, the Tribunal needs to be certain that the employee had not affirmed the contract under which he was employed after such a breach and before he resigned, or that if he had affirmed the contract there was subsequently a "*final straw*" capable of contributing to a series of earlier acts which cumulatively amounted to a repudiatory breach of contract and that he had resigned in response to the repudiatory breach.

31 The leading case of constructive dismissal remains the case of *Western Excavating Ltd v Sharp [1978] ICR 221 (CA)* where as Lord Denning stated:-

> "*If the employer is guilty of conduct which is a significant breach going to the root of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminated the contract by reason of the employer's conduct. He is constructively dismissed"*.

32 The test that must be applied in determining whether or not this has occurred, is an objective test and this is summarised above and set out in the case of *Mahmud v BCCI [1997] IRLR 462* in which Lord Nicholls stated that:-

> "*The conduct must…impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances"*.

33 In the Court of Appeal decision in *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 the test to be applied in a constructive dismissal case was set out as follows:

1. In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies

    a. What was the employer's conduct that was complained of?

    b. Was the conduct complained of calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties;

    c. Did the employer have reasonable and proper cause for that conduct?

2. If acceptance of that breach entitled the employee to leave, he has been constructively dismissed;

3. It is open to the employer to show that such dismissal was for a potentially fair reason;

4. If he does so, it will then be for the employment tribunal to decide whether the dismissal for the reason, both substantively and procedurally, fell within the range of reasonable responses, and was fair.

The Tribunal was also aware of the case of *Post Office v Roberts [1980] IRLR 347* where it was held by the EAT that the conduct by the Respondent which amounted to a repudiatory breach of contract need not be deliberate or intentional or prompted by bad faith.

34 The Tribunal was aware that unreasonable behaviour by the employer is not enough and that the bar is set much higher. The employer has to be guilty of what would be, in effect, the equivalent of gross misconduct from an employee who was summarily dismissed.

35 As already stated the effect of such conduct by an employer would be to break the contract and an employee would have difficulty in succeeding with a claim of constructive unfair dismissal if he has affirmed the contract and waived the breach. An

employee will be held to have affirmed a contract where (with knowledge of the breach) he acts in a manner inconsistent with treating the contract as at an end. In *Bashir v Brillo Manufacturing Co [1979] IRLR 295* it was held that delay in itself is not sufficient to be considered as affirmation of a breach of contract. The employee needs to actually do the job for a period of time without leaving, or some other act which can be said to affirm the contract as varied. Whether or not he has affirmed the breach would depend on the circumstances in each case.

36 The Claimant also had a claim for unlawful deduction of wages. This was a claim for the money deducted from her wages for 5 weeks as set out above. The Claimant confirmed that she had bee paid

Unlawful Deduction of Wages

37 The relevant law is contained within sections 13 and 14 of the Employment Rights Act 1996. An employer shall not make any deduction from wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a provision of the worker's contract; or the worker has previously agreed in writing to the making of this deduction. Examples of deductions authorised by statute are deductions of tax and national insurance payments. An employer can make deductions in relation to any overpayments of wages or expenses that may have occurred. Section 13(3) states that where the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of the wages properly payable by him to the worker on that occasions, (after deductions) the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion.

38 The Tribunal was referred to the following cases by the Claimant's Counsel, Mr Williams. *Industrial Rubber Products v Gillion* [1977] IRLR 389 in which it was stated that the unilateral imposition by an employer of a reduction in the agreed remuneration of an employee is a fundamental and repudiatory breach of the contract of employment.

39 Whether the Claimant has accepted the variation and waived the breach is a matter of fact to be decided by the Tribunal. In the case of *Rigby v Ferodo* [1988] ICR 29 in which an employee who had continued to work under protest while being paid a reduced wage that he had not agreed to, was held by the Court of Appeal not to have accepted the variation of the terms of the contract that the employer had tried to impose on him. The employer had tried to compel him to accept a wage that was less than the amount to which he was entitled under the employment contract. The Court held that he was entitled to the difference between what he was paid by the employer and his contractual entitlement.

40 The Respondent's case is that even if the Tribunal came to the conclusion that the Claimant had been dismissed, the dismissal was fair because it was for some other substantial reason. The Respondent relies in its need to make savings after the loss of major business and because of financial difficulties. Employment Rights Act Section 98(1)(b) states that the reason must be of a kind such as to justify the dismissal of an employee holding the position which the employee held. The onus is on the Respondent to show that such a reason exists and that it acted reasonably in treating

that reason as sufficient reason to dismiss the Claimant. In considering whether the Respondent has done so section 98(4) of the same Act states that the Tribunal has to consider also whether the Respondent acted reasonably in the circumstances, and have regard to equity and the substantial merits of the case.

Applying law to facts

41 Firstly, it is my judgment that the Respondent breached the Claimant's contract of employment by paying her less than her contractual wage. She was not consulted about the variation in her contract. A note was left on her chair and when Mr Kulen did speak to her, he told her that this was what was going to happen. But even if he had asked her, the fact is that the Claimant had not agreed to vary the terms of her contract. She expressly refused to do so. She continued to work her contracted hours. She had not agreed to any change in her employment. The Claimant was entitled to her full wages. Any reduction in her wages was not in accordance with the terms and conditions of employment agreed with the Respondent.

42 The Respondent failed to pay her the full wages for 5 weeks and instead, paid her a reduced amount of £220. Her contractual net wage was £270 per week. Her contractual gross wage is £304.43 per week and £1319.20 per month.

43 The Respondent's action in seeking to unilaterally vary the Claimant's contract was a repudiatory breach of contract. The amount of a person's pay is a fundamental term in their employment contract. There are only particular situations in which that can be reduced and this is not one of them. It was not a deduction authorised by statute or by the Claimant's contract. If the Claimant had agreed to a temporary reduction in her wages then that would be a different matter but if she refused to do so and it is imposed on her as in this case, in circumstances where she has continued to work her full hours then it is my judgment that this a fundamental and repudiatory breach of contract.

44 The Claimant had been employed for over 20 years. She had been loyal to the Respondent and showed commitment to the business. In my judgment, there was no notice given of this change, there was no indication of how long it would last for, the reason for it or who else was affected. The Claimant was given little opportunity to prepare for such a large deduction from her wages. The Respondent maintained her wage for February but the deductions began in March. As she was only paid £270 per week a reduction of £50 per week from her wage was a reduction of about 20%, which is significant. Paying her the right wage for February was insufficient time for her to adjust when considered against a backdrop of over 20 years service. She did not agree to the reduction, even on a temporary basis.

45 It is also my judgment that the Claimant did not delay too long before taking action on the breach of contract. Firstly, she let the Respondent know straightaway in the conversations on 13/14 February that she was not in agreement to the reduction in her hours and in her pay. She stated immediately that she could not afford to agree to the proposed arrangement. She also insisted on her usual hours and pay. Secondly, she continued to work full time. She never reduced her hours. In February the Respondent actually paid her the full wage even though it had originally been proposed that it would be reduced. And as soon as she was told in March that it would definitely

be reduced and she saw that evidenced in her pay packet at the end of each of three weeks; she decided that she had no option but to leave.

46 It is my judgment that the Claimant sought other employment because of the Respondent's breach of her contract. The Claimant had worked with the Respondent for a long time. If the distance she had to travel had been an issue for her – it is likely that she would have left the Respondent's employment well before she actually did. Also, although she saved money on travel when she started working at ASDA the wages are considerably lower which means that she has to work night shifts to earn a sufficient premium so that she could earn a comparable wage.

47 In my judgment the reason for the Claimant's resignation was the Respondent's decision to cut her days down to 4 and to pay her for 4 days even though she continued to work 5 days. The Claimant did not accept the proposed variation in her contract.

48 It is therefore my judgment that the Claimant was constructively dismissed.

49 The next question was whether the Respondent has shown that there was a potentially fair reason for her dismissal.

50 In my judgment, the Respondent valued the Claimant's service and loyalty to the company. It is likely also that there was a change in the business as a result of the loss of some of the EC Soft business in January 2017. However, I am not able to judge the extent of that change or whether or not it required the changes to the contracts of members of staff in the way that the Respondent proposed.

51 The information provided did not enable the Tribunal to make an informed judgment on the company's health. In my judgment, there were measures that could have been taken to avoid having to cut staff's days – as was suggested by Mr Thakrar in court – such as reducing the number of deliveries etc but I am not able to judge whether that was done in this case or what difference such changes would have made. The Respondent have simply not provided sufficient information to show that there was such financial difficulties or that they were in such a dire state that they needed to unilaterally vary the Claimant's contract to reduce her wages. The Tribunal was not given sufficient information to be able to make an analysis of the effect on the Respondent's finances of the loss of the EC Soft Contracts. This is even more complicated by the suggestion that the Respondent was able to make up her wages to the correct amount in February and that it did so again at the end of March.

52 The Claimant denied that she received £200 in addition to that week's pay of £270, on her last day of employment. But if it is the Respondent's case that it could have paid her that extra money it raises the question that remains is whether it was in financial difficulty as it portrayed.

53 In my judgment, the Respondent has failed to prove that it had a fair reason for the Claimant's dismissal. The Respondent has failed to prove that it had some other substantial reason for breaching a fundamental clause in the Claimant's contract. The Claimant's complaint of constructive unfair dismissal is successful.

54 I now turn to the complaint of unlawful deduction of wages.

55 The Respondent confirmed that it paid the Claimant £220 at the end of each of the following weeks: 10 March, 23 March, 30 March, 6 April and 14 April. On each of those weeks she was paid £220.00 as her net wage as opposed to the sum of £270.00 which would have been her contractual net wage.

56 In my judgment, no proof was produced today that the Respondent paid the Claimant an additional £200 at the end of her employment. I find it highly unlikely that this was done. It would have been in the Respondent's interest to have obtained a receipt or a signature or some other recognition from the Claimant that she had been paid this money. It failed to do so. At the start of today's Hearing, the Claimant rightly gave recognition that she had been paid £270 for one week in March and in my judgment, if she had received the rest then she would have said so as I found her to be a witness of truth. As a business the Respondent would keep records of payments made to staff for HMRC and National Insurance and if they had a record of the Claimant being paid this sum then the Tribunal would have expected it to bring that evidence to today's Hearing. It is this Tribunal's judgment that the Claimant has proved that this money was not paid to her as part of her weekly wage. The Respondent confirmed that it paid her £220 for each of those weeks. The Respondent has failed to prove that it paid the Claimant this money at the end of her employment.

57 It is my judgment that the claim for unlawful deduction of wages is also successful. The Respondent is to pay the Claimant the sum of £250 as a total of 5 deductions of £50.

Remedy

58 The Claimant has been successful in her complaints of Constructive Unfair Dismissal and Unlawful deductions of wages.

59 The law on remedy is as follows:

Law on Remedy

Unfair Dismissal

60 In a successful unfair dismissal claim where neither reinstatement nor re-engagement is appropriate, any award to the Claimant by the tribunal will be monetary. A remedy award in an unfair dismissal case is made up of two main elements: a basic award and a compensatory award.

Basic award

61 This is set out in ***Section 119 of the Employment Rights Act (ERA)*** and is calculated using a formula that relates to the age and length of service of the successful claimant. It is calculated in units of a week's pay up to a ceiling. If the amount of a claimant's week's pay exceeded that ceiling then the amount of the award is restricted to it. The Tribunal can reduce the basic award in certain circumstances where it is expressly permitted by statute. None of which were appropriate in this case.

Compensatory award

62 The parameters of the compensatory award are set out in ***Section 123 of the ERA***. It is intended to compensate the claimant for losses arising out of the dismissal, so far as that loss is attributable to action taken by the respondent. It is not to be used to punish the respondent. Such losses as can be compensated would include not just wages lost due to being unfairly dismissed but also any additional benefits attached to the employment that had been lost. There is no claim for any additional benefits in this case. The compensatory award can take into account losses extending into the future. The Tribunal has to rely on its relevant findings of fact in order to determine how much and for how long it would be just and equitable to award to the claimant compensation for such future losses.

63 The claimant is under a duty to mitigate her loss. In this case the Claimant has found alternative employment. She did claim continuing losses as it was her case that she suffers continuing losses as her wages in her new job are lower than that with the Respondent.

Basic Award

64 The Claimant was employed from February 1993 – 13 April 2017. She was employed for 24 years. The maximum length of continuous service that can be counted as part of a basic award is 20 years. The Claimant was 51 at the time of the termination of her contract.

65 The Claimant earned £304.43 gross and £270 net with the Respondent. That is £1319.20 per month. The Claimant began her present job at ASDA in April 2017. She has mitigated her loss. Since she started at ASDA she has earned a total of £9,199.71 net to the date of the Hearing. Her hourly rate is £8.50 and her contracted hours are 21. £8.50 x 21 = £178.50 - £270.00 = £91.50. The difference in pay between the jobs is approximately £90 per week.

66 Calculating the Claimant's basic award =

67 24 years of employment capped at 20 years. 10 years at ages between 20 – 40 = 10 x £304.43 = £3044.33. 10 years at aged over 41 at 1.5 week's pay = £456.64 x 10 = £4566.42. The Claimant's total basic award is £3044.33 + £4566.42 = **£7,610.75**.

Compensatory Award

68 The Tribunal agreed with the Claimant that as her overtime was not part of her contracted hours it would be appropriate to calculate her wages at ASDA on her contractual wage rather than what she has managed to earn through doing overtime during unsociable hours. The Claimant did not work nights with the Respondent and would not choose to work nights if her wage were comparable. The loss to her is therefore calculated in taking her basic wage at ASDA from her basic wage at the Respondent. That is all that she is entitled to contractually.

69 The Claimant submitted that she should be compensated for the difference between the two wages for the period from her dismissal to the date of the hearing which is 31 weeks and for a further 21week thereby awarding her the loss for a period of a year. She also submitted that the Tribunal could award future loss as it sees fit.

70 The Tribunal considered that the Claimant had suffered a loss of approximately £90 per week since her dismissal. The Claimant has mitigated her loss as best she could, given her circumstances at the time. The Respondent reduced her income, without her agreement and had to find alternative work quickly in order that she could keep paying her bills. The Claimant has managed to get overtime which supplements her income but unlike at the Respondent, she has to work many unsociable hours to enable her to do so.

71 The Tribunal's judgment is that the Claimant will be awarded the difference between the basic wage at the Respondent and at ASDA for 31 weeks between the date of dismissal and the date of the Hearing and 21 days between the end of the Hearing and a further 21 weeks. The total compensation awarded is the loss of £90pw x 52 = **£4,680.00**.

72 No award is made for future loss. Although if the Claimant stays in this job there is likely to be a continuing loss, it is this Tribunal's judgment that after a year the Claimant will be in a position to decide whether she wished to stay at ASDA or to move to a different employer that paid her a larger wage. She would have had sufficient time in the labour market to be able to make an informed choice about what she wanted to do.

73 The Claimant was employed by the Respondent for 24 years. She will need to work at least two years in a new employer to achieve a security. The award for loss of statutory rights is **£500.00.**

74 As already stated, the Claimant suffered unlawful deductions from her wages of £50 over 5 week making a total of **£250.00** net. The Tribunal awards loss of wages net of tax and national insurance payments.

75 The total due to the Claimant as remedy for her successful complaints are as follows:

Basic Award:	= £7,610.75
Compensatory Award: 4,680.00 + £500	= £5,180.00
Unlawful Deduction of Wages:	= £ 250.00
Total:	**= £13,040.75**

Costs

76 The Claimant then made an application for an order that the Respondent pay her costs incurred in taking up her case. The Claimant has had solicitors acting for her and had Counsel appear for her today.

77 As the Respondent was not legally represented at today's Hearing the Tribunal adjourned the Hearing so that the Respondent could take some time to understand what was happening. The Tribunal ensured that Mr Kulen and Mr and Ms Thakrar had a copy of the costs bundle and schedule of costs that the Claimant produced and it was explained to both parties that after the adjournment they would each have an opportunity to make submissions or to speak to the application for costs after which the Tribunal would make its decision.

The law applied when considering an application for a costs order is as follows:

78 Rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 states that a tribunal may make an order for costs and will consider whether to do so where it considers that a part has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted; or because any claim or defence has no reasonable prospect of success.

79 In making a costs order the Tribunal may order the paying party to pay the receiving a specified amount not exceeding £20,000 in respect of the costs of the receiving party, or order the paying party to pay all or a specified part of the receiving party's costs with the amount to be determined by way of detailed assessment, or to pay the specific costs of a witness.

80 It was the Claimant's submission that the Respondent had conducted its defence of her claim unreasonably. She submitted that the Respondent had behaved unreasonably from the beginning. How could the Respondent's position be the putting an anonymous note on her chair at work was an appropriate way to agree a variation of contract with an employee? Also, that it was unreasonable of the Respondent to run a case all the way to tribunal when they had no real defence to the claim and therefore no reasonable prospect of success.

81 The Claimant submitted that it had been unreasonable for the Respondent to have contested this to the end. It was part of the Respondent's case that it paid her the deducted amounts but she never accepted that it had. The Respondent knew that it had not done so. The Respondent also failed to bring any proof of the financial situation that they say existed at the time that could have supported a defence of dismissal for some other substantial reason. The Respondent had not properly put forward its defence to the claim.

82 It was submitted that the Respondent had conducted its defence unreasonably. It had served documents pertaining to the financial health of the company at the last minute in an attempt to take advantage of a lay Claimant. It had threatened to bring a solicitor to defend the case in an attempt to scare the Claimant.

83 In his response to the application Mr Kulen stated that he acted with good intentions to save the company and the livelihood of all concerned. He stated that the company did not have the funds to go to solicitors.

84 The Tribunal is aware that costs do not follow the event in the Employment Tribunal. The following comments were made by Mummery LJ in *McPherson v BNP Paribas* [2004] EWCA Civ. 569:

> *"Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in rule 14(1) in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the CPR, it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of ETs"*

85 In the case of *Power –v- Panasonic UK Limited* [2003] IRLR 151 Clarke J succinctly described the exercise to be undertaken by the Tribunal as, (referring to an earlier set of rules), a two stage exercise. First, has the paying party acted unreasonably, vexatiously, abusively, disruptively, or brought a claim that was misconceived? If so, the second stage is that the Tribunal must ask itself whether to exercise its discretion by awarding costs against that party. In that case the court also stated that words to the effect that costs should not be awarded against a party simply because a litigant has failed to beat an offer that was previously made.

86 In *Gee –v- Shell UK Limited* [2003] IRLR 82 Sedley LJ said:

> *"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 for ordinary litigation in the United Kingdom, losing does not ordinarily mean paying the other side's costs".*

However, the issue of unreasonable conduct of proceedings has been part of the consideration in whether or not to grant a costs order. The Tribunal considered the case *Daleside Nursing Home Limited -v- Matthews UK* EAT/0519/08 where a litigant was found guilty of a deliberate lie going to the heart of the complaint. The Court of Appeal held that there was no particular rule that it would be perverse for a tribunal not to make a costs order in such a case but that instead, it remained a question of fact that the tribunal hearing the case needed to take into account. They upheld the order for costs as they agreed that the claimant's lies had indeed gone to the root of the complaint.

87 On the question of the need for any causal link between the unreasonable conduct and the costs awarded, the Court of Appeal considered this in *Yerrakalva -v- Barnsley MBC [*2012] IRLR 78 and held that there does not have to be a causal link between the unreasonable conduct and the costs claimed, but that does not mean causation is irrelevant. Mummery LJ said:

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."*

88 The Tribunal was shown copies of correspondence between the Claimant's solicitor and Mr Kulen of the Respondent. In an early letter, headed "without prejudice save as to costs" dated 12 September the Claimant's solicitor advised the Respondent that there was no denial in the ET3 that she had been paid less than her contractual wage, without her agreement. It was suggested that this meant that the Claimant's case could be said to have been made out. The Claimant made an offer to settle the claim. This was not accepted. A similar "without prejudice save as to costs" letter was written to the Respondent again on 18 September, which also advised that the Claimants costs were likely to be in the region of £5,000 - £7,000.

89 On 27 September Mr Kulen responded to the Claimant's solicitors informing them that the Director had not been well and that the Respondent had not had time to consult legal representation. On 10 November there was an exchange of emails between Mr Kulen and Rabika Basran from the Claimant's solicitors. They discussed witness statements and the possibility of today's hearing being postponed because of Mr Thakrar's ill-health. The Respondent then stated that the Claimant should be aware that he was trying not to 'burden' her by hiring the Respondent's corporate solicitor and that she knew how much they charged. He threatened to apply for costs against her. There was no heed of the warning that the Claimant's solicitor had given or any discussion or reply to the points she made in her without prejudice letter as to why she considered that the Respondent's case was, as she described it 'misconceived'.

Judgment on the application for costs

90 It is this Tribunal's judgment that the Respondent pursued an unreasonable defence in these proceedings. The Respondent knew that the Claimant had not agreed to vary her contract to reduce her wages. The Respondent would have known that it did not have the Claimant's agreement to reduce her wages and yet it did so. After 24 years employment the only thing that changed leading up to her resignation was the deduction in wages. It would have been clear that this was the cause of her leaving the company and that it was a breach of her contract. The Respondent forced her to take the matter to a Tribunal Hearing.

91 The Claimant's solicitors wrote to the Respondent as early as September before the bulk of the costs were incurred advising it on the weaknesses of its case. The Respondent does not appear to have taken legal advice despite the solicitors referred to in correspondence. From the costs bundle provided to the Tribunal, it is apparent that there were opportunities when this matter could have been resolved. The Respondent had no reasonable grounds to this claim as they always accepted that it had not paid her her wages.

92 I accepted that Mr Thakrar had been ill. It is likely that Mr Kulen's reference to a sick Director was a reference to him. However, it is apparent that the case was run by Mr Kulen and that the Respondent had a solicitor whom it chose not to instruct to assist it in defending this matter.

93 It is also my judgment that the Respondent conducted the claim unreasonably due to the failure to disclosure documents at all or until the day before the Hearing. Also, it was unreasonable to use the existence of the solicitor to threaten the Claimant

but not to actually consult the solicitor on the strengths and weakness of its defence. The Respondent failed to respond to the Claimant's offer apart from a threat of seeking a costs order against her and engaging expensive solicitors.

94 It is this Tribunal's judgment that it is appropriate to make a costs order against the Respondent.

95 The Tribunal next needs to consider whether it should exercise its discretion to award costs against the Respondent. It is at this stage that the Tribunal can take into account the paying party's ability to pay. However the Respondent did not provide any information from which the Tribunal could make any findings on its financial health. The documents were confusing, the Tribunal was not taken to some of them and it was not clear whether the company's finances were better now or the same. The Respondent is still trading and it is the Tribunal's conclusion that it can pay any costs awarded against it.

96 The Respondent had no defence to these proceedings. Yet it pursued a defence against an employee who had given 24 years service, all the way to the Tribunal. It is this Tribunal's judgment that it is appropriate to make an order for costs in this case.

97 The Claimant's schedule of costs shows costs incurred by what was referred to as a Grade A worker, the solicitor who was charged out at an hourly rate of £200; and a Grade D worker, an assistant, charged out at the rate of £105. VAT had to be added to both figures. The amounts charged appeared to be reasonable and there was no challenge from the Respondent to the amounts noted on the schedule. These costs were reasonably incurred. As the Respondent refused to discuss the matter with the Claimant or her solicitors the Claimant had to take the matter to a Hearing and it was appropriate to instruct Counsel to attend on her behalf. The solicitors' fees added up to £1,480.00 + VAT of £296.00 for the solicitor and £462.00 + VAT of £92.40 for the assistant. Counsel's fee for preparation and attending on the day was £500 + VAT of £100.00. The total legal fees incurred in pursuing the claim amounted to £2,930.40. The Respondent is ordered to pay this amount to the Claimant forthwith.

98 The Claimant has also asked for an order that the Respondent reimburse her for the issue fee of £250.00 that she paid to start this case. However, since the Supreme Court in the case of *R (on the application of UNISON) v Lord Chancellor* [2017] IRLR 911 the Claimant can apply to the HMCTS for the refund of the fees. The Tribunal make no order against the Respondent in respect of those fees.

99 The Claimant was unfairly dismissed. The Respondent also unlawfully deducted her wages. The Claimant is entitled to the following remedy:

100 Respondent is to pay the following to the Claimant:

101 For her successful complaint of Constructive Unfair Dismissal

Basic Award:	= £7,610.75
Compensatory Award: 4,680.00 + £500	= £5,180.00

102 For her successful complaint of Unlawful Deduction of Wages = £250.00

This makes a total of £13,040.75

103 The Respondent is also to pay the Claimant's legal costs of £2,930.40.

Employment Judge Jones

13 December 2017