EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Casey	**v**	Cardiff and Vale University Local Health Board

Heard at: **Bristol Employment Tribunal On: 1 to 5 October 2018**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: In person
For the Respondent: Miss C Davis - Counsel

JUDGMENT

1. The Claimant's claim of constructive unfair dismissal fails and is dismissed.

2. The Claimant is ordered to pay the Respondent's costs, in the sum of £20,000.

REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed by the Respondent, at the most relevant times, as its Chief Operating Officer (COO). She had been employed in that role for approximately four years, until her resignation on 8 May 2017. She brings a claim of constructive unfair dismissal.

2. Issues. The issues in respect of the claim are set out in full in the case management orders of Employment Judge Oliver [32-37] and Regional Employment Judge Pirani (of 11 September 2018 – not included in the Bundle). These were not in dispute and for ease of reference are summarised here as follows:

   2.1. The Claimant was the subject of an adverse report ('the Report') by the Wales Audit Office (WAO), as to the handling of the engagement of a human resources contractor ('the Contractor'), in relation to breach of procurement rules and Financial Standing Instructions (FSIs) and possibly

also EU regulations. The Claimant asserts breaches of contract by the Respondent, in relation to the outcome of that Report, as follows:

2.1.1. a failure to take responsibility for the systems failures relating to engagement of the Contractor;

2.1.2. a failure to provide context to the WAO as to why the events occurred as they did;

2.1.3. a failure to respond appropriately to the draft WAO Report (the Respondent not responding in the way they normally would to a critical report);

2.1.4. a failure to inform the WAO that it is normal practice within the Respondent that HR personnel sign engagement/contract documentation.

2.2. It was agreed that if these alleged breaches were found to have occurred and to constitute a breach of the implied term of trust and confidence, then that would constitute, by their nature, a fundamental breach.

2.3. Did the Claimant resign because of any such breach? The Claimant asserts that she did, whereas the Respondent states that she resigned because of the criticism of her performance in the Report, for which the Respondent was not liable. The Claimant says, in effect that she was 'left to hang out to dry' by the Respondent, who scapegoated her for the general management faults of the Respondent. (The acronym 'UHB' is used in the documentation to signify the Respondent.)

2.4. There is no dispute that the Claimant resigned promptly in the face of the alleged breach.

2.5. If found to have been an unfair dismissal, can the Respondent show a potentially fair reason for that dismissal?

The Law

3. I was referred to s.95 of the Employment Rights Act 1996 and am conscious that in such a case the burden of proof rests on the Claimant.

4. The case of **Malik v Bank of Credit and Commerce International SA [1997] UKHL IRLR 462** and related cases, indicate that to establish a breach of trust and confidence, a claimant must establish that their employer's conduct, when viewed objectively and in all the circumstances was conduct that, without reasonable and proper cause, was conduct intended or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

The Facts

5. I heard evidence from the Claimant and, on behalf of the Respondent, from Dr Sharon Hopkins MBE who, for much of the relevant time, was the Respondent's interim Chief Executive Officer (CEO) and Mr Robert Chadwick, the Executive Director of Finance.

6. General Summary of Events. I set out here a general summary of events, by way of chronology, which should be uncontentious:

   6.1. December 2014 – first six-month contract between the Respondent and the Contractor. The Contractor had been known previously to the Claimant and she had approached the Contractor directly. It was agreed evidence that the then Head of HR had left at short notice and an urgent replacement was needed.

   6.2. June 2015 – second such six-month contract.

   6.3. 14 December 2015 – offer of a further three-month contract.

   6.4. 12 February 2016 – Contractor accepts role of interim HR consultant, for period 4 January to 31 March 2016.

   6.5. 11 March 2016 – Request by WAO to provide information as to engagement process of and payments to the Contractor.

   6.6. 6 April 2016 – Contractor commences employment as Executive Director of Workforce and Organisational Development, on one-year fixed-term contract.

   6.7. May to November 2016 – further enquiries and interviews by WAO. On 7 June the WAO wrote to the Claimant [108] in relation to the consultancy contract, attaching an appendix of questions. The then CEO leaves his post, to take up another, on 18 November. Dr Hopkins assumes interim role.

   6.8. 6 December 2016 – meeting between WAO and Claimant [325]. There is no dispute as to the accuracy of the minutes of that meeting.

   6.9. December 2016 to February 2017 – further meetings between WAO and relevant staff of the Respondent and provision of a 'statement of facts' by the WAO, for agreement, or otherwise, by the Respondent and affected staff, to include the Claimant.

   6.10. 7 April 2017 – draft WAO report sent to Respondent and affected staff, to include the Claimant, seeking comments [412-453].

   6.11. 2 May 2017 – meeting between Dr Hopkins and Claimant to discuss draft Report [475].

   6.12. 3 May 2017 – Dr Hopkins writes to the WAO in response to the draft [477].

6.13. 5 May 2017 – further meeting between Claimant and Dr Hopkins.

6.14. 8 May 2017 – Claimant resigns, with Effective Date of Termination of 31 May [494]. On the same date, the Claimant provides her comments on the Report to the WAO [495-514].

6.15. 10 May 2017 – Dr Hopkins and the Claimant meet. Dr Hopkins stresses that the Claimant does not have to leave the Respondent's employment (she has been, since 31 March, in a different role, as Director of Unscheduled Care, with an agreed termination date of 30 September 2017).

6.16. 15 May 2017 – Claimant writes to the Respondent confirming her resignation decision, stating '*As previously discussed, the early termination of contract is as a consequence of the very serious allegations outlined in the WAO Report.'* [522].

6.17. 14 July 2017 – WAO decides, in the public interest, to lay the Report before the Welsh Assembly, at which point it would become publicly available.

6.18. 6 September 2017 – Claimant presents her ET1.

7. Claimant's Reason for Resignation. I move straight to this issue, as I believe it central to both Parties' cases. I don't accept that the Claimant resigned because of the alleged breaches by the Respondent, for the following reasons:

7.1. Despite, on the day of resignation, writing a twenty-page letter to the WAO detailing, in highly charged and critical terms, their alleged numerous failings in coming to the conclusions they did [495-514] and which letter made no criticism of the Respondent's handling of this matter, she, on the same day wrote only a brief one-page letter [494] to the Respondent, to proffer her resignation, which not only contained no criticisms (such as she now levels against them), but in fact stated that:

'*You will be aware that the early termination of my contract is a great disappointment to me but in the circumstances I feel I have no choice.*

I am grateful to the UHB for giving me the opportunity to make a contribution to the health and social care of the people of Cardiff and Vale. I have thoroughly enjoyed these last four and a bit years working with Executive colleagues, Board members, Clinical Boards and the wider health community. It has been a great privilege and I am very proud of what the UHB has achieved during this period.

I will leave Cardiff with very fond memories of its people, its health service and the city itself ….'

This is not, I find, the letter of resignation of a person who feels, due to their employer's fundamental breach of contract that they are forced to resign. There is no criticism of the Respondent whatsoever. When pressed as to

why she had written such a letter (in comparison to the one written to the WAO), she said that '*it was an attempt to maintain her dignity'*.

7.2. In further explanation for that failure to attribute blame, she said that she had discussed her disappointment as to the Respondent's failure to support her, with Dr Hopkins, in their meeting of 5 May 2017 and that therefore Dr Hopkins will have been aware of her concerns. She was asked as to what she had said to Dr Hopkins and said (for the first time) that she had raised the matter as to a potential breach of the implied term of trust and confidence. She also said that she had '*had an expectation* (that Dr Hopkins would back her) *but can't recall exactly what she said'.* In her statement, in respect of that meeting, she said:

'*91. I have always maintained that I decided to resign following the meeting with the interim CEO … It was at this meeting that I realised that the UHB was not going to support me in respect of the Wales Audit Office draft report.*

92. I was informed by the interim CEO that the UHB's response was only a paragraph or so reiterating the responsibility of the Accountable Officer and that it had already been submitted …'.

In answer to the question as to why she had not provided the detail she now asserts in oral evidence, in her statement, she said in evidence that she '*should have'.* Dr Hopkins said in her statement that '*Ms Casey did not suggest that she was resigning in response to a breach of her employment contract by the UHB or any of its employees'* and in cross-examination categorically denied that the Claimant had used the phrase 'breach of the implied term of trust and confidence', or anything like it, as she would have remembered such a statement. I prefer Dr Hopkins' account of this meeting, for the following reasons:

7.2.1 Despite allegedly being very upset by this meeting and raising the highly contentious issue that she effectively blamed the Respondent for the Report's outcome, by mentioning the possibility of their breach of the implied term, she failed to reiterate, or even obliquely refer, three days later, to it in her letter of resignation - a startling omission, I find, on her behalf.

7.2.2 Secondly, generally, I preferred the evidence of the Respondent witnesses to that of the Claimant. In her evidence she frequently had to have questions repeated, to elicit answers and despite being urged to give clear answers, frequently used the phraseology '*I don't disagree with that',* or '*can't comment/no comment'* (e.g. when asked a straightforward question as to whether she accepted or not that the WAO was the public-sector watchdog for Wales), or in answer to another question '*if you say so'*. When asked if the WAO Report was the product of a '*long and complex investigation'* (which it clearly was, simply by relation to the time taken and the amount of evidence considered), she did not answer the question, only saying in closing submissions that she viewed it as '*in fact a simple report designed to*

ensure she carry all the blame.' She challenged Ms Davis' motivation for asking certain questions, clearly seeking to 'see behind them', rather than simply answer them. She also admitted in questioning that despite the standard Tribunal orders that she make full disclosure of all relevant documents, she did not disclose the great majority of her correspondence to and from the WAO, because she '*did not consider it relevant'* and despite the Respondent calling for such disclosure. She said in cross-examination that she '*didn't deliberately pick and choose'* and '*thought I'd sent everything'* (when in fact she had only disclosed her letter to the WAO of 8 May and there was clearly at least several others). She also failed, despite direct requests, to comply with the Tribunal's order to disclose documentation relevant to her efforts at mitigation. I consider that this decision damages her credibility, leading to at least the implication that she has something to hide from the Respondent. In contrast, the Respondent witnesses endeavoured to give straightforward answers when asked clear questions. There was no evidence of them attempting to evade any questions and where they didn't know the answer, they said so.

7.3 Even in her letter of 15 May to Dr Hopkins [522], confirming her decision to resign, in response to Dr Hopkins' letter of 10 May [521], stating that '*you do not need to leave the Health Board earlier than you may have planned'*, she still does not directly blame the Respondent for the position she finds herself in, stating '*As previously discussed, the early termination of contract is as a consequence of the very serious allegations outlined in the Wales Audit Office report … I believe they constitute a breach of trust and confidence in my continued employment with the Health Board … Thank you for your kind words and intentions – they are appreciated.'* This is, I find, a far from unambiguous statement as to any liability of the Respondent, implying, to me, that either, somehow, she considers that the WAO have breached her contract of employment, or, in turn, the Report indicated to the Respondent that she was in breach of the implied term and that therefore she could no longer stay in their employment. This chimes with what she said to the WAO in her letter of 8 May, in which she states '*The confidential draft is littered with red headlines proclaiming serious allegations critical of my integrity. There is a duty of trust and confidence between an employer and employee. Any breach of such trust by either party constitutes a fundamental breach of contract. This 'confidential draft' effectively constitutes a dismissal from my employment.'* Also, in her claim form [7], she states that '*the WAO must have known that it was inducing a breach of contract'*. She was challenged in cross-examination as to why she had not squarely laid blame at the Respondent's feet and she said it was because she '*was so highly distressed'* and that '*there was no doubt in her* (Dr Hopkins') *mind that I was upset with what she'd done'*. However, by this point, well over a month had passed since she had seen the draft Report and ten days since her last meeting with Dr Hopkins and I don't accept, bearing in mind her seniority and her experience over many years and her own background as an Employment Tribunal lay member that if she really believed her current allegations, she would not have stated them plainly to Dr Hopkins.

7.4 It's clear that the Claimant's real concerns were with the contents of the Report, its criticisms of her and the effect on her reputation. However, I consider it likely that she knew there was nothing much she could practically do about the Report's conclusions (short perhaps of a no-doubt expensive application for judicial review – although she states that she is still considering such a step and that she has also complained to the WAO). I view these proceedings, therefore, as an indirect and (as she is representing herself) relatively cheap recourse, to attempt to have her concerns litigated, hence her unsuccessful attempt, early in these proceedings, to join the WAO into these proceedings. Such proceedings, therefore, must be, by their nature, misconceived, or unreasonable.

8. Alleged Breaches. If, however, I were wrong as to my conclusions above in respect of the Claimant's reason for resignation, I nonetheless go on to consider the alleged breaches. These boil down to the extent to which the Respondent could have been expected to 'weigh in' on her behalf, against the WAO, thus at least reducing the blame attributed to her, or sharing it amongst the Respondent's management generally and also thus resulting in her not being personally named as a principal contributor to the errors identified. As stated above, the Claimant considers (in my words) that she was 'left to hang out to dry' by the Respondent, in the face of the WAO's investigation and subsequent conclusions, while the Respondent asserts that they did all they could, in the circumstances, considering the evidence against her and that they '*were in the hands of the WAO'* (Mr Chadwick). The final findings of the Report were, in summary that:

8.1. The Respondent had failed to follow its own Standing Financial Instructions (SFIs) that procurement of all services in excess of £25,000 (the Contractor's was for £114,000) is to be by competitive tendering and that the Claimant had been '*integrally involved in negotiating the terms of the contract with* (the Contractor) *and signed the contract on behalf of the UHB'.* The Report considered that the Claimant, as COO, should have been aware of the requirement for competitive tendering, but yet signed the contract [627]. This was particularly concerning as she admitted to having worked with the Contractor several years before, in a professional capacity, but had not declared this potentially relevant interest [644].

8.2. While the then CEO may have had some involvement, there was insufficient evidence to reach a conclusion on his involvement in these matters [627] and it seems unlikely that he was directly involved in discussing or agreeing the Contractor's terms of engagement.

8.3. The Claimant accepted, at the meeting in December 2016 with WAO representatives that she '*had never denied that the procurement procedures were not complied with and was not aware at the material time that they should have been'* [628]. That explanation as to her lack of awareness was not accepted by the WAO and it was stated that she should have sought advice from the Respondent's Procurement Department.

8.4. The second contract awarded to the Contractor, in June 2015, also suffered the same faults. The Claimant's signature had been electronically added to

the contract while she was away from work and on her return, she '*assumed all was in order'* [629]. Her contention that she '*was not a party to the agreement to offer* (the Contractor) *a new contract'* was not accepted by the WAO [632]. Nor was the WAO '*persuaded by Ms Casey's representation that the letter sent to the* (Contractor) *was sent without her knowledge or consent'* and regardless, she should have followed the correct procedures.

8.5. The WAO would expect senior UHB officers to be aware of the need for compliance with the rules, or if unsure to seek advice from their Head of Procurement, which was not done [634]. This failure exposed the Respondent to reputational risk and the risk of action against them by potential tenderers and/or the European Commission (due to potential breach of EU regulations on procurement and tendering).

8.6. The Claimant had failed in her duty, as the officer signing the contract, to ensure that due diligence checks had been done on the Contractor, to include such matters as whether the Contractor had professional indemnity insurance in place, had arrangements in place for payment of tax and NI and had satisfactory references. The WAO did not accept that the Claimant had sought the UHB's Finance Department's advice as to the totality of these matters, merely restricting her queries to '*the wording of the contract'* [636].

8.7. The contracts were not in the form of the Respondent's standardised terms and conditions, but had been drafted by the Contractor, contrary to SFIs [637]. The Deputy Director of Finance was criticised for not informing the Claimant that the form of the contract was unacceptable [639].

8.8. By appointing the Contractor to deliver consultancy projects, but actually using her as a senior member of staff, the Respondent potentially over-claimed VAT in the amount of £58,162 [641].

8.9. There had been ineffective financial monitoring of the Contractor, with payments exceeding the contracted value and contractual expenses not being verified [645].

8.10. That the Contractor was effectively awarded and commenced a third contract by the Claimant, before a tendering process had even commenced [649], thus predetermining the outcome. That contract was confirmed and backdated, for which the Head of Procurement was criticised. The Claimant was criticised for '*directly involving'* herself in the tendering process, when she was not impartial, as she knew the Contractor had already been engaged [654] and for completing a declaration of interests form, recording no such interests [656].

8.11. That the final contract offered to the Contractor, as an employed Director of Workforce and Organisational Development was '*fundamentally compromised, lacked transparency and was poorly documented'* and for which the then CEO (named in the Report) was principally held responsible.

9. Failure to take responsibility for the system failures relating to the engagement of the Contractor. The Respondent states that there were no such system failures to which they could refer the WAO. The Report did not view the Claimant's failure to engage in the proper procurement procedures (not once, but three times) as excusable by her stated ignorance of them. The Respondent referred to her contract of employment and job description [54 and 67] as to her duty and responsibilities to follow and apply such procedures and noted that she was a very senior, experienced and well-paid Board member of the UHB and therefore these were not unreasonable requirements. The Claimant agreed in cross-examination that even though the previous HR director had left on short notice and the then CEO had told her '*to get somebody in'*, he had not instructed her to ignore procurement procedures or SFIs. She also accepted that she had not identified to Dr Hopkins such 'system failures' as she thought Dr Hopkins should put to the WAO, although she 'expected' her to do so. Both Dr Hopkins and Mr Chadwick said that, while they considered the Report repetitive and over-lengthy, Mr Chadwick thought it was '*accurate and evidence-based and difficult to challenge'* and Dr Hopkins that she '*thought the conclusions fair, based on the evidence'*. Dr Hopkins, in her letter of 3 May 2017 to the WAO, commenting on the draft Report stated that [477]:

   ' … I am concerned about the use of individual names throughout the report. I would like these to be reflected as role titles. This is particularly important as the report pays little attention to the role of the then Accountable Officer (the then CEO) *where the responsibility for decision-making sat. At present the report is not as balanced as it should be in reflecting the responsibility of the Accountable Officer and the key role he played in instructing the actions with respect to interim executive functions. It is the CEO who makes decisions with respect to executive functions and appointments including the manner in which gaps in executive function are filled…'*

10. Dr Hopkins had, therefore, I find, raised the Claimant's main points of concern: that the then CEO was primarily responsible, not her and that her name should not be used in the Report. As we know, however, from the final Report, the WAO did not agree that balance of responsibility, having spoken to the then CEO and examined the documentary evidence, considering instead that the Claimant bore primary responsibility. The WAO felt the matter sufficiently serious to make the Report public by laying it before the Welsh Assembly and also reported the matter to the NHS Counter-Fraud service. It is clear, both as a matter of commonsense and from the evidence of the Respondent's witnesses that they were in the hands of the WAO, a statutory independent body with responsibility for investigating such matters for the Welsh Government and could do nothing but co-operate with the WAO, answer their queries and provide documentation. All parties, both the Respondent and the individuals featured in the Report were provided by the WAO with a draft 'statement of facts', seeking their agreement, or otherwise, to them and as far as is known, all recipients, including the Claimant, availed themselves of that opportunity. The draft report was also sent to the Respondent and the individuals concerned and again all concerned had an opportunity to comment on it. However, the WAO only provided the Respondent with a redacted draft, excluding information about named individuals, including the Claimant and directed them to comment only on the non-redacted elements, leaving the redacted elements to be commented on by the named individuals.

This was the WAO's chosen method of seeking views and the suggestion that the Respondent could have challenged that process is illogical – one may as well suggest that if the Police are investigating a suspected crime, the suspect or other witnesses should be able to dictate to the Police how they carry out their investigation. Having considered the evidence and the comments of the recipients, the WAO reached its conclusions.

11. Failure to provide context to the WAO as to why the events occurred as they did. The Claimant referred, in this respect, to the pressures both she and the Respondent generally were under at the time of the first contract. These were the short-notice departure of the HR director, staff shortages, waiting times in A&E and financial constraints. The Respondent pointed out, however that the WAO was already aware of such matters (as set out in the Report), both from their investigations and no doubt from what the Claimant will have told them (albeit we don't know, as she didn't disclose such information) and also from their close involvement, generally, with the Respondent's internal audit processes (as set out in Mr Chadwick's evidence). However, this information did not sway the WAO's decision and in any event, cannot explain the subsequent '*missed opportunities'* to put matters right with the later contracts. Again, the Claimant did not spell out to Dr Hopkins what additional such 'context' she expected Dr Hopkins to provide. I cannot see what further 'context' may have been required from Dr Hopkins, in the light of the WAO's obviously lengthy and complex investigation.

12. Failure to Respond Appropriately to the draft WAO Report (in a manner they would normally have done in the face of other critical reports). In this respect, the Claimant referred to two previous WAO reports, one in relation to contractual arrangements for car-parking at the Hospital and the other in response to a financial audit. In summary, these reports dealt with the following issues:

    12.1 Following a review by the WAO in 2016 of the Respondent's accounts, the WAO challenged the decision by the Respondent to approve variations to a car-park management agreement, with a private company, resulting in payments to the Company of £635,000. Mr Chadwick said that this situation arose because of the Company levying parking ticket fines on staff and subsequent staff discontent. Accordingly, the Board wished to avoid this situation in the future, but needed effectively to 'compensate' the Company for that prospective loss of income. The WAO concluded that the '*decision-making process was flawed, as the Board did not have the information it needed to form a considered view on whether the proposal was either lawful or represented value for money*.' It went on to state that it accepted '*that if the Board had been in receipt of and considered all relevant considerations and disregarded irrelevant consideration, it may well have reached the same conclusion.'* [730]. That report did not name individuals and was not made public.

    12.2 The WAO produced an Audit of Financial Statements Report in 2014 [706]. It records that the Respondent exceeded its revenue resource limit by approximately £19m, which is deemed to be '*unauthorised and is therefore irregular'*. Also, contracts had been entered into, in excess of £1m, without, as required, obtaining ministerial approval and some contracts had been

extended, in breach of procurement regulations. Again that report did not name individuals and was not made public.

13. The Claimant's position is that these reports, although critical of the Respondent and involving sums well in excess of the payments made to the HR Contractor, did not name those considered and were not made public. She said that this was done, effectively, due to intense lobbying by the Respondent, to persuade the WAO not to do so and that the Director of Finance had said that he had 'spent long hours' with the WAO to ensure this outcome. This assertion was rebutted by Mr Chadwick, who categorically denied any such lengthy discussions with the WAO, but which were in fact with the then CEO and the car-parking company. He set out in detail in his statement (10) what the nature of the discussions were that he did have with the WAO and which were not '*aimed at mitigating or reducing any criticism which the WAO might have had of the re-based parking arrangements or how they were arrived at.*' He said that it would have been entirely improper for him to have attempted to unduly influence the WAO in any way. He was not shaken on these points, in cross-examination.

14. I remind myself, of course that it is for the Claimant to prove, on the balance of probabilities, her assertion as to the Respondent somehow influencing the WAO to downplay these two earlier reports, but not the one involving her. As submitted by Miss Davis, the Claimant can however do nothing more than make these bald assertions, unsupported by evidence and disputed by Mr Chadwick. I concur with Miss Davis' view that this allegation is fanciful and not based in reality. I reiterate that in the end, the WAO is an independent statutory body with responsibilities to report, without fear or favour, to the Welsh Government. It is for them to decide what to investigate, how to carry to out the investigation, what to conclude and having done so, how to put into effect those conclusions. The Claimant has provided no evidence to counter that process in her case and if, as she clearly is, dissatisfied with the Report, then there are other mechanisms available to her to challenge it.

15. <u>Failure to inform the WAO that it is normal practice within the Respondent that HR personnel sign engagement/contract documentation</u>. I deal with this point very briefly. It is entirely spurious of the Claimant to suggest that she was somehow merely carrying out an 'administrative' HR function when she signed the relevant contract. She was signing as the COO and to suggest otherwise is entirely disingenuous of her. Somebody of her seniority and experience cannot genuinely be unaware that by signing such a document, she took responsibility for its contents and she does herself a disservice by suggesting otherwise. There was nothing here for the Respondent to inform the WAO of – it was not their 'normal practice'. Further, in any event, the WAO was fully aware of her contentions in this respect, as to merely 'rubber-stamping' the then CEO's decision to grant the contract, and nonetheless dismissed those contentions in its Report.

16. <u>Conclusion in Respect of Alleged Breaches of Contract</u>. If not already clear from my findings above, there is no question of the Respondent having committed any breaches of the implied term of trust and confidence, as alleged by the Claimant. The Respondent was constrained by the methodology chosen by the WAO for its investigation, but within those constraints, Dr Hopkins clearly asserted her belief

that the Claimant did not bear the main responsibility for the identified failures, but that the then-CEO shared in it and that the Claimant should not be named. The Claimant had also made this point to the WAO, but they disagreed and reached the conclusion they did. Applying the test in **Malik** and viewing objectively and in all the circumstances the Respondent's conduct, I cannot conclude that such conduct, without reasonable and proper cause, was conduct intended or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and Claimant.

Conclusion

17. For these reasons, therefore, the Claimant's claim of constructive unfair dismissal fails and is dismissed.

COSTS APPLICATION

1. Respondent's Application. Immediately following judgment, Miss Davis applied for the Respondent's costs, limited to the sum of £20,000.

2. She referred me to Rule 76(1) as to when a costs order may be made, relying on what she said was the Claimant's unreasonable behaviour in bringing a misconceived claim that by its nature, had no reasonable prospects of success. She recognised that case law indicated that an order for costs in an Employment Tribunal was the 'exception rather than the rule', but this was such a case.

3. If there had been unreasonable behaviour, as was the case here, then the Tribunal had broad discretion to make such an order.

4. She relied on the Tribunal's findings in respect of the claim being misconceived and also its findings in respect of the Claimant's credibility.

5. Additionally, however, the Respondent engaged in extensive correspondence with the Claimant, as to the merits, or otherwise of her claim, pointing out in considerable detail the evidential hurdles that she was not likely to surmount and also warning as to the likelihood of them seeking their costs. Miss Davis provided a further 93-page bundle (numbered C1 etc.) dealing with this issue, a copy of which had been provided to the Claimant yesterday. She took the Tribunal through that correspondence, a summary of which follows:

    5.1 About a month after its filing of the Response, the Respondent wrote to the Claimant in November 2017 [C1-5], 'without prejudice save as to costs', stating that they had applied for strike out/a deposit order in respect of sex and race discrimination claims she had brought (subsequently withdrawn) and a deposit order in respect of the constructive dismissal claim. They had done so because they considered these claims to be without merit. Focusing on the only surviving claim, constructive unfair dismissal, they set out, in six detailed paragraphs, why it would fail: namely that the Respondent had no liability for the actions of the WAO; that an alleged failure (as then pleaded) on their part to make 'robust representations' to the WAO on the Claimant's behalf could not be a breach, fundamental or

otherwise of her contract and in any event the Respondent had made such representations (reliant on Dr Hopkins' letter of 3 May [477] and as found by this Tribunal); the burden of proof was on the Claimant to establish this; it was a matter for the WAO to make its decision, based on the evidence before it (again, as found by this Tribunal) and the Claimant had not resigned because of any breach of contract by the Respondent, but because of what the WAO had concluded about her in the Report (again, as found also by this Tribunal). She was referred to the Tribunal's Rules in respect of costs and given an indication of those costs, to date £10,000. She was urged, on the first of many occasions, to take legal advice. While the Respondent noted that the Claimant was a litigant in person, she was, nonetheless a relatively sophisticated one, in that she is professionally qualified, has extensive management experience at a high level, to include human resources and had the means to access legal advice.

5.2 The Claimant's response (much, if not all of such correspondence written by her husband, Professor Burchill, who specialises in labour relations [C6-8]) did not really address the issues, stating that the WAO '*has been co-joined as Respondent to the Claimant's claim'* (subsequent application refused by the Tribunal) and that it was the Claimant's contention that the Report '*is thoroughly meretricious and we intend to demonstrate this paragraph by paragraph.'* It raised entirely irrelevant matters in relation to a subsequent NHS counter-fraud investigation, as that occurred well after the Claimant's resignation and was nothing to do with the Respondent, having been instigated by the WAO. It ended by reiterating that the '*motivation'* for a '*particularly malicious report and the virulent pursuit of notions of fraud'* would be explored both against '*officers of the UHB, but also, <u>in particular</u>, to the Auditor General*.' (my emphasis), indicating, Miss Davis submitted, the true focus of this claim, to 'pull apart the WAO Report'. £50,500 was sought by way of loss of earnings and advice was being sought on '*injury to feelings, exemplary damages and aggravated damages'*.

5.3 The Respondent wrote again in January 2018 (all dates 2018 hereafter), pointing out the lack of engagement with the issues by the Claimant and reiterating that the clear focus of the claim was on the WAO [C9-11] and that it was not the role of the Employment Tribunal to 'clear' the Claimant's name, following the findings of the Report and that the Tribunal was not the appropriate forum for doing so and that therefore the claim was unreasonable, vexatious and an abuse of the Tribunal process. She was again urged to take legal advice on her claim and this correspondence, in particular.

5.4 The Claimant responded a week later [C12-14]. She denied that the focus of her claim was only on the WAO, stating that it included the Respondent's actions/inactions in failing to support her. It was stated that she had submitted an application to the Tribunal seeking to join the WAO as a Respondent, for *'inducement to breach of contract/conspiracy to breach of contract'*. She referred to having '*written evidence from the WAO that the former director of finance questioned the then CEO on whether he had approved the engagement of the HR Contractor and the terms of such engagement and that he confirmed that he had'*, but no such written

evidence, or indeed any correspondence from the WAO to her was disclosed. She contended that '*Despite all this the WAO was minded to believe the CEO'. No doubt the Tribunal will make a finding on whether this amounted to discrimination, when presented with the evidence.*' As stated, no such 'evidence' was presented and the idea that this Tribunal could make a finding of discrimination against the WAO shows a fundamental misconception as to its jurisdiction. The suggestion by the Respondent that had the Claimant not resigned that she might have been subject to disciplinary proceedings is regarded as '*absolute nonsense!!!!'*. She accuses the Respondent of bullying her by their reference to costs.

5.5 The Respondent replied in mid-February [C16-17], denying any attempt at bullying the Claimant, but again emphasising the merits of taking legal advice.

5.6 The Claimant replied later that month, reiterating her previous contentions [C18-19].

5.7 The Respondent wrote again in early March [C20], emphasising that the Claimant could not rely on any referral made to the counter-fraud office, as she was unaware of such until after her resignation.

5.8 On 22 March, the first preliminary hearing was held and following a lunch break and just before the Employment Judge was deliver her decision as to strike out/deposit orders, the Claimant withdrew her claims of sex and race discrimination. She was urged by the Judge to take legal advice. The Respondent stated to her in subsequent correspondence that she clearly had the means to do so.

5.9 On 30 April, the Respondent wrote again [C22-28] pointing out that while the Employment Judge had declined to make a deposit order in respect of the constructive unfair dismissal claim, she had done so because '*she considered that there were points of evidence in dispute that she was unable to resolve without a hearing and she therefore declined to form any view on Ms Casey's prospects of success. It was not the case that Employment Judge Oliver determined that Ms Casey's case had any meaningful prospects of success'*. (In any event, as pointed out by Miss Davis, the Claimant had indicated that she was willing and able to pay a deposit of £3000 and therefore it can be assumed that regardless of Judge Oliver's finding, the claim would have continued, regardless.) Likely costs, at that point, were estimated to be in the region of £60,000. The letter set out a list of points likely to undermine the claim, namely that the Respondent was not in a position to stop, curtail or influence the independent WAO; that all relevant witnesses, to include the Claimant, had been interviewed by the WAO; that the Claimant was offered support and assistance throughout the investigation, to include access to documentation and advice as to draft responses; that the Respondent and the Claimant had had the opportunity to respond to the WAO's 'statement of facts'; that the Respondent had arranged a two-week extension for the Claimant to respond to the draft Report and that Dr Hopkins had written her letter of 3 May 2017 to the WAO. It reiterated that the WAO had taken into account

whether other persons may have been responsible for the errors, or whether there were systems failures and the pressures the Claimant was under at the time, but considered them irrelevant to its decision. Despite several opportunities for the Claimant (and the Contractor) to put across their point of view, the WAO reached their independent opinion that nonetheless she was at fault. Further, the Claimant did not specify what, if any, further information should have been provided by the Respondent to the WAO (as also found by the Tribunal). Also, the Claimant, in signing the contract, was not a mere member of HR personnel, but did so as the COO (as also found by this Tribunal). In response to an issue first raised at the Preliminary Hearing (that the Respondent had responded differently to two other WAO reports), it was asserted that these were not comparable and the fact that the WAO chose, in those cases, not to name individuals, or to publish their reports was their decision. Further, it was submitted, relying on the Claimant's correspondence at the time, it was clear that she had not resigned because of any act or omission of the Respondent, but due to the Report's contents (as also found by the Tribunal). It reiterated its belief that the Claimant was misusing the Tribunal forum, to somehow re-visit the Report's conclusions and 'clear her name'. Her indication that she could afford to pay a £3000 deposit also indicated she had the means to take legal advice.

5.10 The Claimant responded a week later [C29-33], stating that she considered another letter sent to her on 30 April, raising disclosure issues was '*irrelevant'*. In respect of both letters, she stated that they '*serve no purpose whatsoever and certainly do not progress the case'* and '*no doubt the production of these purposeless letters will have cost the UHB in excess of several thousands of pounds. Further, please do not lecture us on the need to save costs in the NHS…'* (on the basis of her experience dealing with such matters). It went on to assert that the Respondent did not need to instruct lawyers, as they had a large HR department who could manage '*a simple Employment Tribunal case'*. It stated that the Respondent's production of two bundles of documents for the Preliminary Hearing and the request for the Hearing itself was '*pointless'.* She considered herself to be being '*bullied'* by the Respondent. Mention was made of considering the taking of legal advice, in respect of the counter-fraud allegations, but due to being asked to pay a £10,000 '*retainer fee'* by a solicitor she consulted, she decided to '*go it alone'*. She went on to say that '*this is a simple case of what is right and wrong. It could have been settled long ago without the need for extortionate legal costs by early mediation or by conciliation. ACAS offered both and we agreed – in both cases you disagreed. To use your language your actions could best be described as vexatious.'* In respect of issues in respect of the nature of the contract between the Respondent and the Contractor, she stated '*I assume that as an employment lawyer you are aware of what constitutes an 'oral contract''*. As to her reasoning for taking the Tribunal route, she said '*The advantage of such a tribunal is that evidence will be given under oath or affirmation with all the potential consequences arising from deliberate untruths. There is also the advantage of the Employment Tribunal system that it has been deliberately designed to avoid the need for legal representation. Another reason, of course, why Blake Morgan LLP* (Respondent solicitors) *is an*

expensive gateway to access. You still try to insist that we seek legal advice.' Finally, she stated '*In all of the above we do not believe that it is up to you to convince us that you are right and we are wrong. It is our position that we will put our case truthfully and in good faith to the Employment Tribunal to the best of our ability'*.

5.11 The Respondent replied on 16 May, reiterating its previous views as to merits and challenging the assertions of the Claimant as to the need for the Preliminary Hearing [C34-37]. A response from the Claimant [C39] stated that she did not believe the Respondent's letter '*actually adds anything to previous correspondence'* and concluded that '*no doubt the Tribunal will ensure, at the end of the day, that all relevant matters are properly presented to it.'*

5.12 On 18 May, the Respondent applied for an 'unless order', as the Claimant had not complied with an order for further information made at the Preliminary Hearing [C42].

5.13 On 24 May, the Respondent invited the Claimant to make disclosure of all relevant documents, not included in their own disclosure, to include documents relevant to mitigation of loss [C50]. Having not received any disclosure, the Respondent wrote again, on 7 June [C52], reminding the Claimant of her duty in this respect.

5.14 On 15 June, the Respondent wrote again, stating that it considered that the Claimant had still not complied with the orders as to further information and disclosure and had, as a consequence, requested a further preliminary hearing [C59]. It set out that '*Ms Casey is under an obligation to provide the UHB with copies of any documents which are in her possession or under her control which are relevant to an issue in the proceedings, whether or not these assist her case'*. A letter to the Tribunal of the same date recorded that at that point, the only documents disclosed by the Claimant were two draft letters dated 1 June 2015 and 14 December 2015 and that no documents in relation to mitigation had been disclosed [C70].

5.15 In response to those queries, the Claimant wrote on 21 June [C72], direct to Judge Oliver referring to evidence she considered showed that she had been scapegoated and in respect of disclosure said '*Another outstanding question raised was the one of 'mitigating loss'. That question would seem to be the result of an intern's response to a law company's pro forma questionnaire. Having completely lost her reputation as a senior manager in the NHS it is difficult to know what would constitute such activity. The Respondent should give examples. We have made it clear that we are not legally qualified and would expect the Tribunal to take control of the case …'*.

5.16 Subsequent correspondence from the Respondent, in June and July [C74 and 76] reminded the Claimant of her duty to disclose documents relating to mitigation and any other documents that may be relevant. The Claimant wrote, in respect of the second preliminary hearing that '*We will simply recommend that the matter, given the now known facts, should simply be*

referred to the Employment Tribunal for a traditional Tribunal Hearing and the waste of public expenditure associated with a full working week hearing should be abandoned'. [C78].

5.17 The second Preliminary Hearing was held on 11 September. Prior to it, the Respondent finalised the Bundle, on the basis that the Claimant had not disclosed any further documentation [C84].

6. Miss Davis made the following additional submissions:

6.1 The Respondent's costs were added to by the behaviour of the Claimant, as set out in the correspondence.

6.2 Despite the care taken by the Respondent to set out the weaknesses of the Claimant's case and the need to take legal advice (also stressed by the Employment Judge at the first Preliminary Hearing), she ignored them. It is clear, from the outset that her claim was misconceived, but she consistently failed to address the issues raised by the Respondent, in extensive correspondence. Her actual target in these proceedings was the WAO and its Report and she failed utterly to provide any convincing evidence as to the alleged breaches by the Respondent. This Tribunal's judgment matches many of the points made by the Respondent in its correspondence. Eventually, her stance in the correspondence seems to boil down to 'I'm not a lawyer and therefore I will simply leave this matter to be decided by the Tribunal'. This is disingenuous and foolhardy on her part, considering her long professional experience at senior management levels, her Tribunal experience over many years, her husband's background in industrial relations (they having even co-authored a book on human resources management (not disputed by the Claimant)).

6.3 She pursued utterly unmeritorious sex and race discrimination claims through to the first Preliminary Hearing, only withdrawing them at its conclusion, shortly before the Employment Judge was to give her judgment. The mere fact that the Judge declined to make a deposit order in respect of the constructive unfair dismissal claim did not indicate that she thought it had reasonable prospects of success, but that without hearing detailed evidence in what is a complicated matter, she could not come to view on the issue.

6.4 The tone of much of the Claimant's correspondence (or more properly that of her husband, Professor Burchill) was often intemperate and dismissive and therefore not of assistance in progressing the matter, or dealing with the issues and contrary to the Overriding Objective.

6.5 The Claimant failed to comply with the Tribunal's orders as to disclosure. She did not disclose any documents in relation to mitigation, despite having had employment since her resignation. Further, apart from her letter to the WAO of 8 May 2017, she disclosed no other such correspondence, despite it being clear from her own references to it that there was other correspondence and she had no basis, as she now asserts, for considering that correspondence not to be relevant. She said, at the second

Preliminary Hearing that she had no further documents to disclose. Both from the fact of the Respondent repeatedly pointing out her duty in this respect and her own experience as a lay Tribunal member, she can have been in no doubt as to her obligations.

6.6 The Respondent has considered the possibility of seeking Detailed Assessment of their costs, but, despite the Claimant's unreasonable and abusive behaviour and the fact that she is apparently now working again, does not wish to go to the trouble of further proceedings in the County Court. It does, however, expect a contribution from the Claimant towards it costs, met, as they are, from the public purse. Accordingly, its application is limited to the Tribunal's jurisdictional limit of £20,000.

6.7 The Tribunal is not obliged to take into account the Claimant's means to pay any such order, but relevant case law suggests, particularly as she is a litigant in person that it should do so. However, despite long prior notification of its intention to make a costs order and the provision of the costs bundle to the Claimant yesterday, she has provided no documentary evidence as to her means. The Respondent understands that she has been working four days a week. She has, in the past and for many years, been very well-paid and indicated, without hesitation that she could pay a £3000 deposit order. She presumably also is in receipt of a reasonable pension. In any event, if payment of any order is not made, then enforcement procedures in the County Court would entail disclosure of evidence as to means and, if necessary, an order as to an appropriate level of payments. The Claimant has failed to be transparent throughout this matter, both as to her ability to seek legal advice and her means to meet any costs order.

6.8 The Claimant clearly had the means to take legal advice, but totally failed to do so, by her choice.

7. Claimant's Response. Following a break of an hour and a quarter, the Claimant (through her husband) made the following submissions:

7.1 She accepted the Tribunal's decision.

7.2 She did seek legal advice on the merits of the claim. (Professor Burchill was asked as to the source of this advice and he said it was from a fellow academic.) In any event, Judge Oliver '*waved the green flag'* at the first Preliminary Hearing, by declining to make a deposit order. She also referred to her approach to a solicitor at the time of the counter-fraud investigation, but on being told that she needed to make a down-payment of £10,000, she decided to 'go it alone'. She agreed that she had not approached any other professional advisor.

7.3 She had been keen to pursue mediation and/or conciliation, but the Respondent had dismissed this out of hand. Had they not done so, this claim may have been resolved, thus saving public expenditure on the Respondent's costs.

7.4 She had not deliberately withheld documents from disclosure, but simply did not consider them relevant.

7.5 She was not misusing the Tribunal to litigate against the WAO. While an application for judicial review may now no longer be possible, she is still considering a claim for defamation.

7.6 Professor Burchill accepted that on occasion the tone of his correspondence may have been unprofessional. However, they handled this case and responded to correspondence the best way they could. They could not afford to get legal advice.

7.7 In respect of the level of costs sought by the Respondent, the Claimant said that these were '*ridiculous, too high and unreasonable'*.

7.8 As to her ability to pay, she said that she could not afford to pay any costs order at such a level. She said that her only income was her pension, of £2500 a month and that she had no savings. She owns her home, which is worth approximately £680,000, but has an outstanding mortgage of £340,000. Their marriage was their second marriage, for both of them and both had grandchildren. Professor Burchill stated, in conclusion that in any event, he could pay any such order, asking as to where he should make payment.

8. Findings. I find that a costs order is appropriate in this case, for the following reasons:

8.1 The claim was entirely without merit and the bringing of it was unreasonable. It is clear both from my judgment and the contents of the Claimant's correspondence (as set out above) that the Claimant was fixated on the decision of the WAO, but instead of attempting to directly challenge that decision, she sought to indirectly do so, by means of her claim against the Respondent, hoping thus to 'clear her name'. She specifically said in her correspondence that she chose this forum (rather than say an action for judicial review in the High Court) because '*it has been deliberately designed to avoid the need for legal representation …* (thus rendering the Respondent's choice to be legally represented) '*an expensive gateway to access'*. She saw, I find, the taking of a Tribunal claim as a financially risk-free option, as opposed to any other (and at least potentially legitimate) legal avenues open to her. By doing so, she hoped to pressure the Respondent, by dint of their own rising legal costs, to come to some settlement with her, hence her references to their 'failure' to engage in mediation or further conciliation. When it was pointed out to her that there was no obligation on a party to engage in such steps, particularly so when they were perfectly entitled to defend themselves against a completely unmeritorious claim, she said that they should have nonetheless done so, to reduce the costs to the public purse, forgetting of course that it was she who had brought this unmeritorious claim in the first place, which she could have withdrawn, as she did with her sex and race discrimination claims, at any point.

8.2 As is clear from the Respondent's detailed and carefully-worded correspondence, she was on notice, for some time, as to the weaknesses of her claim (much of them reflected in my eventual judgment), but utterly failed to address them, eventually adopting the approach that the matter was 'in the Tribunal's hands' and that she would simply await the outcome. This was, particularly in light of the costs warnings she was receiving, foolhardy on her part. Even without the benefit of legal advice, she was in no doubt, from the details of the Respondent's correspondence, as to the evidential hurdles she would need to overcome at this Hearing and which she completely failed to do. I note, in this respect that while she is a litigant-in-person, she is a relatively sophisticated one: she has been a very senior manager for much of her latter career, with HR responsibilities; she has been a lay member of the Employment Tribunal for many years (albeit that she may not have sat for several years) and she, with her husband, has authored a book on human resources management. I find, therefore that even without the benefits of legal advice, she should have understood the risks she was taking in this respect, but chose to ignore them. As to legal advice, I don't believe her evidence as to not being able to afford such (and refer, in this respect, to the findings in my judgment in respect of her credibility, generally). She had been earning an annual salary of £150,000 for at least four years and almost certainly, given her CV, a similar level salary for some time before that and I don't accept therefore that she couldn't afford to at least take legal advice on the merits or her claim and the costs warnings she was receiving, without perhaps the need for formal representation. She indicated at the first Preliminary Hearing that she was able and willing to pay a deposit order of £3000 and that sum, if she had chosen to, could have been used to obtain a worthwhile level of advice. I consider, in fact that it was her choice not to take such advice, based perhaps on the mistaken belief that between her and her husband's expertise and knowledge, she did not need to.

8.3 The tone of her (actually her husband's) correspondence was often rude, patronising or dismissive. She failed to engage substantively with the Respondent's arguments, resorting instead to either ignoring them, or dismissing them as 'ridiculous'. Professor Burchill accepted that on occasion his correspondence may not have appeared professional. This tone and lack of substantive response prolonged the correspondence, incurring further costs and was in clear non-compliance with Rule 2 ('the Overriding Objective'), as to co-operation between parties.

8.4 She failed to comply with the Tribunal's orders as to disclosure. She disclosed no documentation in respect of her efforts at mitigation, despite admitting in this Hearing that she did have paid employment, for at least some period of time, following her resignation. She was reminded several times as to her duty in this respect by the Respondent and as a Tribunal member must have been aware of this requirement. She also failed to disclose, apart from one letter from her to the WAO, any other correspondence between her and that body. She admitted, in this Hearing that there had been other correspondence, but that she had chosen not to disclose it, as she did not consider it relevant. The idea that having brought a claim almost entirely focused on the WAO's investigation of her, that

correspondence between her and that body would not be relevant is fanciful in the extreme. As found in my judgment, I considered it much more likely that she chose not to do so, because she had something to hide. This was an entirely culpable and deliberate decision on her part.

9. Level of Costs Order. The Respondent's costs schedule runs to just short of £125,000 [C89]. While, undoubtedly, were that schedule to be submitted to Detailed Assessment, those costs would be reduced (as is the norm, from my own experience), they would certainly not fall below the £20,000 figure now sought. Even the costs expended on Miss Davis' fees for this and the two previous hearings alone easily run to this figure, without consideration of the drafting of lengthy witness statements, disclosure of 750 pages of documentation and voluminous correspondence. Those preliminary hearings may not even have been necessary, had the Claimant not pursued her spurious sex and race discrimination claims and properly pleaded her constructive unfair dismissal claim (claims of such nature not usually requiring a preliminary hearing). The Claimant could provide no argument as to why any lower figure should be ordered, beyond describing it as '*ridiculous'* and I see no rationale for doing so. There is no doubt that costs of at least £20,000 were legitimately incurred by the Respondent in resisting the Claimant's misconceived claim and therefore that is the appropriate amount.

10. Claimant's Means. Despite long prior notification that the Respondent would be seeking a costs order and the Respondent providing her with their costs bundle yesterday, the Claimant provided no documentary evidence as to her means. I did not accept her oral evidence on this issue (again, bearing in mind my previous findings in respect of her credibility). I found it deeply implausible that having earned a high salary for many years and being married to a senior academic, on, no doubt, a reasonable salary also that she had no savings whatsoever. She had chosen not to disclose her earnings since her resignation, in contravention of Tribunal orders and I had therefore every reason to assume that she was not being forthright now, either. I consider it likely, therefore that she will have the means to pay such an order, if not immediately, certainly over time, or, if necessary, as ordered in any enforcement proceedings that may become necessary, at which she would have the opportunity to present evidence as to her means. In any event, her husband offered to make such payment, clearly indicating that at least between, they can afford to do so.

11. Conclusion. For these reasons, therefore, the Claimant is ordered to pay the Respondent's costs, in the sum of £20,000.

Employment Judge O'Rourke
Dated 5 October 2018

Sent to the parties on:

24 October 2018

For the Tribunal: