



EMPLOYMENT TRIBUNALS

Claimant: Andreia Da Silva Couto

Respondent: Amica Care Trust (previously Somerset Redstone Trust Signature House)

Heard at: Southampton On: Thursday, 21st and Friday
Employment Tribunal 22nd February 2019

Before: Employment Judge Mr. M. Salter

Representation:

Claimant: In person, assisted by Mrs P. Cosentino (Portuguese Interpreter)

Respondent: Mr. E. Kemp, counsel; Ms. K Gardner, solicitor; Miss C. Bray, Assistant Solicitor.

JUDGMENT

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

REASONS

INTRODUCTION

Written Reasons

1. These are my reasons given orally at the final hearing on Friday, 22nd February 2019. In accordance with Rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") written reasons would not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision.
2. After receiving the decision at the hearing the Respondent requested written reasons. This was a surprising request given that they won, were represented by counsel throughout, had the attendance of a solicitor all through the hearing and at

the outset a partner from the instructed firm attended, yet seemingly no note of the decision was taken. The reason given for the request was for the Respondent to take “HR Learning points” from the outcome. The E.J. explained the impact such requests have on already stretched tribunal resources, but the Respondent maintained its request, as is its right. The Employment Judge later discussed the request with a senior Employment Judge on the region and the Regional Judge.

Written Record of Decision

3. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal’s Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant’s case as formulated in her ET1

4. The Claimant’s complaint, as formulated in her Form ET1, presented to the tribunal on 6th September 2018, is in short, she was constructively unfairly dismissed.

The Respondent’s Response

5. In its brief Form ET3, received by the tribunal 9th October 2018, the Respondent denied there was a constructive dismissal, asserted that the Claimant did not resign because of the breach but for some other unexplained reason, later developed in tribunal that the claimant left to pursue other employment; there was an (unspecified) fair reason for dismissal and that the Respondent acted fairly.

6. In its ET3 the respondent contend that it would be likely the tribunal should exercise its jurisdiction to “all of the costs against the Claimant”, and it put the Claimant on notice that it intended to make a costs application.

Relevant Procedural History

7. The matter did not have any case management hearings, but there were attempted to obtain further particulars of the claim from the claimant which resulted in the document at [31]

THE FINAL HEARING

General

8. The matter came before me for final hearing. The hearing had a two-day time estimate during which the Claimant represented herself assisted by Mrs Cosentino an interpreter. The Respondent was represented by Mr. Kemp of Counsel, with Ms. Gardner Solicitor and Miss Bray Assistant t solicitor also being present.

List of Issues

9. There had been no list of issues identified prior to the hearing. Discussing it with the parties the following appeared to be the list:

Qualification

- a. The Respondent accepts that the Claimant was an employee and that at the time of their dismissal she had sufficient continuity of employment to present a claim of unfair dismissal. However, the Respondent denies that the Claimant was dismissed, thy say she resigned.

Breaches Alleged

- b. The Claimant claims that the Respondent acted in breach of contract in respect of the implied term relating to mutual trust and confidence i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?. The breaches were as follows
 - i. Breach of confidentiality (14ht November 2018)
 - ii. Change to contract of employment 14th November
 - iii. Abusive treatment (14th November)

Where Any Proven Breaches Fundamental Breaches?

- c. Not all breaches of contract are fundamental ones, do any of the breaches proven by the Claimant amount to fundamental ones? The Respondent does not accept that a breach of implied duty of trust and confidence is necessarily repudiatory.

Did the Claimant Resign in Response to those Breaches?

- d. Did the Claimant resign because of the breach? The Respondent contends the Claimant resigned to pursue other employment.

Did the Claimant Delay to long in Resigning?

- e. Did the Claimant delay before resigning and affirm the contract?

Was any Constructive Dismissal Necessarily Unfair?

- f. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act? The Respondent, in tribunal, and not in the pleadings, contends it is some other substantial reason, namely a breakdown in the relationship.

Particular Points that were Discussed

Litigant in person

10. As the Claimant was representing herself I explained to her that I could not and would not be presenting her case for her, but would ensure, as far as possible, she

was not disadvantaged by representing herself; I explained that both I and Mr. Kemp have obligations to her as a litigant in person.

11. During the hearing I explained to the Claimant the requirement to “put your case” to the relevant witnesses. Despite this and a reminder by me the Claimant failed to put an important allegation to Mrs. Hunt. I considered that it was only fair and right to both the Claimant and Ms. Hunt, that this allegation was put to the witness, which I did.

DOCUMENTS AND EVIDENCE

Witness Evidence

12. I heard evidence from the Claimant on her own behalf
13. I also heard evidence from the following witnesses on behalf of the Respondent: Mrs Kerry Hunt a Home Manager for the Respondent; Mrs Caroline Walton a Trust Support Manager and Mrs Laura Wilkes, who was at the time a Home Manager for the Respondent, all three of them were involved in some way with the Claimant’s two grievances.
14. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. The Claimant in fact provided two statements, and it only became apparent when she was about to give evidence that the Respondent had not been provided with a copy of one of these statements. After a brief adjournment to read the 6 page statement Mr. Kemp indicated he was content to continue.
15. All witnesses were cross-examined

Bundle

16. To assist me in determining the matter I have before me today an agreed bundle consisting of some [169] pages organised seemingly, although not entirely clear, thematically rather than chronologically and prepared by the Respondent. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.
17. At 1030 on Thursday, when my clerk was due to bring the parties in he arrived carrying a further set of papers which the Claimant had not handed in at 1000 with her witness statement. Knowing nothing of these documents I did not accept them

but directed the claimant obtain copies of them for the Respondent, the tribunal and the witness table. After having the parties in the tribunal at 1030 I adjourned until 1050 for the copying to be undertaken. At 1050 Mr. Kemp took me through the papers and, ultimately, he only objected to two of them being included and it was agreed I would see what use was intended to be made of these documents before I determined their relevance. As it was they were no referred to.

SUBMISSIONS

Claimant

18. The claimant made oral submissions which I have considered with care but do not rehearse here in full. In essence it was submitted that the treatment of her by the Respondent was so bad after the email she sent complaining that she was entitled to resign

Respondent

19. I had written opening submissions from the Respondent. Since the skeleton is in writing it is unnecessary to repeat it here. Mr. Kemp made brief submissions taking me through the various stages of a constructive dismissal claim and highlighting why, at each stage, the Claimant's case should fail.

MATERIAL FACTS

General Points

20. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant, Mrs Hunt, Mrs Walton, Mrs Wilkes in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

21. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

22. Is a care home group.

The Claimant

23. The Respondent employed the Claimant as a Night Care Assistant from 1 July 2016. She resigned on 17th July 2018 giving the requisite one-months notice, which was latterly paid in lieu.
24. The Claimant returned from Maternity Leave on 3rd November 2017. She returned to a trial period of flexible working of fixed shifts on Friday, Saturday and Sunday nights.
25. The Claimant worked alongside Nurse Grace Germodo. The Claimant complained about nurse Germodo when she (the Claimant) first commenced work with the Respondent.
26. On 21st March 2018 the Claimant complained about Nurse Germodo and how she was treating a colleague Marcia Filipe. The Claimant raised this via email with Mrs Hunt [26].
27. On the same day Ms. Hunt met with Nurse Germodo to discuss the concerns raised [37-38] from this meeting it is clear Nurse Germodo was able to identify "Marcia" as a person whom had made the complaint. Nurse Germodo then apologised to Ms. Filipe [39].
28. The Claimant says that Nurse Germodo was informed of who the author of the email was and had been provided with a copy of the email. Mrs Hunt denies she provided Nurse Germodo with the email.
29. Nurse Germodo then began to ignore the Claimant. The Claimant entered a grievance on 28th March [41] complaining Nurse Germodo's conduct. The Respondent commenced a grievance process and held a meeting on the 28th March 2018 [43]. It is unnecessary to go into the details of this process as the Claimant accepts it was reasonable and was conducted in a reasonable way.
30. The Claimant confirmed at the end of the meeting that she was happy for Ms. Hunt to investigate the grievance. The grievance process proceeded and is documented in various letters and minutes. Ultimately a meeting was held between Caroline Walton and the Claimant on 23rd April 2018 [50]. In this meeting the claimant is recorded as saying that she wants to continue working with Nurse Germodo. The Claimant signed these minutes as being accurate

31. In cross-examination however the Claimant stated, for the first time, that Ms. Hunt was manipulating her to enter a grievance. This clearly is a serious allegation. When giving evidence Ms. Hunt denied this (it should be noted that the Claimant did not put this allegation to Ms. Hunt, I as I explained above, was left to put that allegation to her). I was faced with a straight conflict of evidence on this with no other material on which to base my decision. I have decided that Ms. Hunt did not and was not manipulating the Claimant as alleged, I come to this conclusion on the basis the allegation is not contained anywhere in the file, nor is it alleged in any subsequent meeting concerning the grievances. Further, and tellingly, such a serious allegation is not even contained in the Claimant's witness statements, one of which was drafted on Wednesday 20th February 2019. I consider this allegation therefore lacks credibility and so I do not consider it to be proven.
32. Ms. Walton conducted a meeting with Nurse Germodo on 1st May 2018 and delivered the outcome of the grievance to the Claimant at a meeting on 8th May 2018 [64].
33. The Respondent wrote to the Claimant and confirmed the outcome of her grievance on 10th May 2018 [74]. She was informed of her right to appeal the decision, which she did [76].
34. On the 10th May 2018 the Claimant presented a second grievance. She told me that she wrote this herself. It is a different style of document to any before or after and makes specific allegations of breach of statute and refers to "aforementioned Acts and Regulations" and wishing to bring to the "directorships attention their fiduciary duties". Whilst the Claimant's written and spoken English is of a high standard I have some serious doubts she wrote this letter that has the feel of one being written for her by a lawyer or for someone with some HR experience. Whatever the truth of the matter this second grievance was directed to Keren Wikinson the Respondent's CEO.
35. A grievance meeting was held into the second grievance on 22nd May 2018, this time managed by Mrs Wilkes. [101]. Again, the Claimant signed the minutes of the meeting.
36. On 29th May the appeal into the First Grievance was heard by Mrs Maguire. She did not attend to give evidence, but was seemingly not needed as the Claimant

accepted the process used was reasonable, although she disagreed with the outcome which was confirmed to her on 31st May 2018 [88]

37. On 31st May 2018 the Claimant emailed Ms. Hunt [125] seeking clarification over the steps she needed to take to undertake other employment whilst with the Respondent. She stated that It was not her intention to leave the Respondent but that in the near future if she decided to leave she would provide notice.
38. The Claimant was provided with an outcome to the Second Grievance on 5th June 2018 that partially upheld her complaints: it was found that Nurse Germodo had ignored the Claimant, although this was not an act of discrimination. Other elements of her complaint were rejected. The Respondent had sought for there to be mediation between the Claimant and Nurse Germodo, but Nurse Germodo was not prepared to be involved in this. The Respondent therefore sought other measures to reduce the Claimant and Nurse coming into contact with one another, this involved shift changes. The claimant accepted the Respondent investigating such steps was reasonable.
39. Nurse Germodo was disciplined for her behaviour and received a Final Written Warning on 26th June 2018 [56].
40. On 29th June 2018 the Respondent wrote to the Claimant [152] after two meeting concerning the claimant's trial period of flexible working. There was to be a change in her shift patterns that would mean on one week she would undertake Tuesday, Friday and Saturday night shifts and on the other week, Sunday, Tuesday and Thursday night shifts and a Saturday day shift. This day shift was 12.5 hours.
41. On 30th June 2018 the Claimant signed the agreed changes [155].
42. On 4th July 2018 the claimant emailed Ms. Hunt about a flexible working request [157 refers].
43. On 12th July 2018 the Claimant met Mrs Hunt to discuss her shifts, in which the Claimant agreed to try the new shift pattern for four weeks [130] and acknowledged that Mrs Hunt "was trying to help her".
44. The Claimant resigned on the 17th July [133] as a result of the "recent experiences at my workplace" she provided one-months notice and expressed her enjoyment of being part of the team, as a result of an email that complained of bullying the Respondent wrote to the Claimant on 31st July and proposed the claimant be paid

in lieu of her notice so as to not require her to attend work where, she said, she was being bullied. The Claimant accepted this proposal.

THE LAW

Statute

45. By section 94(1) of Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer. By section 95(1)(c), for the purposes of the Act, an employee is dismissed by his employer if:

95 Circumstances in which an employee is dismissed

...

- (c) the employee terminates the 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 employer's conduct.

Authorities and Texts

46. An employee has the right to treat himself as discharged of his contractual obligations only where the employer is guilty of conduct which goes to the root of the contract or which shows the employer no longer intends to bound by one or more of the essential terms of the contract – see *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA*. Thus, the employer's conduct must constitute a repudiatory breach of the contract. There is implied in a contract of employment a term that the employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation which necessarily goes to the root of the contract – see *Woods v WM Car Services (Peterborough) Ltd [1982] IRLR 413, CA*; and *Malik v BCCI SA [1997] IRLR 462, HL*.

47. As far as I am required to consider this point, I disagree with the Respondent that a breach of this implied term is not automatically repudiatory: as conduct which breaches the term of trust and respect is automatically serious enough to be repudiatory, permitting the employee to leave and claim constructive dismissal – see *Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT*. In *Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445, CA*, it was held that the range of reasonable responses test is not appropriate to establishing whether an employer had committed a repudiatory breach of contract entitling the employee to resign and claim constructive dismissal. The *Malik* test is the correct test.

48. The employee must leave in response to the breach of contract. In *Nottinghamshire County Council v Meikle [2004] IRLR 703, CA*, it was held that

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once a repudiation of a contract has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee has also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response, at least in part, to the fundamental breaches by the employer. The innocent party must at some stage elect between whether to affirm the contract or accept the repudiation which later course brings the contract to an end. Delay in deciding what to do in itself does not constitute affirmation of the contract, but if it is for a long period it may be evidence of an implied affirmation – see *WE Cox Toner International Ltd v Crook* [1981] IRLR 443, EAT. In *Chindove v William Morrisons Supermarkets Ltd*, unreported EAT, 26th June 2014, it was held that a reasonable period is allowed before an employee is taken to have affirmed any breach of contract. It depends on all the circumstances, including the employee's length of service, the nature of the breach and whether the employee has protested at the change. EAT recognise that deciding to resign for most employees is a serious matter. It may well require them to give up a job which provides them with their income, their family with support, and be a source of status to the employee in his/her community. It all depends on the context and not upon any strict time test.

49. The particular incident which causes the employee to leave may in itself be insufficient to justify his/her resignation, but may amount to constructive dismissal if it is the “last straw” in a deteriorating relationship. This means that the final episode does not in itself need to be a repudiatory breach of contract, although there remains the requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer – see *Waltham Forrest London Borough Council v Omilaju* [2005] IRLR 35, CA. In *Lewis v Motorworld Garages Ltd* [1986] ICR 157, CA, it was said that the breach of the implied obligation of trust and confidence may consist in a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each particular incident may not do so. In particular, in such a case the last act of the employer which leads to the employee leaving need not itself be a breach of contract. The question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the “last straw” situation. The Tribunal should consider whether the last incident is a sufficient trigger to revive the earlier ones. In doing so, they must take account of the nature of the incidents, the overall time spent, and the length of time between the incidents, and any other factors that may have amounted to a waiver of any earlier breaches. I

50. I must look to see whether there is a fundamental breach of contract judged objectively. Unreasonable conduct is not sufficient. Here the breach of contract relied upon is the breach of the implied term of mutual trust and confidence. That breach of contract must be the cause of the Claimant's resignation, although it may not be the only cause. Here, the Claimant relies upon a series of incidents cumulatively, and possibly the last straw. The Respondent relies on affirmation or waiver of the breach, by reference to the Claimant's decision to seek changes in her hours and to increase them.
51. The Respondent referred me to Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1 where, at paragraph 55 Underhill LJ helpfully summarises the steps in a constructive dismissal claim:
- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - (2) Has he or she affirmed the contract since that act?
 - (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
 - (4) If not, was it nevertheless a part (applying the approach explained in Omilaju...) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term...?
 - (5) Did the Employee resign in response (or partly in response) to that breach?

CONCLUSIONS ON THE ISSUES

General

52. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Findings on the Issues applying the Kaur Questions

Question 1: what was the act that caused or triggered the resignation

53. In her evidence, on more than one occasion, the Claimant stated it was the flexible working request that caused her to resign. Yet her evidence focused on the grievance process; however, in cross-examination she accepted the respondent's process, procedure and approach to her grievances were reasonable, but disagreed with the outcomes. Yet further in her first witness statement the claimant says she resigned "due to all situation and for keep going to work and my work colleagues came to me saying that The Nurse Grace been telling everyone that even the Queen cant to nothing to her". In paragraph 27 of her second witness statement the claimant states she:

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“Sent my resignation letter on 17th July 2018 as I been left with no choice due to the Respondent behaviour towards myself. The Respondent bad conduct during the Grievance and lack of support during difficult grievance process and knowing my financial situation tried to complicate even more proposing new working hours when they were aware I have requested flexible working hours on my early return to work after maternity leave”

54. In her claim form [7] it states “My working hours changed and I been forced to resign on 17th July...”
55. It would appear, therefore, that the last act is the Flexible working request is that of July 2018.

Question 2: has the contract been affirmed since that act?

56. I do not think it has as far as time is concerned There is a short period of 5 days from a Thursday to a Tuesday.

Question 3: was the act or omission of itself a repudiatory breach?

57. It may be that my assessment of this also dovetails with factors relevant to question 2, affirmation. The minutes I have seen show the claimant agreeing to trial the new shift pattern. The Respondent therefor had proposed a trial of a new shift pattern that would have provided the claimant with more working hours in order to see if she was able to undertake that and, within a relatively short period of time, decide if the new pattern was workable with her childcare commitments. The Claimant agreed to this.
58. I do not find that such an action was the Respondent acting a way calculated or likely to destroy the implied duty of trust and confidence by this act alone.

Question 4: Was it part of a course of conduct?

59. To state the obvious clearly the meeting of 12th July was an action by the Respondent towards the Claimant as were the grievance meetings. To leave the analysis there however would be to fall into error. Ineed to consider if these matters are somehow linked, I do not consider there was anything linking these events. I have considered what I know from the papers and what I have gleaned over the course of the day's evidence and I do not find that Ms. Hunt was protecting anyone at the Respondent (as has been alleged in the papers and witness evidence), not do I consider that she had any motive or reason to “do down” the claimant.

60. These acts appear to me to therefore not be a "course of conduct" as opposed to a series of separate act which happen to involve Ms. Hunt by virtue of the managerial office she held.
61. If I were wrong on that assessment and these are a course of conduct my assessment of the claimant's prospects would not go much further anyway as even combined with the history of March 2018 onwards, I find these do not cumulatively amount to a repudiatory breach of the implied duty of trust and confidence.
62. On my findings, in July 2018 the Claimant had gone through two reasonably run grievance processes, one of which had partially upheld her complaint and had not appealed the second of them, and had been provided with a four week trial of a new shift pattern that increased her working hours and on a pattern that would not involve her coming into contact with Nurse Germodo.
63. Whether these amount to a breach is an objective assessment and so the Claimant's views or for that matter any witnesses views are not directly relevant to that assessment, however, I think it is telling that the Claimant herself accepted that the procedure and behaviour of the Respondent was reasonable when it conducted the grievance processes. This is a view and assessment I agree with: the Respondents acted properly and reasonably in the manner and way it undertook the grievance processes. Understandably the Claimant was disappointed in the outcomes, but this does not mean the Respondent is unreasonable, indeed in many (if not most) grievances one or more people are unhappy at the outcome.
64. Looking at the July matter, again, whilst this may have been disappointing to the claimant, I do not consider that the Respondent proposal (and the claimant apparent acceptance) provides any basis objectively assessed, that could provide material to find a cumulative breach of the implied duty.
65. Accordingly, the claim of constrictive unfair dismissal is not well founded and is dismissed.

Matters After Judgment

66. Having delivered the above judgment the Respondent then, as it indicated it would do in its ET3, sought its costs from the Claimant.

67. At the outset of its application Mr. Kemp, on behalf of the Respondent stated it was content for the Claimant not to have to provide any documentary evidence of her means, if she wished for those to be taken into account, and so I would determine the application on the basis of the Claimant's oral evidence alone. I explained the process to the Claimant.
68. The Respondent made its application on the basis of the Claimant had no reasonable prospect of success and that she acted unreasonably in not considering settlement of this matter which when offers were made by the Respondent to resolve this matter.
69. As part of its application I was shown various correspondence from the Respondent seeking costs from the claimant, and informing the Claimant the Respondent had incurred fees in the region of £35,000.00 at the date of the letter with a further £10,000.00 to be incurred by the time the two-day hearing was heard. In fact, the time recording documents produced by the Respondent showed that the actual level of fees at the time of the letter was in excess of £25,000.00 up to the date of that letter in preparation for the two-day hearing, with a further £10,000.00 to be incurred up to and including the hearing itself.
70. In tribunal the Respondent limited its cost application to £2,000.00, it was not explained what this related to so I presume it is a proportion of the £10,000.00 the Respondent estimated for the Final Hearing.
71. I heard the Claimant's evidence of her limited financial means, she explained that with three children her and her husband could not afford childcare so her husband had had to give up work to look after their children; she effectively "was working to cover the bills" and was in arrears of rent and had received letters from her landlord about this. She found giving evidence about this distressing and was in tears whilst doing so.
72. The Respondent laregley did not seek to cross-examine the Claimant on these matters, but maintained its application in face of this evidence.
73. I remind myself that any assessment of the prospects of success is objective, and on the evidence I have before me I consider that the Claimant did not have reasonable prospects of success in her constructive dismissal claim. My findings on the factual matters are set out above, and are based on matters that were seemingly not in dispute.

74. The Claimant explained that she was not coming to the tribunal for money, and that in her situation, if she was focused on money then she would have accepted the Respondent's offer of £5,000.00; she wanted a determination of her claims as she is entitled to. I consider that this is a plausible explanation and one I am prepared to accept. I do not find that her conduct in this regard is unreasonable.
75. Having made these findings, I then turned to consider my discretion to award costs. I had the unchallenged and, in the circumstances of this application (e.g. when the Respondent is content of the application to proceed without any documentary evidence being produced by the Claimant to support their evidence) unchallengeable, evidence of the claimant's perilous financial position. Even though the Claimant did not seemingly engage with the Respondent's correspondence and numerous costs warnings, which is a factor I weigh in the balance when considering my discretion, and one that does her no favours, I do not consider that this is a matter which I should exercise my discretion and order the Claimant to pay any contribution to the Respondent's costs in light of her financial situation.
76. I therefore rejected the Respondent's application for costs.

Employment Judge M. Salter

Date: 22nd March 2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.