Appeal No. UKEAT/0005/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 4 July 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS J COOKE APPELLANT

HIGHDOWN SCHOOL & SIXTH FORM CENTRE AND GOVERNORS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD ALFORD (of Counsel) Direct Public Access
For the Respondent	MR MICHAEL SALTER (of Counsel) Instructed by: Lyons Davidson Limited Victoria House 51 Victoria Street Bristol BS1 6AD

SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

UNLAWFUL DEDUCTION FROM WAGES

UNFAIR DISMISSAL - Constructive dismissal

Breach of Contract/Unauthorised Deductions - Constructive Unfair Dismissal

The Claimant was a teacher, paid at level 1 on the upper pay scale ("UPS"), working to terms and conditions laid down in the *Burgundy Book*. She complained that the Respondent had acted in breach of contract/had made unauthorised deductions from her pay (i) in failing to progress her to UPS2; (ii) when she had been absent from work due to work related stress, in failing to keep paying her at her full rate in accordance with paragraph 9.1 of the *Burgundy Book*. She further complained of constructive unfair dismissal, having resigned her employment due to the Respondent's treatment of her in respect of her grievance (which had included a complaint about the pay progression issue) and what she took to be an email critical of her relating to an Occupational Health appointment.

The ET dismissed the Claimant's claims. She had no right to automatic pay progression: she had to apply to be considered and had failed to do so. As for paragraph 9.1 of the *Burgundy Book*, she had not been able to show that a medical practitioner had attested that her injury (stress) had arisen out of, and in the course of, her employment. In respect of the constructive unfair dismissal claim, put as a "last straw" case, the final matter for the Claimant had been the email relating to the Occupational Health appointment but, as she had known by the time of her resignation, that was not critical of her. As for the Respondent's treatment of her in respect of her grievance, the ET found it had acted properly and had not thereby been in breach of any contractual obligation. In any event, the Claimant had agreed that the pay progression issue would be addressed as and when she returned to work. The Claimant appealed.

Held: *allowing the appeal in part*

On the appeal, the Respondent accepted that the Claimant had a contractual right to be considered for pay progression to UPS2 but argued it had not acted in breach of its obligation in this regard. This was not, however, how the ET had approached the case; it meant that the basis upon which the ET had found no contractual obligation had been rendered unsafe.

Further, although the ET had found that the Claimant had agreed the pay progression issue would be addressed upon her return to work, that did not amount to a finding that she had waived the right to complain of the breach of her express right to pay progression; although it was a relevant matter in terms of the implied obligation to maintain trust and confidence.

As the parties agreed there had been an obligation upon the Respondent to consider the Claimant's pay progression (without her having had to make an application), the point would be remitted to the ET to determine whether the Respondent had complied with that obligation.

As for the claim under paragraph 9.1 of the *Burgundy Book*, whilst the Claimant's GP might have expressed an opinion that the Claimant was unfit for work because of stress, the ET had not reached a perverse conclusion in finding that was not the same as saying the Claimant's stress arose out of and in the course of her employment (the requirement for paragraph 9.1); the two were not necessarily the same and this had been a matter for the ET, which had reached a permissible conclusion on the point. This ground of appeal was dismissed.

In respect of the constructive unfair dismissal appeal, the ET had found that the relevant "last straws" were the Respondent's treatment of the Claimant's grievance and the email regarding the Occupational Health appointment. The pay progression issue was part of the background to the grievance but was (a) not found to have been a last straw, and (b) would have to be viewed,

in any event, in the light of the ET's further finding that the Claimant had accepted that this issue was to be addressed as and when she returned to work and, thus, could not rely on it as a continuing breach of the implied obligation to maintain trust and confidence. Otherwise, the ET had made unchallenged findings in respect of the matters relied on as "last straws" and its conclusion on constructive dismissal was not susceptible to challenge.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the Reading Employment Tribunal (Employment Judge Ryan, sitting alone on 3-5 June 2015; "the ET"), sent to the parties on 24 August 2015, dismissing the Claimant's complaints of constructive unfair dismissal and unauthorised deductions from wages and/or breach of contract. The Claimant appeared before the ET in person but is today represented by Mr Alford of counsel. The Respondent was, and remains, represented by Mr Salter of counsel. This matter previously came before me on 16 April 2016 at an Appellant-only Preliminary Hearing, at which the Claimant was represented under ELAAS, when I permitted the appeal to proceed on the basis of amended grounds.

The Background Facts

2. The Claimant's employment with the Respondent began in 2008. She was a full-time science teacher and had passed the threshold for the upper pay scale ("UPS") and was paid on UPS level 1 ("UPS1"); she remained on that pay level throughout her employment. At the beginning of each academic year, the Claimant had a successful review which recorded that she was eligible to progress to UPS2, but she did not make an application to do so. Subsequently, in her 2012 review process the Claimant did make enquiries about progressing to the next pay level, but those remained unanswered.

3. Separately, after an Ofsted inspection in May 2013, observations were carried out of lessons within the science department. The observation of the Claimant's lesson led to an assessment that was unfavourable, giving her lesson a score of 4, signifying "inadequate". This

A was communicated to the Claimant, who took it badly, but the ET rejected her characterisation of the observation feedback meeting as bullying and intimidation. Thereafter the Claimant went absent from work, subsequently being signed off work by her GP as unfit to work due to "*stress at work*" and "*work-related stress*" (ET paragraph 21).

B

4. After receiving Occupational Health advice in 2013, in the December, there was a meeting with the Claimant and her trade union representative offsite. The Claimant described her perception of the observation feedback meeting and referred to her pay level, the fact that she had been on UPS1 for five years and nothing had been done in response to her enquiries about moving up the scale. She was advised that as she had been off work for six months her salary would then reduce to half pay. Her TU representative argued that there was scope for the school to exercise discretion to extend the period of full salary, given that the Claimant's absence was triggered by school related incidents; the TU representative was referring to clause 9.1 of the Conditions of Service for School Teachers in England and Wales ("the *Burgundy Book*"), which allowed that:

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> **"9.1. In the case of absence due to accident, injury or assault attested by an approved medical practitioner to have arisen out of and in the course of the teacher's employment, including attendance for instruction at physical training or other classes organised or approved by the employer or participation in any extra curricular or voluntary activity connected with the school, full pay shall in all cases be allowed, such pay being treated as sick pay for the purposes of paragraphs 3 to 7.5 above, subject to the production of self certificates and/or doctors' statements from the day of the accident, injury or assault up to the date of recovery, but not exceeding six calendar months."**

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5. Notwithstanding her TU representative's argument, in November 2013 the Claimant moved on to half pay, and in May 2014 her pay ceased altogether.

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6. Returning to the chronology, further meetings took place in March and April 2014. At the latter the Claimant was advised that she would have needed to upload evidence to support an application for pay progression and it had been her responsibility to follow up on that issue.

H

On 3 May 2014, the Claimant submitted a formal grievance but that was rejected, save in respect of one issue (concerning missing information), after a meeting on 16 May 2014. The Claimant appealed and a hearing took place on 12 June, which had to be adjourned before it could be completed because the Claimant felt exhausted and unable to continue. She was given the opportunity to send in further points in writing, but the Respondent did not resume the meeting so as to permit the Claimant to attend to make any further oral presentation.

7. In the event, the Claimant did not make any further representations but resigned by letter of 13 June 2014. In resigning the Claimant referred to the previous issues she had raised and her lack of confidence in the grievance process. She also objected to an email exchange about a further Occupational Health appointment, cancelled failing a response from the Claimant; in fact she had responded but her response had not been received. Her objection was to the Respondent's comment, by email of 12 June 2014, that expenditure incurred on charges for unkept Occupational Health appointments would be considered a misuse of public funds; the Claimant considered that to be a criticism of her. Notwithstanding the Claimant's resignation, the grievance appeal panel continued its consideration of her appeal but rejected her complaints. That decision was communicated to the Claimant by letter of 20 June 2014.

The ET's Conclusions and Reasoning

8. The ET was concerned with the Claimant's claims of constructive unfair dismissal and unauthorised deduction of wages and/or breach of contract. Specifically, the Claimant complained that she had been entitled to be paid full sick pay from November 2013 to May 2014 in accordance with clause 9.1 of the *Burgundy Book* and should then have been on half pay; in fact, her pay had been reduced to nil. She further contended that the Respondent acted in breach of contract in failing to move her to UPS2 during her employment. In respect of her

constructive unfair dismissal claim, the Claimant's case was put on the basis of a breach of the implied obligation not to act in such a way as to undermine the trust and confidence necessary to the employment relationship. In this regard the Claimant relied on the Respondent's email of 12 June 2014 and the Respondent's Governors' actions as constituting last straws.

9. At an earlier Preliminary Hearing, before Employment Judge Pettigrew on 10 March 2013, the Claimant's complaint in respect of the handling of her grievance had been recorded as relying on alleged breaches of procedure. That said, the ET at the Full Merits Hearing allowed that the Claimant's complaint about the Governors' actions amounted to criticism both of the procedural aspects of the grievance process and the outcome of that process. Part of the Claimant's grievance had included a complaint about pay progression, separately relied on by the Claimant before the ET as a standalone breach of contract or unauthorised deduction.

10. On the constructive dismissal claim, the ET did not accept the Respondent's email about the cancelled Occupational Health appointment accused the Claimant of improper conduct; indeed, the Claimant had accepted in evidence that, by the time she wrote her resignation letter, she realised the email had not borne the meaning for which she contended. Whilst that was the last straw for the Claimant, it did not amount to a breach of the implied term.

11. The ET further rejected the other matters relied on by the Claimant, specifically finding that the Governors' actions were beyond legitimate criticism and could not be said to have contributed to a breach of the implied term. On the pay progression breach of contract claim, whether relied on as supporting the constructive unfair dismissal claim or as a standalone complaint in itself, the ET held that the Respondent's process required those who sought a pay increase to make an application; the Claimant had known of this but had failed to take the

required steps, there was no breach of contract by the Respondent. Moreover, even if the Claimant had been able to establish some breach of contract in respect of past failure to address the issue of pay progression in her case, the ET found it had been agreed that this matter would be addressed as and when the Claimant returned to work, a proposal in which the Claimant had acquiesced and thus could not rely on as a breach of the implied term.

12. As for the sick pay claim, the ET had regard to the relevant provision, clause 9.1 of the *Burgundy Book*. It accepted this was wide enough to encompass a stress related illness. That said, the ET noted the requirement that a medical practitioner had to attest as to the reason for the injury giving rise to the absence in question; this meant the medical practitioner had to have stated that this was their opinion, not simply to have recorded the view of the teacher concerned. The ET did not consider this requirement was met by the Claimant's GP's notes or by the Occupational Health reports in this case. Whether treated as a breach of contract or unauthorised deduction claim, the complaint was not made out.

The Appeal and the Parties' Submissions

The Amended Grounds of Appeal

13. At the earlier Appellant-only Preliminary Hearing in this matter I was persuaded that the appeal should be permitted to proceed to a Full Hearing on two complaints of breaches of contract/unauthorised deductions. The first related to the move to the higher pay level: the Claimant took issue with the ET's Judgment that there was a requirement that she make an application herself ("the pay progression point"). The second related to the ET's conclusion that the Claimant had not met the requirements of clause 9.1 of the *Burgundy Book* so as to entitle her to full pay whilst continued on sick leave ("the sick pay point").

14. To the extent that the Claimant succeeded on either or both of those points, I allowed that this might undermine the ET's conclusion on the question of constructive unfair dismissal and, thus, that the appeal against that finding should also proceed.

The Claimant's Submissions

15. On the pay progression point, the Claimant contends the ET erred in focusing on fact finding in relation to the Respondent's process rather than, as it should have done, considering the actual terms of her contract. As a teacher the Claimant's contractual conditions of service were provided by the **School Teachers' Pay and Conditions Act 1991** and the School Teachers' Pay and Conditions Document of 2012 ("the STPCD"). The STPCD requires that, when a teacher is on the UPS, "*achievements of post-threshold teachers and their contribution to school(s) should have been substantial and sustained*". It provides that, other than in exceptional circumstances, progression on UPS should be based on "*two successful consecutive performance management reviews*". There was no requirement within the STPCD that any application was required to move through UPS; it was merely a pay scale based on two successful consecutive reviews. The only mention of an application being required was when a teacher was to pass from the main teachers' pay scale to the UPS ("*the threshold application*"). This reading and approach was supported by guidance issued by the National Union of Teachers and Association of Teachers and Lecturers. The Claimant had already successfully undergone the threshold application process when crossing to UPS in 2000. The ET had failed to engage with the contractual position, focusing only on the process operated by the Respondent. Whilst that might have been relevant, it missed the real point.

16. On the sick pay point, the Claimant accepted clause 9.1 of the *Burgundy Book* meant an approved medical practitioner needed to attest the underlying cause of absence but nothing here

could turn on the meaning of a test that simply required a medical professional to state that the injury in question had arisen in relevant circumstances. It was accepted the Respondent's Occupational Health adviser had been unable to attest to the cause of the Claimant's absence (although had recommended that matters should be explored with the Claimant as soon as possible). The *Burgundy Book* allowed, however, that the employer might approve a medical practitioner such as a GP; it was an error by the ET to hold the fit notes provided by the Claimant's GP were insufficient to satisfy clause 9.1; they went further than merely recording the Claimant's perception and must be taken to state the opinion of the GP (otherwise there would be no purpose to fit notes other than as record of the Claimant's view, which could be provided by self-certification). The fit notes recorded the Claimant's stress was related to work (and see the approach of the ET in **Roberts v Governing Body of Whitecross School** UKEAT/0070/12/ZT, which had not been the subject of challenge on that appeal).

17. The real issue was whether the Claimant's GP had been an approved medical practitioner for the purposes of clause 9.1. The definitions section of the *Burgundy Book* defined "Approved Medical Practitioner" as "*any registered medical officer nominated or approved by the employer*". If the Respondent had not sought its own advice and was content to rely on the Claimant's GP's advice, that must be taken to be an implied approval of the GP as a medical practitioner for these purposes. An employer could not be entitled to avoid the payment of sick pay by failing to approve medical evidence available to it. Whilst the Claimant's case had not been put before the ET as relying on a breach of contract arising from a failure to review the medical evidence, it had impliedly relied on the Respondent's inaction as amounting to a deemed approval of the GP's evidence as sufficient attestation for these purposes.

18. Turning to the constructive unfair dismissal claim, although the email about the Occupational Health appointment, and, generally, the treatment of the Claimant in relation to her grievance, were relied on as last straws, it was also apparent she had relied on other matters, including the lack of pay increases over the years, and that her complaint about a failure to pay her under clause 9.1 of the *Burgundy Book* had fed into her grievance. If the ET had, as the Claimant argued, erred in its approach to these contractual issues, it could not be said she had waived any breach, and the Claimant did not accept that the Respondent's agreeing to look at these issues in the future would be sufficient or that the ET had made a clear finding on acquiescence. Specifically, on the pay progression point, the ET had obviously seen that as part of the constructive dismissal complaint, and it was apparent that the Claimant's grievance about the Governors' actions - a last straw, see paragraph 65 of the ET's Reasons - comprehended not just the procedural aspects of the grievance process but also the substantive outcome (paragraph 73 of the Reasons), which must include the pay progression point.

The Respondent's Submissions

19. First, on the pay progression point - the failure to move the Claimant to the higher pay level - the Claimant had the burden of proving the breach of contract; her case failed when the ET rejected her account that she was not aware of the requirement to apply for UPS pay progression. The ET had correctly stated the legal approach it was to adopt, specifically:

> **"63.9. As to claims in breach of contract, it is for the claimant to prove on the balance of probabilities that the respondent is in breach of some express or implied term of the contract and the loss that he alleges flows from that breach."**

20. The only contractual obligation on the Respondent was to consider the Claimant for pay progression, and the Claimant had not established the Respondent had failed to do this. The finding that the Claimant had been eligible (paragraph 8) was simply a finding she was eligible to be *considered for* pay progression. There was no finding the Respondent had breached its

obligations in this respect. Moreover, it had been common ground before the ET that the issue would be addressed on the Claimant's return to work; the ET had found, in the alternative, that the Claimant had acquiesced in the Respondent's proposals in this regard (see the ET's finding at paragraph 69) such that she could not complain of a continuing breach.

21. As for the sick pay point, again, the burden of proof rested on the Claimant to show she satisfied the relevant contractual term or, for the unauthorised deduction claim, that she had an entitlement to the money, making it properly payable. Once again, the ET had properly directed itself and reached a permissible conclusion, weighing the evidence available against the requirement of the *Burgundy Book*. The Claimant was unable to show an approved medical practitioner had attested the absence was due to an injury that had arisen out of and in the course of her employment. The best evidence the Claimant had been able to adduce attested, at most, to the fact that she was unfit to return to work because of stress at work or work related stress; it did not state an opinion as to the underlying cause of her injury, whether that had arisen out of and in the course of her employment. It was not enough to say the Claimant had produced the best evidence she had; it had not been found to satisfy the burden of proof.

22. Finally, turning to the constructive dismissal claim, the ET had reached permissible findings on the evidence and had not erred in concluding there was no constructive dismissal. As the Court of Appeal made clear in **Nottinghamshire County Council v Meikle** [2004] IRLR 703, it was entirely a question of fact for the ET as to why the employee resigned; the issue of causation remains at the heart of any assessment of a constructive dismissal case. The ET here approached its task correctly (applying an objective test) and reached permissible decisions. The Claimant's case on constructive unfair dismissal focussed on a breach arising from what was said to be the Governors' failures to deal with her grievance complaint. In

identifying the last straws (see paragraph 65) the ET allowed that the complaint was not simply about the grievance appeal stage but also the substantive grievance. It was clear - as the ET (properly) understood the Claimant's case - the focus of this complaint was, however, on the procedural complaints relating to that process (see also the decision of EJ Pettigrew at the earlier Preliminary Hearing in this regard). Adopting the approach laid down by the Court of Appeal in **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35, given the ET had found that the matters relied on by the Claimant could not amount to a last straw, it was not open to her to then seek to reopen the finding on constructive dismissal based on matters not properly relied on as last straws. In any event, the ET had found in the alternative that the Claimant had acquiesced.

Discussion and Conclusions

23. There is no dispute between the parties as to the underlying legal principles or the approach the ET was to adopt in that regard. I turn, therefore, to the grounds of appeal.

24. The first point relates to the Claimant's complaint on pay progression. The ET's reasoning in this regard is set out under its consideration of the constructive unfair dismissal claim, and it is not entirely clear whether it saw the complaint as one of a breach of the Claimant's contractual entitlement under the STPCD or, more broadly, as an aspect of her complaint that the Respondent had acted in breach of the implied obligation upon it to maintain trust and confidence. Seeing it as part of the latter would explain the ET's focus on the Respondent's process and the Claimant's awareness of what the Respondent required of her. That said, the ET does state (at paragraph 68) "*The lack of pay increases did not amount to a breach of contract*". The question is, why did the ET reach that conclusion?

25. For the Respondent, it is said that the obligation upon it was only ever to *consider* the Claimant for pay progression. It does not disagree with the Claimant's interpretation of the STPCD; i.e., as requiring no further application by her. What it says, however, is that the entitlement was to be considered for pay progression; an interpretation consistent with the guidance provided by the documents from the NUT and ATL, relied on by the Claimant.

26. It seems there is no real disagreement between the parties: once on the UPS, a teacher is not required to apply for further pay progression; provided they meet the requirements for eligibility - as the Claimant had (see the ET, paragraph 8) - they would be entitled to be considered. As to whether the Respondent was in breach of its obligation towards the Claimant in this regard - whether it had done sufficient to consider her case - that is not something I can discern from the ET's findings, which are based upon a different understanding of the contractual position. I am left with a finding that there was no breach of contract on a basis different to that now argued before me by the Respondent (albeit that the Respondent's answer to the appeal simply relied on the ET's reasoning on this ground). On the ET's reasoning (see paragraph 68), the Respondent was not in breach of its obligation to consider the Claimant's advancement to the next level of the scale, because she had not made an evidenced application that it should do so. That is not the same as finding that the Respondent was not in breach of its obligation, because, as a matter of fact, it had considered the Claimant's case.

27. Given the Respondent does not dispute the Claimant's reading of the contractual position as laid down by the STPCD, it must follow that I allow the appeal on this ground: the ET erred in approaching the pay progression breach of contract/unauthorised deductions claim on the basis that an application was required by the Claimant. The question for it was, rather, whether - allowing that the obligation on the Respondent was to consider the Claimant's case -

it had in fact acted in breach of that obligation. There is then a question as to where this goes, given what the ET found to be the Claimant's acquiescence in the Respondent's proposal as to the way forward on the pay progression issue; related to this is the question whether this impacts upon the ET's conclusion in respect of the constructive dismissal claim.

28. Turning to the latter, whilst the ET approached this as a "last straw" constructive dismissal case, it plainly understood the pay progression point to be part of the relevant background relied on by the Claimant. There are, however, two difficulties for the Claimant in this respect. First, the last straws identified by the ET did not include the pay progression issue: that had not been understood to be a last straw at the earlier ET Preliminary Hearing before EJ Pettigrew, and the way in which the ET set out the complaint in the Full Merits Hearing Judgment shows that the pay progression issue had been seen as background to, and separate from, the Governors' actions (the most relevant last straw). Even if that was an erroneous distinction (given pay progression was part of the Claimant's grievance and she could thus be seen to be objecting to this as part of the Governors' actions in terms of the decision on the outcome of the grievance process), second, the ET found the Claimant had acquiesced in respect of any past breach of the implied term on the part of the Respondent by agreeing that it should address the issue of pay progression as and when she returned to work. In the circumstances, the appeal against the constructive dismissal finding cannot succeed.

29. That leads back to the question whether that alternative finding of acquiescence goes to the issue of breach of the express term of the contract, rather than breach of the implied term. I am not persuaded that the ET's finding at paragraph 69 is to be read as going that far, although that might arise from a brevity of reasoning rather than a considered limitation to the conclusion on the breach of contract unauthorised deductions claim.

30. I then turn to the second breach of contract or unauthorised deductions complaint that is the subject of the appeal: that is, in respect of the failure to continue to pay the Claimant full pay whilst on sick leave pursuant to clause 9.1 of the *Burgundy Book*.

31. The Claimant relies upon the fit notes provided by her GP. The Respondent had not specifically asked the Claimant's GP to express an opinion on the cause of her injury but I can allow that (1) a GP's expression of view might be sufficient in these circumstances, and (2) in the absence of express nomination by the Respondent, approval of the GP, as the requisite medical practitioner, might be implied in certain circumstances. That said, what the medical practitioner had to attest to was whether the accident, injury or assault had arisen out of, and in the course of, the teacher's employment. That is not necessarily the same thing as attesting to whether the absence from work is due to the accident, injury or assault. Whilst the distinction might be a fine one to draw, particularly in the case of work related stress, the question still arises as to whether that stress arose out of and in the course of the teacher's employment. I can allow that the GP's signing of the fit note was an expression of a medical practitioner's opinion that the Claimant was unfit for work because of her stress at work or work related stress, but I do not consider the ET reached a perverse conclusion in finding that was not the same as saying the Claimant's stress arose out of and in the course of her employment. One can envisage circumstances where the underlying cause of stress is unrelated to a teacher's employment but means he or she now suffers stress at work or work related stress; defining the cause of absence is not necessarily determinative of the cause of the underlying injury. Ultimately this was a matter for the ET; I am not persuaded that it reached a conclusion impermissible on the evidence before it. I therefore dismiss this ground of appeal.

Disposal

32. Having given my Judgment and indicated my view that the point on which I have allowed the appeal would need to go back to the ET for reconsideration, the parties addressed me further on disposal. Given the Employment Judge has now moved region, they agree the proportionate way forward is to remit the point to a different Employment Judge for reconsideration in the light of my Judgment. Following the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT, I accord with that view and duly so direct.

Costs

33. Finally, the Claimant has made an application for her costs under Rule 34A(2)(a) of the **Employment Appeal Tribunal Rules 1993** as amended, seeking recovery of fees, totalling £1,600. The Respondent resists the application, observing the Claimant has only been partly successful on her appeal; she lost on two of the three grounds, most significantly, on the constructive unfair dismissal claim. Moreover, there had been some without prejudice correspondence prior to the hearing with a view to avoiding a Full Hearing, although it appears that was not put specifically on a "without prejudice save as to costs" basis and it has not been suggested that there was a way by which the lodgement or hearing fees could have been avoided. Ultimately, the Claimant had to incur those costs to pursue her appeal, on which she has been successful, at least in part. I accept, therefore, that my costs jurisdiction is engaged under Rule 34A(2)(a). That said, I have a broad discretion as to whether to make an award of costs on this basis. A successful Appellant might reasonably expect to recover their EAT fees but partial success is a relevant factor to take into account. Doing so and applying a broad brush approach, I award the Claimant one third of the costs incurred by way of fees.