EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Montero-Cowell	**v**	**(1) J Stern & Co Services Ltd** **(2) Mr T Price**

Heard at: London Central
On: 21 – 27 September 2017

Before: Employment Judge Hodgson
Mr D Scholfield
Mr D Eggmore

Representation

For the Claimant: Mr A Korn, counsel
For the Respondents: Ms Darwin, counsel

JUDGMENT

1. **The claimant shall pay the entirety of the first respondent's costs from the date of issue on the standard basis.**

2. **The costs shall be subject to a detailed assessment in the employment tribunal.**

3. **When preparing any bill of costs, credit should be given to the claimant by way of offset, or otherwise, for the costs of £8,000 already ordered.**

4. **The claimant's name be amended to record that her full name is Ms Maria Belan Susana Montero-Cowell**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 7 October 2016, the claimant brought claims of victimisation and unfair dismissal. The final hearing commenced on 21 September 2017.

1.2 The claims were withdrawn on day four, 26 September 2017. All claims were dismissed by consent.

1.3 The respondent applied for costs. It is necessary to give some background in order to set out the context in which that costs application occurred. We then set out the issues relating to the cost application and our decision.

Conduct of the hearing and the issues

2.1 At the commencement of the hearing on 21 September 2017, we considered the issues. There were claims of constructive unfair dismissal and victimisation.

2.2 We agreed that Employment Judge Glennie had allowed the claimant to amend to include certain claims, but an amended claim was filed which went well beyond the amendments permitted.

2.3 The matter was reviewed by Employment Judge Grewal on 10 July 2017. Her order contained the specific amendments allowed. It follows that the full claim was contained in the claim form, and the specific note of the written amendment, as set out by Employment Judge Grewal.

2.4 We considered the draft list of issues. We spent some time looking at each item and agreed various amendments. Ms Darwin agreed to file an amended version of the issues by 9:00 on day two, 22 September 2017.

2.5 The tribunal raised with the parties the fact that the dismissal had not been pleaded as an allegation of victimisation; the claimant took no issue with this. The tribunal specifically noted that the dismissal would not be considered as an act of victimisation, unless the claimant made representations to demonstrate that the allegation had been made in the claim form, or the claim was specifically amended to include such a claim.

2.6 The protected acts were identified, so far as was practicable. There were a number of vague references in the amendment, as allowed by Employment Judge Grewal, and the claimant was ordered to provide details of the words relied on by 9:00, 22 September 2017.

2.7 The specific allegations of detriment were identified.

2.8 We considered the alleged breach of contract relied on in the constructive unfair dismissal case. The claimant alleged there was a last straw incident. In the claim form, the last act relied on was inviting the claimant to attend a meeting on 2 March 2016 to discuss a specific claim for expenses. The expenses related to a restaurant bill from 31 January 2016, with a subsequent claim on 11 February 2016.

2.9 There was a suggestion that some subsequent matter relevant to the expenses investigation was also a last straw. No such matter was pleaded, and it was confirmed the claimant must specifically apply to amend, if she relied on another act. In any event, the claimant was ordered to provide a full statement of what was alleged to be the final straw, by 9:00, 22 September 2017.

2.10 The respondent did not accept the claimant resigned in relation to any breach, as alleged or at all. It is the respondent's case the claimant had already sought employment and that she resigned, at least in part, because she did not want to face the expenses allegation.

2.11 The respondent alleged the claimant affirmed any breach of contract.

2.12 The respondent alleged conduct as a potentially fair reason, should it be found to have dismissed the claimant. The conduct was a fraudulent claim for expenses.

2.13 Both parties indicated that they had various applications to make; we should summarise those.

2.14 The claimant wished to apply to remove from the bundle certain pages which were said to refer to negotiations. Consequential redactions were sought in relation to witness statements. The claimant relied on section 111A Employment Rights Act 1996; the tribunal indicated that it was difficult to see how negotiations which may or may not have been relevant to possible settlement would be relevant to the issues we had to decide. The parties agreed that two pages should be removed from the bundle and that the respondents' statements should be redacted. Those matters were attended to. There was no need to make any formal ruling.

2.15 The respondents indicated there were three issues of concern. First, had the claimant waived legal privilege in her statement by referring to instructions she allegedly gave to her own solicitor? Second, would it be appropriate to have a key to anonymize certain clients of the respondent? Third, was there further disclosure needed?

2.16 We declined to consider legal privilege at that stage. It was clear the claimant made reference to instructions given to her solicitor. It is possible that privilege had been waived. It was possible that privilege would not be waived until the statement was put in evidence. The claimant needed to reflect on whether she wished to rely on the evidence, and whether any documents relevant to the transaction would have to be disclosed.

2.17 The parties had agreed between them some form of key to maintain confidentiality for clients whose identity was not relevant to the proceedings. This was a matter of relevance and not something we needed to interfere with.

2.18 The third point concerned disclosure of documents. The respondent alleged the claimant had failed to disclose all documents pursuant to order 2 of Employment Judge Grewal of 31 August 2017. These documents concerned the contact she had had with her new employer, and when that contact was made. The claimant said all documents had been disclosed. In the circumstances, we gave an unless order: the claimant must either disclose all documents by 10:00, 22 September 2017, or confirm there had been full compliance with the order. In default thereof, the claim would be struck out without further notice.

2.19 The respondent also sought disclosure of credit card statements. The key factual dispute revolved around the claimant's request for expenses of 11 February 2016 made in relation a restaurant bill from 31 January 2016. The documents supplied showed that the bill was split equally and paid by two cards: a Visa and Amex. The last four digits of each card were recorded, but the owner of neither card was not shown.

2.20 The claimant stated that the disclosure was irrelevant, and that the respondents were simply fishing for *her* statements as they wished to see what *other* transactions the claimant had made. The respondents' position was that the statements could be redacted, other than the specific transaction in issue. The respondents wished to know who owned the credit cards. The respondents said there was a legitimate suspicion that one of the credit cards was not owned by the claimant and therefore, there was an argument that there was no basis for her to reclaim the total of the expense incurred.

2.21 We ruled that the ownership of the credit cards was relevant. The claimant was ordered to provide, by 9:00, 22 September 2017 evidence as to which credit cards were used and their ownership. This could take the form of the credit card statements or other relevant proof. We noted that at this stage we would not give an unless order, but did note that the matter was a fundamental issue necessary for the fair hearing of the case.

2.22 These matters took us to nearly 13:00 on day one. We indicated that we would read for the rest of the afternoon, and see the parties at 10:00 the following day.

2.23 Cross-examination started on day three. The parties indicated, initially, that four days would be needed for all cross-examination. We noted that we did not have sufficient time to allow for such an extensive cross-examination. We indicated that the case must conclude within the seven days. Two days would be necessary to deal with the findings. This would leave three days for cross-examination and submissions. We stated that no further time would be allowed and the parties should agree a timetable, and if that was not feasible, they should make an appropriate application.

2.24 We confirmed that there would be no consideration of remedy, including any Polkey issues, and this hearing would deal with liability only.

2.25 On day two, the claimant confirmed that she had fully complied with order 2 of 31 August 2017.

2.26 The respondent filed a further draft statement of issues. It was not specifically considered at that time. (It was adopted later.)

2.27 The claimant filed a document headed "claimant's response to EJ Hodgson's orders on 21 September 2017." This document was a mixture of alleged further particulars and applications. The applications to amend lacked clarity.

2.28 The claimant wished to amend the claim of victimisation. The written application was difficult to follow. It was suggested orally that the intent was to include the alleged dismissal as an act of victimisation. The tribunal enquired whether the intent was to say the alleged final straw, which concerned instigating a disciplinary investigation in relation to expenses, was part of the reason for resignation, and hence part of the reason for the alleged breach. Mr Korn stated this was correct. The tribunal agreed with the respondent that the alleged amendment did not capture this, and it was arguably significantly wider. The claimant elected to redraft the application rather than proceed at that time.

2.29 The tribunal noted the application in relation to constructive dismissal was so unclear it could not be granted. It appeared to be no more than a further bare allegation that the claimant was pressurised into signing a contract. The claimant indicated she would consider the matter before proceeding.

2.30 The claimant's response failed to set out the specific wording of the various emails said to constitute protected acts. It also appeared to introduce new allegations.

2.31 The claimant failed to produce documentary evidence demonstrating the ownership of the Visa and Amex cards Mr Korn requested the claimant should give evidence. This was agreed subject to the following conditions: the scope of evidence would be limited, and the claimant would be released to give further instructions. It was agreed that the cross-examination would be limited to who paid for the meal, which cards were use, and who owned those cards.

2.32 The claimant gave evidence and confirmed that the Amex card was owned by her, and the Visa card was owned by her ex-fiancé, Mr Robin Luce. When asked who paid on the Visa card the claimant stated it "could have been myself, as at the time we just put two cards in. We shared pin codes." When asked whether the bill was split the claimant stated "two cards for one bill." The claimant volunteered that Mr Luce was a prospective client, albeit she was not asked that question.

2.33 On day 2, the respondents sought to make an application to strike out the claim on the grounds that it was scandalous. The respondents specifically declined to put the matter on the basis of no reasonable prospect of success.

2.34 The tribunal expressed its concern about the way both parties were proceeding with this matter. On the claimant's side, there was a failure to set out the claim adequately initially, and it appeared the claimant was still seeking to amend the claim even at this late stage. Moreover, it appeared the claimant had failed to provide documentation in relation to the expenses claim. The respondents still had concerns that the claimant had failed to fully comply with the order of 31 August 2017. Further, the claimant appeared to have waived privilege in relation to part of her transaction with her solicitors, but had failed to produce any relevant documentation.

2.35 We did not hear the respondents' application. We noted that if it was still possible to have a fair hearing, it may be inappropriate to strike out on the basis of alleged scandalous behaviour. We noted that if the respondent wished to proceed with the application, it must set out the application in writing and cross-reference to the various documents that it indicated were relevant.

2.36 We noted that if either party continued to behave in a way which led to the case being adjourned, there may be consequences in the form of costs. We encouraged both parties to behave in a way which would further the overriding objective.

2.37 Over the weekend and prior to day three, the claimant filed a further document headed "Claimant's amended response to EJ Hodgson's orders on 21 September 2017. This document still failed to set out, adequately, the wording of the protected acts relied on. It provided "further particulars of the last straw." This contained a new allegation: "the failure to accept her explanation prior to and at the meeting." This was a new fact which required amendment, but no order was sought. The application in relation to victimisation was amended, but failed to state that the dismissal was said to be an act of victimisation. There was an extensive application to amend "regarding the complaint of constructive dismissal." This application itself was uncertain and diffuse. It referred to numerous other documents and was extremely difficult to follow. For example, the first matter relied on is "a series of behind closed doors meetings with the second respondent referred to at page 699, 700, 701 and 702 and 718." The significance of these references was not explained and the relevant content was not identified; it appeared to introduce yet further uncertainty.

2.38 On day two, the tribunal had made it clear that if the claim proceeded, the time for cross-examination would be limited. There would be a total of three days cross-examination and submissions. The tribunal would impose a timetable and would not allow extension of time; it would exercise its case management power to limit the length of any cross-

examination. It was noted that if this was not an appropriate way to proceed, the parties should apply to adjourn the hearing. It was noted that the seven day hearing had been agreed by the parties. There should be sufficient time to hear this case within the seven days, and to give a reasoned judgment. Significant time had been wasted by the interlocutory matters.

2.39 The tribunal had noted on day two that it would not hear the respondents' application to strike out at that time because it needed to read the statements in order to start cross-examination on day three, and the parties should be very cautious about pursuing any further matters which wasted time.

2.40 On day three, we discussed the timetable. The tribunal reiterated that the claim would be timetabled to complete within the seven days, two days being reserved for the decision. If either party considered this was inappropriate or prevented a fair hearing, it would be necessary to apply to adjourn. The timetable was agreed in principle. Neither parties sought to adjourn.

2.41 The respondents did not renew the application to strike out.

2.42 On day 3, the claimant had filed a further, amended, response to the order 21 September 2017. The original application to include a further allegation of victimisation was amended. Extensive additions were made to the application to amend "regarding [the] complaint of constructive dismissal."

2.43 The application to amend was allowed in part. Full oral reasons were given at the time. It may be helpful to give a brief summary of those reasons. The proposed amendment to the victimisation claim was confused and unclear. However, Mr Korn clarified in oral submissions that the purpose was to allege that any dismissal was also an act of victimisation as the alleged last straw, which concerned instigating an investigation into the claimant's expenses, was said to be an act of victimisation. We considered this to be a simple relabelling of facts which were already in issue and which must be decided. It was necessary to deal with all the relevant facts in any event and there was no basis for saying that the respondent had been taken by surprise or suffered any prejudice in dealing with the allegation. The balance of hardship favoured allowing the amendment. The amendment was allowed in the following terms: the claim shall be amended to allow the claimant to pursue, as an allegation of victimisation, the claim of constructive dismissal as pleaded.

2.44 We did not allow the amendments in relation to constructive dismissal. The nature of the amendment was unclear. It appeared to be a confused and mixed amalgam of bare assertion and unparticularised factual allegation. For example, the first particular refers to "a series of 'behind closed doors' meeting with the second respondent referred to at page 699, 700, 701 and 702 and 718." Another part of the amendments introduced a matter not previously raised concerning comments on maternity benefits in 2015.

2.45 There were already extensive particulars in support of the allegation of constructive unfair dismissal. The claimant could pursue that claim. The last straw had been identified. There was no adequate explanation as to why it was necessary to amend the claim. It was unclear whether these matters were in addition or in substitution. Moreover, as the vast majority of the allegations were diffuse and unparticularised, the amendments simply served to introduce significant uncertainty. It could not be reasonably ascertained from the nature of the amendment what factual matters were being put in dispute. To the extent that factual matters were identified, some appeared to be new.

2.46 There was no hardship in refusing the amendment, as the claimant could pursue the claim as pleaded. There was no argument by the claimant that she was abandoning the original allegations, or that those allegations were not sufficient to demonstrate a breach of contract. There was no suggestion the claimant was not relying on the original alleged course of conduct said to amount to a breach. There was considerable hardship to the respondent. Any amendment should make it clear what facts are being put in dispute, so that a respondent can obtain the relevant evidence and seek to meet the claim. The respondents should not be expected to deal with wholly unparticularised allegations, as there is no effective way of identifying the relevant evidence. Moreover, the new allegations would inevitably have led to an adjournment. There was no hardship to the claimant. There was considerable hardship to the respondent. We refused the amendment.

2.47 It was noted that the name of the claimant as recorded may be inaccurate and it may need to be amended.

2.48 The cross examination of the claimant commenced at approximately 11:20 on day 3. During the cross examination, it became clear that the claimant relied on her allegation that she had instructed her solicitors on 12 April 2016 to file a resignation on her behalf, but they had failed to file that resignation until 26 May 2016. The claimant accepted that a number of instructions had been given in writing and that she had those documents, but had failed to disclose them. The tribunal gave permission to the claimant (with the respondent's consent) to discuss those documents with Mr Korn for the purpose of disclosing them.

2.49 On day four, we received a small supplementary bundle of documents from the claimant which contained correspondence with, and instructions to, her solicitor. The respondent agreed they should go into evidence. We also received a statement from Mr Henry Lloyd for the respondent; the content was admitted by the claimant.

2.50 On day four, Mr Price commenced his evidence in the morning. The cross-examination continued in the afternoon. Just after 15:00, Mr Korn asked for an adjournment. When we returned, he indicated the claimant was withdrawing the claim. We discussed this with him to satisfy ourselves that the claimant had given those instructions, that she

understood the nature of the instructions, that he was satisfied that she was in a position to give the instructions and that she did so willingly. He confirmed that he had fully discussed the matter with the claimant and had advised appropriately. The claimant confirmed to us that she wished to withdraw. We adjourned to consider the matter. When we returned, the withdrawal was confirmed and we dismissed all claims.

2.51 The respondents indicated they wished to apply for costs and referred to the fact that there was a deposit order. Mr Korn did not wish to proceed at that time. We considered the matter. Ms Darwin confirmed the respondents' intended to make an application for a detailed assessment.

2.52 Mr Korn was concerned that he would not be able to deal with a bill of costs in a matter of a few hours. We confirmed that it was appropriate to adjourn and give the parties the following day to prepare. We ordered the respondents to provide the claimant, and the tribunal, with an application, together with a skeleton argument in support, by 14:00 on day five of the hearing. The costs application would proceed at 10:00 on day six. We confirmed that there were three points to consider: was the threshold for ordering costs met; should we exercise our discretion to award costs; and should a detailed assessment be ordered.

2.53 Reference was made to the claimant's means. Mr Korn suggested it would take some time to collate the relevant information. Ms Darwin did not accept this, at least in part because consideration had already been given to the claimant means. We noted that we may take the claimant's means into account, but we did not have to. Any failure to set out her means may lead the tribunal to conclude that she has sufficient means to satisfy any judgment.

2.54 We noted that the respondents must be in a position to prove the costs incurred, that the respondents are obliged to pay those costs, and the costs exceed any sum requested by way of summary assessment. It may not be necessary to have a schedule of costs if the application for costs is limited, and there is clear evidence the costs incurred for a particular period exceed those claimed.

Costs application

3.1 The first respondent applies for costs. The second respondent was under no obligation to pay the costs, and brings no claim. In this judgment, further reference to the respondent is a reference to the first respondent, unless otherwise stated. The respondent seeks costs on three grounds: the claimant has acted vexatiously, disruptively, abusively, or otherwise unreasonably in both the bringing of the proceedings and the conduct of the proceedings (rule 76 (1) (a)); the claim had no reasonable prospect of success (rule 76 (1) (b)). There is no specific claim for costs based on breach of order, although it is implicit that part of the claim of unreasonable conduct includes allegations the claimant breached the tribunal's order.

3.2 Before considering the detail of the application for costs, it is appropriate to summarise the matters relied on for each head of claim.

3.3 The first respondent relies on the following matters in support of its contention that there was no reasonable prospect of any claim succeeding: the claims pursued were founded on act of dishonesty (the dishonest claiming of expenses); the claimant affirmed the contract after any breach and so lost the right to resign and claim dismissal; any alleged breach was not relied on when resigning, as the claimant resigned because she obtained new employment; the claims of victimisation were out of time; and any potentially relevant alleged protected acts were fatally flawed because they were false allegations made in bad faith.

3.4 The following matters are raised in support of the contention the claimant acted abusively, disruptively or otherwise unreasonably in bringing or conducting the proceedings: the claims pursued were founded on act of dishonesty (the dishonest claiming of expenses); the claimant failed to heed the deposit order; the claimant failed to comply with the duty of disclosure, and in particular refused to disclose statements for the credit and charge cards used to pay for the meal which was subject to the claim for expenses; the claimant's general conduct of the proceedings, including numerous inappropriate or irrelevant applications and allegations; the claimant unreasonably alleging that information had been deleted by a third party (the Xero info) in relation to her expense application; the claimant alleging common assault, with no prospect of success; and the claimant refusing settlement offers.

3.5 There is one specific, additional, matter relied on in support of the allegation the claimant has acted vexatiously: her Linked In message of 18 January 2017 which states the aim of the proceedings is "ultimately in an effort to persuade the FCA to shut them down once [and] for all."

Preliminary matters

4.1 In order to consider the application for costs, it is necessary to identify the specific issues raised. Whether there was a reasonable prospect of success must be measured against the firm ground of the issues relevant to the claims pursued. We should consider what the claimant, knew or ought to have known had she gone about matters sensibly.

4.2 When considering whether there is no reasonable prospect of success, before evidence is given, it is appropriate to take the claimant's case at its height. This means it should be assumed that the claimant can make good the allegations contained in the claim form. This is subject to one broad exception: if there is clear contradictory documentary evidence, which demonstrates that the factual basis cannot be made out, a tribunal may take that into account.

4.3 When a case is concluded, a tribunal can have regard to all the evidence given. That evidence may reveal that an individual knew, or ought to have known, that the factual basis as asserted was unsustainable. If it is clear a

false factual basis has been pleaded, this may be relevant to whether a claimant knew, or ought to have known, that there was no reasonable prospect of success.

4.4 In the current claim, the claimant had presented all the evidence on which she wished to rely. We heard part of the respondent's evidence. We are of the view that we can consider the sworn evidence as given. We must ask whether the evidence as given is sufficient to enable us to conclude, safely, whether the claimant knew, or ought to have known, that the facts pleaded in support of the claim were unsustainable. We do not have to assume that she could make good all the facts as pleaded. If it is clear that the claimant's pleaded case was unsustainable, we may take that into account when considering whether there was any reasonable prospect of success at the outset, and whether the claimant ought to have known that there was no reasonable prospect of success had she gone about matters sensibly.

4.5 As already noted, the issues in this case were clarified at the commencement of the hearing and they are reproduced below. We have added in the additional victimisation claim which we allowed by way of amendment.

> **Amended claim**
>
> **1. An amendment was allowed in the following terms: the claim shall be amended to allow the claimant to pursue, as an allegation of victimisation, the claim of constructive dismissal as pleaded.**
>
> **Constructive Dismissal**
>
> **2. Has the Claimant proven on the balance of probabilities that she was dismissed on 26 May 2016 within the meaning of s.95(1)(c) ERA 1996? The Claimant says that, by the following alleged acts, the Respondent repudiated the contract by:**
> **(1) not providing the claimant with a copy of the contract of employment until November 2015;**
> **(2) the second respondent physically hitting the claimant with the contract of employment on 22 September 2015;**
> **(3) the second respondent and Mr Jerome Stern undermining and micromanaging the claimant, by:**
> **(a) 22 September 2014: Mr Stern emailed a client (Ms Natalie Buttriss at the Vincent Wild Life Trust VWT) where he arranged a meeting between himself and the client, excluding the claimant;**
> **(b) 11 March 2015: Mr Christopher Rossbach and Mr Stern instructed the Claimant not to communicate on her own initiative with VWT. The claimant responded to this email and on upon receipt, Mr Stern spoke about the claimant to Mr Rossbach and questioned the claimant's knowledge of the account and referred to the Claimant as "she", in the third person and in the claimant's presence;**
> **(c) 31 March 2015: the claimant was not invited to a company dinner;**
> **(d) 31 March 2015: the claimant spoke to Mr Stern and informed him that she had met with a representative of a large Italian family office, Mr Stern shook his head and pulled faces;**
> **(e) 31 March 2015: At a dinner, Mr Stern sat the claimant and Mr Norman in the furthest corner from Mr Stern and chose to sit one of**

the claimant's invitees next to himself instead of next to the claimant;
(f) On or around August 2015: the second respondent denied the claimant access to the drive containing VWT data;
(g) On or around beginning 2016: Mr Rossbach stated he could hear the claimant's "brain clunking" at a meeting, implying that she did not understand the issues at the meeting;
(h) In early 2016: Mr Stern met with a prospective client whom he met through Mr Matt Norman (an existing client whom the claimant had introduced) and did not inform the claimant;
(4) The respondent refusing to allow the Claimant to continue to work five days a week after 23 December 2015 to alleviate her financial worries, making her meet her targets in just three days;
(5) The second respondent and Mr Cubitt intimidating the claimant to sign the amended contract (including Mr Cubitt reprimanding the claimant around February 2016);
(6) Investigating the claimant's expenses (2 March and 3 March 2016) – the "last straw."

3. Did the claimant expressly and/or impliedly affirm her contract of employment after each and/or any of the above breaches? The respondent relies in particular on the following allegations/matters:
(1) The claimant delayed resigning for 22 months after some of the conduct she complains of.
(2) The claimant continued to undertake work;
(3) The claimant continued to claim sick pay and/or pay and benefits including the use of her company telephone and telephone charges until 10 June 2016;
(4) The claimant had ostensibly been advised by lawyers by 5 February 2016 at the latest that she had grounds to bring a constructive unfair dismissal claim;
(5) The claimant stated that she believed that trust and confidence had broken down as at 5 February 2016.
4. If not, did the above course of conduct 'play a part' in the claimant's resignation (Wright v North Ayrshire Council [2014] ICR 77 at [18-20]? In relation to causation, the ET will have to consider in particular that the Claimant had, by the time of her resignation, secured alternative work.

5. Has the respondent shown that the claimant was dismissed for a potentially fair reason? The respondent relies on conduct, namely the claimant's claim for personal expenses as business expenses.
6. Further, was any dismissal fair within the meaning of s.98(4) ERA 1996?

<u>Victimisation – s27 Equality Act</u>

7. Did the claimant carry out a protected act? If so, what? The claimant asserts that the following acts were protected acts:
(1) comments made in 5 February 2016 grievance letter regarding disability discrimination;
(2) comments made in 9 February 2016 grievance hearing regarding sex discrimination.
(3) comments made in the email sent by the claimant at 6.45 on 3 March 2016;
(4) comments made in the email sent by the claimant at 9.14 on 3 March 2016;
(5) comments made in the email sent by the claimant at 11.08 on 3 March 2016;
(6) comments made in the email sent by the claimant at 15.44 on 3 March 2016;
(7) comments made in the email sent by the claimant on 8 March;

(8) comments made in the email sent by the Claimant on 18 March; and
(9) comments made in 9 March Grievance Appeal letter.]

8. Were the above protected acts within s.27(2) of the Equality Act 2010 in circumstances in which the evidence and/or information and/or allegations contained in the above were false and/or made in bad faith (s.27(3) of the Equality Act 2010)?

9. Did the respondent subject the claimant to a detriment because she carried out a protected act? The claimant asserts that she was subjected to the following detriment:
(1) an investigation into her expenses by email dated 2 March 2016;
(2) the investigatory meeting on 3 March 2016;
(3) the refusal by R2 on 3 March 2016 to provide a grievance appeal outcome until the claimant complied with the investigation into her expenses;
(4) the omission to provide the Claimant with a grievance appeal outcome up to and beyond her resignation; and
(5) an investigation into her expenses by further email of 10 June 2016.

10. Is the claimant's claim re the alleged act of detriment in time? Was there a continuing course of conduct?

11. If so, would it be just and equitable to extend time?

The Law

The relevant legal principles

5.1 It is common ground that we are to consider the claim for costs pursuant to rule 76 Employment Tribunal Rules of Procedure 2013.

5.2 Rule 76, insofar as it is applicable, states:

> **76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> > **(b) any claim or response had no reasonable prospect of success.**

5.3 The word "may" confirms that making the order is discretionary. However, the tribunal shall consider exercising that discretion in certain circumstances. The circumstances are often referred to as the threshold test or the gateway.

5.4 The threshold test is met in a number of circumstances which include: if either a party, or a party's representative, acts unreasonably in bringing or conducting proceedings (rule 76(1)(a)); and if the claim had no reasonable prospect of success (rule 76(1)(b).

5.5 We also have regard to rule 39 which provides, insofar as it is applicable as follows:

> **39 (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. …**
>
> **(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order. …**
>
> **(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—**
>
> > **(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and …**

5.6 Rule 39(5) is not reflected directly in the 2004 rules, albeit it was always open to a tribunal to find that a failed allegation, which was subject to a deposit order, demonstrated unreasonableness.

5.7 Under rule 39(5), if the specific allegation or argument is decided against the paying party for substantially the reasons given in the deposit order, the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument. This leads to an automatic finding of unreasonable conduct under rule 76(1)(a). We would note that the wording in rule 39(5) refers to unreasonableness "in pursuing that specific allegation or argument for the purpose rule 76." That wording is not reflected specifically in rule76(1)(a) and it is not clear whether the reference to unreasonableness in 39(5) is a reference to bringing proceedings or conducting the proceedings. We would suggest it could be either, depending on all the circumstances.

5.8 It follows that a tribunal may find the threshold test has been met by directly deciding the matter under rule 76(1)(a) and/or (b), and it may also determine if rule 76(1)(a) is engaged indirectly because of the operation of rule 39(5).

5.9 Once the threshold test has been met, the tribunal must consider the exercise of its discretion. Discretion will result in a tribunal making a number of decisions which can include the following: should costs be awarded at all; should the costs be awarded for a period; should the costs be limited to a percentage; and should the costs be capped. The order can be tailored to suit the circumstances.

5.10 In exercising its discretion, the tribunal should have regard to all of the relevant circumstances. It is not possible to produce a definitive list of the matters the tribunal should take into account.

5.11 We should be cautious about the citation of authorities on costs, albeit broad principles can be distilled from the relevant authorities.

5.12 We should not adopt an over analytical approach to the exercise of a broad discretion. The vital point is to look at the whole picture and ask whether there has been unreasonable conduct in the bringing and conducting of the case. In so doing, we should consider what was unreasonable about the conduct and what effect it had. See **Yerrakalva v Barnsley MBC [2012] ICR 420,** LJ Mummery said:

> **39. I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.**
>
> **40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in *McPherson* delivered by me has created some confusion in the ET, EAT and in this court. I say "unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect." Perhaps I should have said less and simply kept to the actual words of the rule.**
>
> **41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in *Mc Pherson* was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.**

5.13 Costs are always compensatory; they are never punitive.

5.14 We must recognise the difficulties faced by litigants in person. The threshold test is the same whether parties are represented or not, but the tribunal should not judge a litigant in person by the same standards as it would a professional representative. Lay people may lack the objectivity assumed in a professional adviser, and that is a relevant consideration when exercising discretion.

5.15 The case law does identify specific matters which may be relevant to the exercise of discretion and we should consider some of the matters previous tribunals have found relevant to the exercise of discretion.

5.16 As it may affect the ability to analyse appropriately and reach objective decisions, Ill-health may be a factor.

5.17 When considering what a party should have reasonably have known at a particular point in time, we should exercise caution. We have regard to the comments of Sir Hugh Griffiths in **ET Marler v Robertson 1974 ICR 72**.

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

5.18 We can consider how a party has pursued a matter. We can have regard to **Beynon v Scadden [1999] IRLR 700, EAT**. We would note the following from Justice Lindsay.

> **A party who, despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the "Micawberish" hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up, runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of his litigation.**

5.19 When considering whether a party should reasonably have realised there was conclusive opposition to that party's case, we should consider if there were clear statements setting out that opposition. Those statements may appear in the response or claim form, correspondence, and cost warning letters.

5.20 The tribunal should have regard to any deposit order. Deposit orders operate as a warning to a party that a particular allegation or argument may prove to be unsustainable.

5.21 Where evidence turns out to be false, it may be appropriate to consider whether the evidence was advanced dishonestly, particularly if it concerns a central allegation. However, a lie, even about an essential allegation, will not necessarily lead to an award of costs.

5.22 It may be appropriate to consider a party's motive in bringing a claim. This is particularly relevant where there are allegations of vexatious behaviour.

5.23 The manner of proceedings should not be limited to questions of vexation; conduct that causes disruption, or prolongs the claim may be relevant. This is part of the general consideration identified in **Yerrakalva**.

5.24 Rule 84 expressly provides that the tribunal may have regard to a paying party's ability to pay.

> **84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.**

5.25 The tribunal is not obliged to restrict the order to one the paying party could pay in **Arrowsmith v Nottingham Trent University 2012 ICR 159** at **paragraph 37 Lord Justice Reimer said the following.**

> **37. …The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.**

5.26 In **Vaughan v London Borough of Lewisham UKEAT 0533/12** the EAT also reiterated the tribunal was not obliged to have regard to the ability to pay at all.

> **26. We come finally to the question of the Appellant's means. The Tribunal was not in fact obliged as a matter of law to have regard to her ability to pay at all: rule 41 (2) gave it a discretion.**

5.27 It may be desirable to consider means, and the tribunal should give reasons for why it has, or has not, taken means into account. The tribunal should set out its findings about ability to pay.

Conclusions

6.1 Claims for costs are frequently considered in one of two circumstances. The first is the claim has been withdrawn or dismissed before any evidence has been heard. The second is that all the evidence has been heard and a reasoned judgment given. This claim falls into neither category. The claimant has given evidence; Mr Price (the first of the respondents' live witnesses) was in the middle of his evidence when the claim was withdrawn.

6.2 It follows that the entirety of the evidence as anticipated, has not been heard. The tribunal must exercise caution in finding facts when only part of the relevant evidence has been heard. That said, the claimant's case had concluded and evidence had been given. Ignoring the evidence given would be arbitrary and inappropriate. It can no longer be assumed, as it might on an initial application to strike out, that the claimant can make good the allegations of fact relied on in her claim form. Where clear evidence has been given which fundamentally undermines the contentions made in the claim form, that must be taken into account.

6.3 When we are considering whether there was no reasonable prospect of success, whether it was unreasonable to commence proceedings, and whether the conduct of those proceedings was unreasonable, we must have in mind what the claimant should have reasonably known had she gone about matters sensibly. It is appropriate for us to take into account all the evidence we have heard when conducting that enquiry.

6.4 During the course of oral submissions, Mr Korn reminded us that we should be cautious about analysing the law in great depth and assuming that such law was known, or ought to have been known to claimant. For example, the respondent placed reliance on the case of Vairea **v Reed Business Information Ltd EAT 0177/15** (HHJ Hand QC). It is suggested that this is authority for the proposition that once a breach is accepted it cannot be revived. This may or may not be a correct interpretation of the case, or a sufficient statement of the law. We do note, that there is perhaps other authority which suggests that in certain circumstances affirmation is conditional and repetition of behaviour may at the least permit reliance on the previous conduct. Whatever the position, it is not appropriate to assume an employee, in the real world, could have a reasonable appreciation of such fine detail. We would also observe that

there may be technical arguments as to how cases can be advanced: for example, the effect of mixed motives when resigning. It may be that analysis of potential ways in which a case may be put will tell us little about whether there was a reasonable prospect of success, and what the claimant ought to have known had he or she gone about matters sensibly. We should view such technical arguments with great caution; seldom will they assist.

6.5 With that in mind, we turn to consider the specific matters relied on by the respondent. We start with the assertion that there was no reasonable prospect of success from the beginning, and we will consider each of the headings relied on as identified above.

6.6 The first threshold question we consider is whether the claim had no reasonable prospect of success when it was issued.

6.7 In order to consider this question, it is necessary to recognise that the dismissal claim is based on an allegation that the claimant was constructively dismissed. The dismissal is said to be unfair, and also an act of victimisation.

6.8 The victimisation claim includes other allegations of detriment, but the victimisation allegation, investigating her expenses and holding an investigatory meeting, is relied on as a last straw, and cannot be separated from the dismissal claim. The victimisation claim includes an allegation that delaying the grievance appeal outcome was an act of victimisation. There is a final allegation concerning the continuation of the investigation.

6.9 The claimant accepts that she sought payment of expenses for a meal that she had with her fiancé at the Black Rat restaurant on 29 January 2016. That claim was made on 11 February 2016. The expense was not preauthorised. The bill was split and the claimant paid half on her AMEX card; her fiancé, Mr Luce, paid half on his Visa card. Both receipts were submitted. No document identified that Mr Luce had paid half of the bill. Mr Cubitts, whose role it was to check such things, queried the expense on 18 February 2016, but the query was not brought to the claimant's attention until after her initial grievance had been decided.

6.10 It is the claimant's case that the fact that she raised a grievance caused the respondent to retaliate by, improperly, seeking to investigate her expenses. The claimant also maintains that part of that grievance, filed on 5 February 2016, referred to complaints of both disability discrimination and sex discrimination. It is common ground that those references were brief and general. She alleges that those references were sufficient to constitute a protected act.

6.11 It is clear that leading up to her resignation, the claimant took advice from, and liaised with, solicitors. There is no suggestion that she did not understand the fundamental principles of constructive dismissal. There is no suggestion that the basic principles are so difficult or esoteric that they

were not readily understood by the claimant. Constructive dismissal was mentioned at an early stage in the relevant correspondence.

6.12 There is no doubt that the claimant understood, at all material times, that to succeed on the claim of constructive dismissal, she would need to establish a breach of contract.

6.13 Her claim has been built on an allegation that the initiation and pursuit of the investigation into her expenses was an act of retaliation which was improper. The essence of her argument is that it was a retaliation that was blameworthy conduct because there was no proper basis for the investigation.

6.14 It was clear, therefore, when she commenced proceedings that in order to succeed on any constructive dismissal claim, whether put as an allegation of unfair dismissal or as an allegation of victimisation, it was necessary first, to establish a breach, second, to establish that the contract had not been affirmed, and third, to establish that the breach was at least part of the reason for her resignation. We are not concerned with the extent to which the claimant either did, or could, analyse the finer details of the case law; there is no suggestion that she did not appreciate the broad requirements.

6.15 The essence of the claimant's argument is, and has always been, that there was no proper basis for investigating her expenses; instead, it was improper retaliation in response to a grievance which contained a protected act. It matters not whether the alleged retaliation is seen as a breach in itself or the last straw in a course of conduct. In either case, there must be, at the very least, some element of blameworthy conduct on the part of the respondent.

6.16 It is necessary to examine what the claimant knew or ought reasonably to have known, at the time. We can make relevant findings of fact based on the claimant's evidence.

6.17 The claimant's contract allowed her to claim expenses if they were wholly and exclusively incurred for the business. She understood that they should be approved before being incurred. She understood there was a process by which she could gain approval. She had not obtained approval. She had not discussed with anyone, in principle, claiming expenses in relation to her fiancé, on the basis that he may become a client. She had not made any specific arrangements with her fiancé that the specific meal would be one dedicated to discussing business. She had not paid for the entirety of the meal; her fiancé had paid half. When she submitted the claim, she failed to state that she had paid for only half the meal. She exhibited the receipts for both the Visa and the Amex cards. She did not identify that one card belonged to her fiancé. In her oral evidence she stated she wrote the following words on her application for expenses:

I am submitting this expense because I have discussed J

> **Stern and co investments at length with Mr Robin Luce of the Luce family office and so far it has always been on my own personal account.**

6.18 Those words failed to inform the respondent that half the meal had been paid by Mr Luce.

6.19 It has been the claimant's case to us that her request for expenses contained full and frank disclosure and, the fact that she had not paid for the entire meal was clear and transparent. It is her case that it was obvious that one of the cards used for payment was not hers and that the presentation of the request for expenses was merely an invitation for the expense to be approved. Therefore, there was no attempt to mislead or to present a fraudulent claim.

6.20 We have not been able to accept the claimant's explanation. We have found that the claimant presented a claim for expenses which she knew to be unjustified. It was not some pseudo attempt to obtain clearance or approval; it was a calculated deception. Half the bill was paid for by her fiancé. The claimant never had a right to reclaim his contribution pursuant to her contract. She failed to inform the respondent that half the bill was paid by her fiancé. The claimant knew that the claim for expenses was unjustified, at all times. The suggestion that the presentation of the claim was a mere invitation to the respondent to accept or reject it is unsustainable.

6.21 As she knew at all times that she had no right to claim the full amount, the presentation of the application for expenses was dishonest.

6.22 When the claimant was challenged, she had an opportunity to explain that she had paid only half of the meal. She could have explained that her fiancé owned the Visa card. Her evidence before us was that that information was transparent. Had it been the claimant's intention to be transparent, she could easily have clarified the position orally or in writing. Instead, the claimant chose to avoid the respondent’s questions and to prevaricate.

6.23 It has been suggested to us that, in some manner, the respondent is at fault for failing to ask, specifically, for the ownership of the cards. That submission is in our view, baseless. The expense was investigated because first, it was a large amount and second, it was paid for by two cards. The fact that two cards were used led to a reasonable and legitimate enquiry as to the ownership of those cards. The claimant could have been in no doubt at any point that she was being asked to demonstrate that she owned both cards.

6.24 On 3 March 2016, she was specifically asked to provide both credit card statements (page 1191) she agreed to provide them. She never provided them. The claimant ignored all requests during the proceedings to provide relevant statements. She refused to provide them (see page 198 page 263). It was only on the second day of the hearing, when the claimant was required to give oral evidence, that she admitted the Visa card was owned by her fiancé.

6.25 The claimant alleged in her claim form, and in the original draft of her witness statement, that she had paid for the meal. In the context of this case, that could only be interpreted as an assertion that she owned both cards. There has never been a suggestion that, in some way, she reimbursed Mr Luce. It follows that the claimant commenced the case asserting that she had paid for the meal and maintained that position throughout the case until the second day of the hearing. That was a fundamentally dishonest position for the claimant to adopt.

6.26 The exact narrative statement she made when claiming her expenses was recorded in the Xero system, which was operated by third party. Unfortunately, the record of the specific claim was deleted. The claimant sought to suggest there was improper conduct by the respondent. The claimant has sought to imply that the original explanation given, when she presented the claim for expenses, fully explained the circumstances of the claim, and the involvement of her fiancé. The suggestion is the respondent has covered it up because it would have exonerated her and shown that she had been honest, open, and transparent when making her expenses claim. In her oral evidence, the claimant was able to reconstruct the wording that she used. We can assume that the claimant reconstructed the original wording in a manner which was favourable to her, but the wording described was of no assistance; that wording was in no sense the full and frank disclosure, as alleged.[1] There is nothing to suggest that there was any evidence contained on the Xero system which materially assisted the claimant. On the claimant's own evidence, the opposite is true: it entirely supported the respondent's position.

6.27 We have concluded that the claimant knowingly presented a false claim for expenses. When the investigation started, she sought to frustrate the investigation and failed to disclose relevant documentation. The claimant failed to state that she had not paid the full cost of the meal. The claimant understood that she was being requested to prove she had paid for the meal by producing the statements. She actively lied by saying she could produce both statements, when it was clear that one card belonged to her fiancé. She continued to mislead the respondent throughout the investigation. She continued to fail to cooperate with the investigation. The claimant presented a claim form which was based on a fundamental untruth, and persisted with that untruth throughout the entirety of the proceedings, until day two.

6.28 The respondent also looked at the claimant's Oyster card expenses. The claimant's evidence to us was that she claimed the full total of her Oyster card top up, but her use of that card included private travel. At all material times, the claimant knew the following: she was not entitled to claim expenses for private travel; she had used the card for private travel; she was not entitled to the full some claimed; and the reason for the investigation.

[1] See the wording set out above.

6.29 Having determined what the claimant knew or ought to have known when she commenced her claim, it is necessary to consider whether there was any reasonable prospect of success and whether the claimant knew or ought to have known whether there was no reasonable prospect of success.

6.30 In order to succeed in a claim for constructive dismissal, the instigation and continuation of the investigation into the claimant's expenses must have either been a breach of contract or, at the very least, in some sense culpable or blameworthy. Having regard to the fact that the claimant must have known that the investigation was appropriate and warranted, she could not have failed to understand the fundamental weakness of her case.

6.31 The claimant had acted dishonestly both in relation to the restaurant claim and the Oyster card claims. They were false claims for expenses. There were clear and appropriate grounds for investigation. The investigation identified legitimate questions which required answers. In her evidence, she conceded that it could not be a breach of contract. She was also unable to give any meaningful reason for why it could be seen as blameworthy. There was no reasonable prospect of suggesting that the investigation was blameworthy.

6.32 The claimant seeks to defend her position on the basis that there is an arguable case that the investigation amounted to victimisation. It is suggested, rightly, that what must be considered is the motivation of the relevant individuals who started the investigation. This is said to be fact sensitive. It is said that retaliation because of a protected act does not need to be the sole motivation to establish victimisation; it merely needs to be a substantial reason. All of that is true. Discrimination (and we use discrimination here to include victimisation) cases are fact sensitive, but the fact that there is a theoretical possibility of arguing that a protected act existed and that there was an element of retaliation because of that protected act, may tell us little about the prospect of such arguments succeeding.

6.33 The victimisation claim faced significant barriers, which should have been obvious from the start of the case. The first problem is that the protected act itself was advanced tentatively and as a minor part of a much larger grievance. That in itself would not be enough to say there was no reasonable prospect of success, but the potential for arguing a lack of good faith was clear. There was always a risk there would be a failure to establish any protected act at all.

6.34 Should the claimant establish a protected act, the next difficulty was establishing causation. First, it would be necessary to consider whether there were facts on which the tribunal could conclude that there was victimisation. The claimant has not pointed in any meaningful way to those facts. The claimant relies on the fact that the treatment occurred and there was a relevant protected act. There is a real doubt as to whether any tribunal, properly directed, could find victimisation from those facts. If the claimant could demonstrate that it was clear at all times that

the expenses claims were obviously legitimately incurred, that may be a fact from which victimisation could be found. The difficulty is the claimant knew there was no prospect at all of such a fact being found.

6.35 The claimant also knew the strength of the respondent's explanation. The explanation was simple: it appeared the claimant had dishonestly claimed expenses; this called for an investigation; the investigation was instigated; and the claimant refused to cooperate appropriately or at all. The claimant knew at all times the strength of the respondent's explanation. There were facts on which the respondent would be able to establish that there were rational and clear grounds for the investigation. There was clear and cogent evidence in support of the explanation. She should have known that there was no reasonable prospect of defeating that explanation.

6.36 The submissions before us concentrated on the question of causation. The tribunal noted during the course of submissions that there is an initial question: whether the treatment was detrimental. Detriment also presented a serious barrier for the claimant. The tribunal would have to consider what a reasonable employee, fully apprised of the circumstances, would consider to be detrimental treatment. Here, it was inevitable that the tribunal would find that the claimant had made requests for expenses to which she was not entitled. It is difficult to see how it could ever be argued that it is a detriment to the claimant for the employer to undertake an investigation into expenses, which have in fact been improperly claimed, when there are appropriate and legitimate grounds on which to found that belief. There was no reasonable prospect of establishing that the investigation was detrimental at all.

6.37 For the reasons we have given, there was never any reasonable prospect of arguing that the expenses investigation was either a breach of contract in itself, a breach of contract because it was an act of victimisation, or in any sense blameworthy conduct. The investigation claim could not be a final straw. It could not be a breach in itself. The constructive dismissal claim was bound to fail. Further, the claimant should have understood at all times that there was no reasonable prospect of succeeding in her claims for the reasons we have given.

6.38 We have considered in some detail the general argument that discrimination cases are fact sensitive and that the alleged act of retaliatory victimisation may have been part of the reason for the investigation. Whilst the theoretical possibility exists, having regard to the factual circumstances, as they should have been known to the claimant, the possibility was fanciful in this case.

6.39 We acknowledge that claimants who feel wronged may not approach claims entirely rationally. They may be overly optimistic, even unrealistic, as to what can be achieved. The bar should not be set too high; claimants should not be criticised for failing to see at the outset what, in hindsight, may appear obvious. But there is a fundamental difference between an unrealistically optimistic claimant and one who bases a claim on a cynical untruth and a continuing deception. This a case of the latter and not the former. This was not a peripheral lie. This was deliberate dishonesty

about the key, central factual issue. It follows that the dismissal claims could never succeed.

6.40 We should consider, briefly, the remaining allegations of detriment. The continuation, in June 2016, of the investigation into expenses was justified. In any event this was a peripheral matter. In her evidence, the claimant appeared to forget she had alleged the email of 10 June 2016 was an act of victimisation. There was no reasonable prospect of establishing any continuation of the investigation was any more an act of victimisation than its instigation.

6.41 The claimant complains of the failure to complete the grievance appeal outcome. This allegation is wholly without merit. The respondent made it clear that it wished to complete the investigation into the disciplinary matters before concluding the appeal. That was a clear and rational explanation; there was no reasonable prospect of defeating that explanation.

6.42 For the reasons we have given the threshold for ordering costs is met because there was no reasonable prospect of the claim succeeding at any time.

6.43 It must also follow that bringing the claim was unreasonable. The claimant was dishonest about the key factual dispute: the expenses claim. She set about the case intent on obscuring, deceiving, and misleading. For the reasons we have given, there was no reasonable prospect of success. It was unreasonable to bring the proceedings in those circumstances.

6.44 As the claim was withdrawn, the deposit order has no specific effect. As it was a clear statement of some of the difficulties, it has some relevance to our discretion, but in the circumstances of this case adds little or nothing. We would also observe the fact that there were a number of offers to settle the claim which add little or nothing.

6.45 We should consider briefly the other matters advanced in support of the contention that there was no reasonable prospect of success.

6.46 First, the respondent relies on an allegation that it was clear that the evidence of affirmation was overwhelming. There is some force in this argument. There was a significant delay between the alleged final straw which occurred on 2/3 March 2016 and the eventual resignation on 26 May 2016. The claimant's account, that there was some delay by her solicitor, is inherently unlikely; the documents produced were unsupportive.

6.47 Whilst it is arguable that an individual may reserve the right to resign pending, for example, a grievance resolution, the reservation of right is not limitless. Here the claimant was clearly pursuing other employment. She obtained and started new employment by 3 May 2016. It is unclear why she delayed further, but there was no reasonable prospect of pinning the blame on a failure of her solicitor to act on instructions – the available documents contradict her assertion.

6.48 It is not necessary for us to come to a final conclusion as to whether the difficulties arising out of potential affirmation were so great that there was no reasonable prospect of success. The claimant should have recognised that there were significant difficulties.

6.49 There are also difficulties with causation. It has been argued before us that the breach of contract does not have to be the sole or principal reason for resignation. That is undoubtedly true. However, the claimant does not in her claim form, or in her statement, acknowledge that there were mixed motives. That is a serious omission. It should have been obvious to the claimant that there were real problems with causation. However, these problems cannot be entirely divorced from the central difficulty: there was no prospect of establishing the investigation was a breach of contract, or in any sense blameworthy. There was a real prospect that the tribunal would find that the true reason for dismissal was a combination of the fact that she had obtained a new job, and her wish to exit the old job, whilst avoiding a legitimate investigation into a dishonest claim for expenses. The factual basis of those matters should have been obvious to the claimant at all times. This does not rely on some esoteric or technical argument. It is the claimant who now seeks to advance a technical defence – the last straw need not be the sole or principal reason – but there is no evidence that she had that in mind when resigning or bringing the claim, and it does not appear in her evidence. When all those matters are considered, it should have been obvious to the claimant that there was real difficulty in establishing any causative link.

6.50 We have noted that there was no prospect of establishing a breach of contract. However, it is not only the alleged last straw where there is weakness in the argument. We should consider, briefly, the main points relied on by the claimant.

6.51 The claimant complains about the non-provision of the contract, but the contract was supplied; she signed it, without reservation. In no sense whatsoever could this be a breach of contract.

6.52 It is said that she was physically hit with the contract. The alleged seriousness of this incident has significantly decreased as the case progressed. Initially, the claimant suggested she was hit two or three times. It then became a tap on the shoulder to each syllable of words to the effect, "When are you going to sign this." There was no complaint at the time. The matter was not reported to the police at the time, although it was sometime later. Even if the allegation is true, it is weak.

6.53 The claimant's allegation that she was excluded from meeting a client was unsustainable, and effectively abandon.

6.54 Her complaint regarding the Stern dinner had no substance. It was clear she was always going to be invited. Her main complaint appeared to be where she was seated, but there was no rational basis for her unhappiness.

6.55 The claimant complained that she did not have access to the J drive. There was a clear and appropriate explanation. She needed to sign a contract for confidentiality purposes. As soon as she did, she was given access.

6.56 There is suggestion that there was a reference to her brain clunking. Even if that were true, the individual said to be responsible applied it to himself. The comment had been used in a humorous, self-deprecating manner. The claimant appears to rely on the fact the statement was used, without setting out the context. Such a comment could be used unkindly, but without the context, there was little chance of establishing it could have been part of a breach.

6.57 We do not need to consider the other allegations in detail. It is clear that the claimant was unhappy about a number of incidents. Those incidents were so minor, or had such reasonable explanations, that there was no prospect of establishing that they individually, or cumulatively, amounted to a breach of contract. Indeed, the claimant accepted, in relation to the vast majority, there was no breach of contract. A number she also accepted did not represent any form of inappropriate conduct.

6.58 We next consider the allegation that the claimant conduct of the proceedings has been unreasonable and/or vexatious.

6.59 We need not consider this in detail. It has already been found by Employment Judge Grewal that the claimant's conduct has at times been unreasonable. This has led to costs orders. It was accepted, in submissions, that some of the claimant’s correspondence was intemperate, that is a sensible concession. We do not need to consider the correspondence in detail. We have had our attention drawn to letters written during the course of these proceedings which make allegations including that Mr Price has perjured himself giving evidence. The documentation also appears to allege expenses remain owing. Whether the claimant has in mind the expenses of the Black Rat restaurant remains unclear; she does not specify. There is continuing correspondence which makes it clear that the claimant seeks to establish that the respondent is guilty of financial impropriety of one form or another, and that is a matter she intends to pursue with the FCA.

6.60 There is no doubt that at times the claimant's conduct of these proceedings has been unreasonable. That much has already been found by Employment Judge Grewal and we do not need to add to her observations, other than to say the conduct she identified has continued.

6.61 For the removal of doubt, we would observe that the claimant has been represented at the hearing by Mr Korn, as a direct access barrister. It is clear that he has sought to encourage the claimant to approach this matter in a temperate and reasonable manner. To the extent that there has been unreasonable conduct during the course of the proceedings it is, in no sense whatsoever, caused or contributed to by Mr Korn whose helpful and constructive approach has done much to assist the tribunal and advance the claimant's case.

6.62 There is an allegation that the claimant's conduct is vexatious. There is force in this allegation. We have been referred to the social media comment on Linkedin of 18 January 2017. This would suggest that there was an ulterior motive which is to persuade the FCA to shut the respondent down. That is consistent with much of the correspondence we have seen. It is clear that the claimant does intend to cause damage to the respondent. Her desire goes beyond a simple resolution of her case. The reference to shutting the respondent down is perhaps the most neutral way of recording her intent. Given the nature of the correspondence and the various allegations contained therein, we find this is a case where the proceedings have, in part, been used inappropriately and improperly in an effort to inflict damage upon the respondent. That is, in our view, vexatious.

6.63 For all the reasons we have given, we are satisfied with the threshold for ordering costs has been passed.

6.64 We must now consider whether to exercise our discretion. We have received evidence from the claimant as to her means. It is clear that she owns property in this country which has equity of approximately £350,000. She has an income of £5,000 a month. We accept that her outgoings largely obliterate this, but she remains in financial services with a real prospect of increasing her earnings by reference to commission. She currently has around £6,000 in the bank. In late August 2017, she had over £30,000 in her current bank account, we do not know where it came from. She has a house in Italy, albeit the value may now be between and €30,000 - 50,000.

6.65 The claimant has significant capital. We take the view the claimant has a significant earning capacity. She may increase her earnings in the future. We know nothing more of her wider future prospects. We are satisfied that she has sufficient funds to meet any judgment we make.

6.66 We have considered whether we should make any order at all, and if so, the extent of that order. We have actively considered what may be broadly described as mitigation. We accept the claimant has suffered from ill health; she has had depression. We were given no medical report. We accept that she is on a high dose of antidepressants. The GP notes give a mixed picture; at times she had improved. There is no suggestion before us that any depression has affected her cognitive reasoning or her ability to distinguish right from wrong. There is no suggestion that any mental health issue has ever prevented the claimant from recognising a fundamentally dishonest act.

6.67 We accept the claimant has withdrawn the claim and perhaps some credit should be given for that. However, the withdrawal was late in the day and only after she had given evidence. It was not until the claimant gave her initial evidence that accepted she had not solely paid for the Black Rat meal, even then she did not withdraw the claim. The claimant offered no explanation for the withdrawal, or for the timing of it. In the circumstances, the fact of the withdrawal is not significant mitigation.

6.68 It is also clear that the claimant had personal difficulties. Her relationship with Mr Luce has broken down and she alleges that he has been abusive; we can make no findings, but have no reason to doubt her evidence on this.

6.69 The claimant's property was flooded, and she is in dispute with the insurance company.

6.70 The claimant has been through a distressing and difficult time. However, none of that is advanced as an excuse for dishonesty.

6.71 Whilst there are elements of mitigation, as we have indicated above, there remain serious concerns about the claimant's conduct.

6.72 We have regard to the overall unreasonable conduct. That unreasonable conduct extends not only to the inappropriate and aggressive nature of the correspondence, but also to the fact that the claimant failed to give material disclosure in relation to the charge and credit card statements, which she represented were hers, until day two of the hearing. It follows the claimant remained in breach of her duty to disclose documentation. We also cannot ignore the fact that there are elements of vexation in this case. This has led to an aggressive approach which has undoubtedly led to a significant increase in the costs.

6.73 As there was no reasonable prospect of succeeding in this case from the outset, and as that should have been apparent to the claimant had she gone about matters reasonably, it is appropriate for an order for costs to be made for the entirety of the proceedings.

6.74 We have considered whether it would be appropriate to order only a percentage of the costs. If, for example, part of the claim had a reasonable prospect of success it may be relevant to order only a percentage. If it were possible to argue that some of the alleged victimisation claims could have succeeded, it may be appropriate to award a percentage reduction. However, there was no reasonable prospect of any claim succeeding and the victimisation claims, other than dismissal, were peripheral; they did not materially add to the cost or advance the case. We therefore conclude that there should be no percentage reduction.

6.75 There has been no claim for costs on an indemnity basis, and so costs are ordered on a standard basis.

6.76 We retain a general discretion as to the amount of costs. That discretion is unfettered. We can order up to £20,000 on a summary basis. The claimant admits that at least £20,000 of costs have been incurred reasonably and requires no further evidence than that already produced.

6.77 Costs are compensatory, never punitive. We do not know the final figure for the costs incurred by the respondent. We are told it is likely to be in the region of £200,000. If there had been any basis for saying that the claim

was brought reasonably at any time, or if the conduct itself had not been unreasonable and/or vexatious, it may have been appropriate for us to exercise our general discretion to limit the costs. However, no such arguments are sustainable for the claimant.

6.78 We take the view that the respondent must be fully compensated for the costs incurred, and we therefore order a detailed assessment.

6.79 We have considered generally whether there should be an interim payment. There will be no interim payment, unless we receive a further specific application and submissions.

6.80 We will take no further action in relation to any deposit money without further application and submissions.

Employment Judge Hodgson 12 December 2017