EMPLOYMENT TRIBUNALS

Claimant: Ms L Owens

Respondent: Roberts Solicitors Limited

HELD AT: Manchester **ON:** 28 January 2019;
26 April 2019
13 June 2019 (In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Mr K McNerney, Counsel

RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1.The claimant's claim of breach of contract in the form of constructive wrongful dismissal fails and is dismissed;

2.The Tribunal has no jurisdiction to consider any other type of breach of contract claims, and to the extent that the claimant has sought to bring these, they are dismissed.

3.The claimant's claims of unlawful deduction from wages in respect of non – payment of her salary is dismissed upon withdrawal by her;

4.The claimant's other claims of unlawful deductions from wages are not well founded, and are dismissed;

5.To the extent that the claimant has sought to bring claims under reg. 30 of the Working Time Regulations 1988, these are dismissed;

6. For the avoidance of doubt, any claims the claimant has brought before the Tribunal are dismissed.

7.The respondent's counterclaim succeeds, in that it is declared that the claimant's resignation without notice was a breach of contract. The Tribunal makes an award of nominal damages in the sum of £1 for breach of contract.

REASONS

1. By a claim form presented to the Tribunal on 16 September 2018 the claimant brought claims of what appear to be breach of contract, breach of the working time regulations, and unlawful deductions from wages. By its response of 12 October 2018 the respondent resists the claims and has brought an employer's contract claim, to which the claimant responded on 18 December 2018.

2. The claims were heard on 28 January 20919, but could not be concluded that day, hence a further day of hearing was held on 26 April 2019. Judgment was reserved, and the Tribunal deliberated in Chambers on 13 June 2019. Due to pressure of judicial business, and some health issues, the reserved judgment could not be completed, and is now promulgated, with apologies to the parties.

3. It is important at this juncture to identify the claims that the claimant has pursued before the Tribunal. In her claim form the claimant set out her claims as being:

"

1. *salary July (including average bonus) 3458*

2. *retentions owing pre – July 400*

3. *damages breach of express terms of contract*

4. *damages breach of implied terms of trust and confidence and constructive dismissal*

5. *damages breach of working time regulations*

   a Working over 48 hours a week due to poor caseload and fees management

   b Under 11 hours daily rest

   c seven days a week

6. *Hours over contract 30022 (trib limits)*

7. *Damages for working under abusive practices*

   a Off sick and bonus would be withdrawn (potentially 1000+) unless taken as holiday

   b Bonus arbitrarily withdrawn from colleagues reason unfair and irrational

c forced to work knowing in breach or outside SRA rules, Insurance, the law society conveyancing scheme"

4. The claims she made are further set out in the document that she submitted on 18 December 2018, at pages 27 to 84 of the bundle, at page 28. That document has formed the basis of her evidence, and is part pleading, part witness statement. On page 28 of the bundle, in a further document, under the heading "Claim", the claimant set out the following:

i)£1,750 which the Claimant could reasonably have expected to have been paid at the end of August which was not paid

ii)£1,666 basic salary (to be confirmed)

iii)£400 across two retentions

iv)£200 in respect of fees deducted and therefore bonus lost as a consequence of the Respondent taking £200 and failing to allow the Claimant the benefit of the firm's professional indemnity insurance

v)£300 x 15 months = £4,500 for losses suffered as a consequence of the Respondent's abortive fees policy

vi)Claim for additional hours worked over contracted hours (illustrative figure 23,092) or over working time regulation maximum hours (illustrative figure 12,315) where the figures given are for illustrative purposes; an accurate calculation frustrated until the respondent produces their working time regulation records.
vii)Damages

Claim (ii) was withdrawn, and is dismissed.

5. The claimant gave evidence, and called no witnesses. For the respondent Wayne Roberts, Director, gave evidence. There was a main bundle, a supplementary bundle, and the claimant produced further documents following the postponement. References to page numbers are to the main bundle, and any reference to pages in the supplementary bundle will be prefixed by the letters "SB". The parties made oral submissions. Having heard the evidence, read the documents before it, and considered the submissions of the parties, the Tribunal finds the following relevant facts.

5.1 The respondent is a firm of solicitors. It is incorporated, and Wayne Roberts, a solicitor, is Managing Director and the Principal of the firm. Catharine Crossley The claimant is also a solicitor, specialising in conveyancing. The firm's business is residential and commercial conveyancing. It trades under the name Roberts Crossley Solicitors. The claimant started her employment with the respondent on 30 January 2017. She applied for the post by letter of 13 January 2017 (page 190 of the bundle) and was successful.

5.2 At some time (when is unclear) a document was produced, and signed by both parties, entitled "Terms and Conditions of Employment" (pages 238 to 248 of the bundle). The signatures appear on the last page, and the document is dated 30 January 2017. The following terms appear in this document:

*"**1.6 HOURS OF WORK***

Your normal hours of work are 9.00 a.m. to 5.30 p.m. Monday to Friday with a break of one hour for lunch……

1.7 RATE OF PAY/BASIC SALARY

£20,000 PER ANNUM

1.8 BONUS SCHEME

TBA

5 Normal hours of work

5.2 You are required to work not less than 37.5 hours per week and such other duties as may be necessary for the proper performance of your duties.

5.4 You agree not to be bound by the terms of the Working Time Regulations 1998 that would otherwise restrict your average working hours to a maximum of 48 hours per week.

11a Notice

11a.1 If your employment continues after the end of your probationary period the period of notice to be given in writing by the firm hope you to terminate your employment is:

11a.1.1 eight weeks notice if you have been continuously employed for less than a year; and then

11a.1.2 one extra week's notice for each completed year of continuous service to a maximum of 12 weeks' notice after 4 years continuous service,

11a.4 Any employee bonus entitlement, whether contractual or paid at the discretion of the firm will cease and will no longer be payable immediately upon either party giving/receiving notice.

5.3 The bonus scheme that was orally agreed (but is not documented) was that the claimant would receive a discretionary bonus equivalent to 20% of all fees that she brought into the respondent firm in excess of £5000 per month. The respondent operated a system of retention against bonus, whereby £200 of the bonus would not be paid until the property had been registered at the land Registry.

5.4 In March 2018 the claimant raised with Wayne Roberts the issue of bonus and sought an increase to 30%. This was discussed in an email chain between the two parties between 2 and 8 March 2018 (pages 191 and 192 of the bundle). In essence the claimant is seeking an increase in her remuneration to around £40,000 per annum, but Wayne Roberts would not agree to this. He did agree to further look at the figures at the end of March 2018.

5.5 On 12 April 2018 the claimant sent an email (page 148 of the bundle) to Wayne Roberts entitled "Work Load", in which she informed him of the volume of work that had arrived into the firm. She expressed concern that she would not be able to get through the sheer amount of documentation within the preferred timescale. She went on to suggest that the firm was well placed for some "horizontal expansion", and made a suggestion and a business case for raising the fees that were charged for commercial work, where she considered there was scope for expansion.

5.6 Later that month in an undated document addressed to Wayne Roberts (pages 132 to 147 of the bundle) the claimant identified what she saw as a problem created by the charge out rates affecting commercial work and the system allocation of files. She said that as a result of this she was having to make up the charge out rates by working long hours, and that this needed to be brought to his attention. She set out the hours that she was working, and informed him how she was working at the weekend. This was possible because the claimant and other employees did have access to the respondent's office at weekends and whenever they required it. Any work done on these occasions was not monitored or recorded, and there was no requirement upon the claimant or anyone else that they work such hours. She said this:

> *"Currently I am coming into the office at 6.30 each morning allowing me two hours each day before 9 am, working eight until between 7 and 9 three days a week and then I am also having to work one and frequently two days at the weekend. My additional hours during the week are 16 and I will generally work between seven and 10 hours at the weekend. For the purposes of the following examples I have used 20 hours for the additional hours I am working which I believe to be a fair reflection. I have given it several months trying to make the situation work but there is only a very limited number of additional improvements and refinements I can make. It is not that I am doing the job wrong, I have been doing it for twenty-five years. The situation cannot be improved or go on."*

5.7 She then set out various calculations for targets, fees, timings and costings and produced a table comparing basic fees, average fees, hours per transaction, charging rates and units. She went through a breakdown of the time involved in a commercial lease transaction, and discussed the number of files. In terms of her salary, she said that salary should be around 30% of charging rate. She noted that she had received a salary of £33,000 for last year on fees of £116,794, which was 28%. She said this was well below what she would like to achieve. She calculated how this translated into an hourly rate,

and how working an extra 20 hours a week reduced her hourly rate of pay to £10.57.

5.8 The claimant then proposed some solutions to the problems that she had highlighted, and set out some three options for Wayne Roberts to consider. She made a proposal that the firm endeavoured to promote the commercial work, which would require her to devote some time to this. She suggested therefore reducing her file load by 50%, which she appreciated would require her to make the financial threshold of £5000 to cover the cost of the firm, but this would enable her to address other matters. She then set out some costings, and other improvements to standardisation and efficiency, and made other suggestions as to how her proposal could benefit the firm. In conclusion she said that she could promote and build the commercial portfolio, deliver the service it demanded, deal with training and organise and deliver efficiency and standardisation of working for everybody, whilst handling a hopefully growing file load that would continue to cover her costs. She considered that the potential rewards for the firm was such that it was worth dedicating 12 months to this proposal. She ended by saying that her salary package would have to be restructured to take account of the fact that part of the billing time would be dedicated to other matters , and said she had no objection to going on to a fixed salary with no bonus.

5.9 Wayne Roberts did not reply in writing to this document, but did discuss it with Zoe Rollinson, and did increase the fees charged on commercial leases.

5.10 On 19 June 2018 claimant sent Wayne Roberts email asking that she move to the top floor of the office. She proposed this because she was being asked to give support advice and guidance to other members of staff which was assisting them, but was not helping her. It took up a great deal of her time and was not recognised or rewarded (page 193 of the bundle). Wayne Roberts replied later the same day declining the claimant's request, and asking her to decline to assist other members of staff when they approached in this way. He said that she could inform them that she had been told not to help them with their work and that she had to concentrate upon her own work (page 194 of the bundle).

5.11 The claimant was paid (page SB33) on or about 29 June 2018, in the net sum of £2794.03, which included a discretionary bonus of £2074.64 gross.

5.12 On 30 June 2018 the claimant sent Wayne Roberts a nine page document by email (pages 195 to 203 of the bundle) in which she brought to his attention some six cases that she was dealing with, which were causing her concern, and which led her to express the worry that the respondent firm may be under "corporate attack". The claimant also prepared (it is unclear if it was ever sent) a letter to the National Crime Agency dated 1 July 2018 in which she reported a transaction which she was concerned may involve money laundering. She brought this also to the attention of Wayne Roberts.

5.13 On 3 July 2018 at 06:51 the claimant sent an email to Wayne Roberts on the subject of GoMove Me (referred to sometimes as "GMM"). This was an online estate agency that Wayne Roberts was launching. He had on 27 June 2018 sent an instruction to all staff informing them that this would be live at the end of that week. He encouraged staff to promote it, and instructed them to attach a "banner" at the bottom of their emails and other electronic communications.

5.14 The claimant had reservations as to whether the association between this estate agency and the firm of solicitors was an appropriate one, and considered that it may breach what she believed to be rule 21 of the Solicitors' Code of Conduct. She accordingly told Wayne Roberts in her email that she did not wish to be involved, as she had noted that the same telephone number and quotations platform was being used for this agency as another, legitimate, agency. She asked therefore to be removed from the quotations register so that no one was given her name and no quotations were sent through to her. She said that she would no longer be able to take any telephone calls from Conveyancing Warehouse, another agency and division of the respondent, as it was using the same telephone number.

5.15 Additionally, the claimant on 2 July 2018 deleted the advertising banner from the footer of her emails, and made contact with CASA (a conveyancing software system, the Tribunal understand) asking to be removed from the system.

5.16 On 3 July 2018 at 10:58 (page 217 of the bundle) Wayne Roberts sent an email to the claimant it which he replied briefly to the claimant's previous long document, and raised with her her refusal to set up a file, due to her concerns about GMM. He warned her that if she refused to set the file up, this would be dealt with at a disciplinary hearing. The claimant replied to him by email at 11:40 that morning (page 216 of the bundle), explaining her concerns about rule 21, which she said bound her as an employee. She referred briefly to Wayne Roberts' reference to her previous lengthy document which he said had contained "allegations", and reiterated her concerns about any involvement in GoMove Me.

5.17 At some point during 3 July 2018, or previously, Wayne Roberts had mentioned to the claimant the number of accounting errors that she was making. She responded to this by an email at 18:16 on 3 July 2018 (page 218 of the bundle). She explained why these errors had occurred, and said she would try a different coping strategy that would hopefully do the job.

5.18 At 07:02 the following morning, 4 July 2018, the claimant sent a further email to Wayne Roberts saying that as there were others who were less behind with their files than she was, and they clearly had capacity, she would like to hand some of her files over to them. She mentioned how she had been consistently working in excess of 60 hours a week and on a few occasions more than 80, but it could not be done. He asked Wayne Roberts today to know to whom she should pass on some of her files and she would do so that day.

5.19 At 17:38 on 4 July 2018 when Robert sent an email to the claimant entitled “Response to Recent Emails” (pages 209 and 210 of the bundle). The text of this email referred to the claimant’s document of 30 June 2018 in which she suggested that the respondent firm was under some form of corporate attack. Wayne Roberts set out his view upon her contentions, and responded to other points that she had made in that email. He also attached to this email a letter (pages 211 to 213 of the bundle) inviting her to attend a disciplinary hearing on 6 July 2018 at 11.00 a.m.. In the letter he set out some five matters, three which would be dealt with as gross misconduct, and two which would be dealt with as unsatisfactory work performance.

5.20 The first disciplinary matter related to the removal of the advertising banner from the claimant’s email following the instruction given on 27 June 2018 (erroneously referred to as 27 July 2018) , and her subsequent request to be removed from CASA. The second was related to the first, in that it referred to the claimant’s refusal to take Conveyancing Warehouse calls enquiries or quotations. The third matter was refusal to set up a new instruction that had been received from Conveyancing Warehouse.

5.21 In relation to unsatisfactory work performance the first allegation related to the number of accounting errors at the claimant had made, which had increased over the months to 19 in the present month. Finally the last performance issue was the claimant being behind with her work, more so than any other fee earner. The claimant was told that she would be entitled to accompaniment at the disciplinary hearing by a work colleague.

5.22 The claimant replied this email at 07:44 the following day, 5 July 2018, picking up the use of the word “conspiracy” by Wayne Roberts, and saying that she would address the other points at the hearing on Friday, at which she did not require anyone else to attend.

5.23 On 6 July 2018 there was further email traffic between the claimant and Wayne Roberts (pages 225 to 228 of the bundle). Wayne Roberts had looked into the Solicitors Code of Conduct, and had discovered that the Rule 21 that the claimant had referred to had been abolished in October 2011. He advised that she did not therefore have a defence based upon that rule, and provided her with the links to the relevant sections of the current Code of Conduct. In the light of this discovery he deferred the disciplinary hearing until 11.00 a.m. on Monday 9 July 2018 to enable the claimant to submit a revised defence. The claimant acknowledged this, and thanked Wayne Roberts for it, saying they would discuss it on Monday.

5.24 The claimant then prepared a document which is undated (pages 229 to 230 of the bundle), but which was provided to Wayne Roberts on the morning of 9 July 2018. In this document the claimant firstly set out the results of her consideration of the SRA (Solicitors’ Regulation Authority) Handbook, and her position in relation to GoMoveMe. The claimant recognised that she and Wayne Roberts had a different opinion as to whether these arrangements were

compliant with the Code of Conduct, but as she was a solicitor, she had raised a legitimate concern, which was not insubordination and was not gross misconduct. Having considered the potential future effects upon her position of accepting work generated from GoMoveMe, she said this Page 229 of the bundle):

"…. It is clear now that I must cater for that potential future breach and the manner in which this has been handled in the only way possible and move to a different firm. I am not giving you my notice but informing you that the structure of this venture, a change to the way in which the firm now operates and wider considerations leave me no choice. I will continue as long as I am able [sc. "or"] until another position as been found all the risk becomes apparent but I have must [sic] now leave as quickly as possible."

5.25 The claimant went on in this document to refer to the accounting errors made, which she said was a product of her dyslexia, which was a recognised disability. She ended with this:

"Bearing in mind the above and that you have invited me to conduct this disciplinary by written representations I wonder if a meeting or further discussion is necessary. I consider it is as well for the matter to settle and for all sides to understand that all this has rendered my position at this firm untenable, that the firm's approach, position and change to my contract mean I have been left with no choice but to leave which will happen in good time, that this is not an adversarial process, that to avoid the unnecessary drama and humiliation of other members of staff witnessing and, on Monday hearing our meeting and to allow the firm time to consider what I've had to say it should be cancelled if I don't hear from you to the contrary I will attend at your office at 11.00."

5.26 Having received that letter that morning when Robert sent an email to the claimant at 10:47 (page 232 and 233 of the bundle) thanking her for her letter, and informing her that in view of its contents he confirmed that the disciplinary hearing would be held in abeyance. He went on to assure the claimant that the firm had always complied with the Code of Conduct, and that there had not yet been a single client or even a single enquiry. He considered that the chances that an unsuspecting member of the public would instruct GoMoveMe thinking that it was regulated by the SRA were non-existent. There ensued further email traffic in which the claimant sought clarification of what the term in "abeyance" meant , and to ask if she had been taken off the rota. Wayne Roberts replied that abeyance was a word that was in the dictionary and that as the claimant was leaving in good time and as quickly as possible a hearing need not take place stop it would be necessary to provide her with at least 24 hours notice if a decision was taken to resume the hearing. He made reference to the claimant's notification that she suffered from dyslexia and suggested she needed medical evidence in support. The claimant replied that she did not have any medical evidence as the diagnosis was many years ago when she was at school.

5.27 The claimant then took leave during July 2018 . She had since June 2018 been seeking other employment. She had approached a recruitment agency Sacco Mann. By 20 June 2018 she had secured an interview with firm of solicitors in Macclesfield, which took place on 22 June 2018. She was given positive feedback from that interview on 28 June 2018 (pages SB8 and SB10). On 14 July 2018 she was informed of a locum position available with Trafford MBC. On 16 July 2018 the claimant submitted her CV to the Sellick Partnership who were conducting the recruitment of the locum for Trafford MBC (pages SB6 and SB25). By 18 July 2018 the claimant had been offered the post with Trafford MBC , and was discussing her start date (page SB24).The claimant has not disclosed any offer letter, contract of employment, or other details of her earnings in this new role, but makes no claim for notice pay.

5.28 The claimant was paid on 31 July 2018 (see page 237 of the bundle), and received as part of that payment a discretionary bonus of £1814.84 gross.

5.29 At close of business on 31 July 2018 claimant left a note on the desk of Catharine Crossley (page 235 of the bundle), in which she said this:

"Today has been my last day.

Wayne was advised and acknowledged I would be leaving as soon as possible and my position at this firm has been rendered completely untenable. This is a wrongful constructive dismissal but in addition I have a number of concerns. The courts will forgive me staying following breach until I was paid but I am not prepared to undermine the claim or through acquiescence accept a breach and so am prohibited from staying after today."

5.30 Following the claimant's resignation the respondent did not recruit a replacement. Her files were distributed amongst other members of staff, thereby increasing their workload. Wayne Roberts contends that this increase in workload reduced the ability of these fee earners to take on new files.

5.31 The claimant generated fees over a 12 month period of £116,162.98, an average of £9,6802.24 per month (see page 279 of the bundle). The respondent's fee income in the three months up to the end of July 2018 was, on average, £91,180 per month (pages 280, 281 and 282 of the bundle). Following the claimant's departure, to the end of December, that fee income for five months was £355,420. The respondent expected that to be £445,901 based on the preceding months. It contends that there is a shortfall of some £21,780 between the fee income that would have been received in that period, which it attributes to the claimant's departure.

5.32 Wayne Roberts' evidence was that there was an approximate three month turnaround period from receipt of instructions to completion and billing.

5.33 Another employee, Amy left in August, another, Michelle Darby, left without giving notice on 31 August 2018, and another Nicky, left in September 2018. There had then been two new starters, around October or November, but

they were probationers, and would take two months to train up. The respondent did not turn work away, but could reduce new instructions by cutting down advertising, or not taking calls. No evidence of any reduction in new instructions being accepted, or any other financial breakdown or accounting information was provided to the Tribunal.

5.34 On 2 September 2018 the claimant contacted ACAS, and on 3 September 2018 an early conciliation certificate was issued. On 16 September 2018 the claimant presented these claims to the Tribunal.

5.35 By letter of 27 September 2018 (page 98 of the bundle) the respondent wrote a letter before action to the claimant, contending that she had been in breach of contract by failing to give notice, and claiming from her £14,251.60 in damages. The figure for lost income upon which that claim was based was £18,000, and credit was given for the salary the claimant would have earned in the sum of £3,748.50.

5.36 There ensued further communications between the parties which do not advance the issues to be determined.

6. Those then are the relevant facts. It has to be observed that the Tribunal found the claimant's evidence, and indeed much of her case, very hard to follow and comprehend. She has written somewhat rambling and hard to follow documents with wide – ranging comments, and criticisms of the respondent, which has hindered the Tribunal in its task of trying to keep to the issues in the claims, and to consider the legal and factual bases for them. Large parts of the claimant's documents/statement comprised of irrelevant allegations against Wayne Roberts relating to wholly extraneous matters (e.g his alleged conduct at Chester Races, and alleged instances of sex discrimination) which it is hard to see as anything other than attempts at character assassination.

The Submissions.

7. The parties made submissions. For the respondent Mr McNerney had , in his submissions made at the start of the hearing, suggested that the claimant could not complain of constructive dismissal, as she lacked qualifying service present complaint of unfair dismissal, and therefore could not claim constructive dismissal pursuant to section 95 of the ERA. The Employment Judge did not agree, as it is clearly legally possible to bring a contractual wrongful dismissal claim on the basis of constructive dismissal. While section 95 applies in the statutory context common law, wrongful constructive dismissal claims have long been recognised as legally possible. In his submissions made at the conclusion of the hearing he invited the Tribunal to find that whether on 9 or 31 July 2018, the real reason that the claimant resigned was that she had found alternative employment. She may well have been "fed up" at work, but this did not entitle her to claim constructive dismissal. The letter in which she actually resigned did not give any specific reasons. The previous document, if viewed as the reasons for her resignation, does not set out anything that could amount to a fundamental breach of contract of employment. The claimant had relied upon the potential disciplinary hearing for her concerns relating to rule 21, and alleged

accounting errors. The claimant had indeed accepted that she made such errors. There was no repudiatory conduct on the part of the respondent, and the claimant left on 31 July 2018, in a somewhat sneaky way by making sure that she had been paid her bonus that day. On 18 July 2018 the claimant had accepted the offer of employment with Trafford MBC, 13 days before she then resigned. She did not have the common decency to inform the respondent and simply left.

8. Under the WTR claims, he submitted there was no jurisdiction for the Tribunal to consider the claims made in respect of breach of regulation 4, and regulation 10. In relation to arrears of pay there were non-the claimant had been paid a bonus for July on 31 July when she left. She had no further entitlement. Dealing with the retentions these were perfectly lawful consequences of failures on the part of the claimant. These appeared to be all the claims that the claimant was making, and he therefore turned to the counterclaim, which was based upon the legal obligation upon the claimant to give nine weeks notice. If there was no constructive dismissal, the claimant was obliged to give notice to the respondent and was in breach. The respondent was obliged to quantify its counterclaim, and there had been some difficulty in doing that. The respondent had simply looked at its fee income over corresponding period and had quantified the reduction in fees in the region of some £18,000. There were a number of permutations put forward by the claimant in terms of how these calculations might be made, put as strands A, B and C. They depended very much on what view the Tribunal took of her arguments as to whether, and if so when notice was ever given. In terms of the bonus, the respondent was seeking to recover that which had been paid in July 2018, as it would not have been paid if the claimant had given the requisite notice.

9. After an extended luncheon adjournment the claimant made her submissions. In relation to the wrongful dismissal claim the respondent's breaches had made it impossible for her to stay and breach her professional responsibilities as a solicitor. She could have been personally liable, and had to protect her professional position. She was not seeking nine weeks notice pay, or any additional bonus payments. She had suffered injury to feelings, and there had been a breach of the implied term of trust confidence. She was publicly humiliated and had suffered damage but not financial damage. She appreciated that the Tribunal may not be able to make an award in this respect. She argued that the contract of employment was in fact over on 9 July 2018 when she sent her email to the respondent. From that point on a new contract came into being between the parties, which was the reality of the situation when the respondent said that the disciplinary hearing would be held in abeyance. Thereafter no notice was required from either party to terminate this contract. She did not therefore have to give any but in fact stayed on until 31 July 2018. In relation to working time, the claimant had been put into a difficult position and had been discriminated against because of her position as a solicitor. Turning to the counterclaim, the respondent was under a duty to mitigate its losses and had been told from 9 July 2018 that the claimant would be leaving. It had done nothing to mitigate, it had not sought any locum cover or any replacement for her. The respondent also failed to take into account of the change of circumstances, whereby 50% of her caseload had been taken off in any event. The respondent's target income was £8000 per month.

10. She was a high performing employee who had exceeded expectations. The lead-in time for conveyancing files was three months but the respondents were using figures based on a five-month period. They had not used figures based upon profit, but had used turnover. They would have to adduce much more evidence. There was no evidence they did reduce their advertising as a direct result of her departure, and evidence should have been provided. The reality was that they did not suffer any loss, her work was merely absorbed at no additional cost. There was no locum or any overtime incurred. She had been on holiday during July, during which time all her files been placed with other fee earners. This counterclaim is being brought once the respondent knew she was suing them and should be dismissed.

11. The reason she left was that she did want another job. She had endeavoured to make changes, but had to vote with her feet. As at 9 July 2018 she did not have other employment at that time. In relation to the reasons she did give these on 31 July 2018 because she had already done that in replying to the disciplinary invitation. She considered that she was being humiliated as a solicitor and this was unacceptable. The accounting errors were irrelevant, there were many omissions in the imputing and this was a complete red herring. Her report in April showed the position with the files and the respondent had an awareness of the hours she was working. She was not however alleging that she had ever made specific complaints, she had done this discreetly, and the respondent was aware of the position. Finally if there was no entitlement to receive bonus once notice was given, she would not have contributed any more than the basic contractual hours she was obliged to work.

The Law

12. The relevant statutory provisions are set out in the Annex hereto. Clearly, whilst the Tribunal is not considering a complaint of unfair dismissal, it is considering the law of constructive dismissal in the context of a breach of contract, a wrongful dismissal, claim. Similarly, in relation to the respondent's employer's counterclaim, the issue is the predominantly the same – was the respondent guilty of fundamental breach of contract so that the claimant was not required to give any notice, if, indeed, she did not do so?

13. The classic statement of the law on constructive dismissal is set out in the judgment of the Court of Appeal in ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** which held that for an employer's conduct to give rise to a constructive unfair dismissal it must involve a repudiatory breach of contract. There are three elements to a constructive unfair dismissal, namely:

> That there was a fundamental breach of contract on the part of the employer;
>
> The employer's breach caused the employee to resign; and
>
> The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
>
> In order for a Tribunal to deal with these matters it must identify the contractual term or terms, either express or implied, which have allegedly been breached.

> It must then go on to identify a fundamental breach of that contract on the part of the employer. The implied term of trust and confidence was the term of the contract which had allegedly been breached by the respondent by various acts or omissions over a period of time which, the claimant says, cumulatively amounted to a fundamental breach. The Tribunal, therefore must firstly decide whether the employer was guilty of conduct which is a significant breach , going to the root of the contract of employment, or which showed that the employer no longer intended to be bound by one or more of the essential terms of the contract.

14. The claimant relies upon the implied term of trust and confidence. That term, as recognised in cases such as ***Wood v. W M Car Services (Peterborough) Ltd [1981] IRLR 347*** and ***Mailk v BCCI [1997] IRLR 462*** is that the respondent will not , without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.

15. It is also clear that in order to establish that there has been a fundamental breach of contract it is not necessary to show one fundamental act or omission. There does not need to be one event, there can be a series of events which cumulatively amount to a breach of that implied term. In such circumstances, where there is not one individual act or omission relied upon, but a series of actions that are alleged to amount to that breach, where they culminate in one particular act that is known as the "last straw", and in order to establish that a claimant has been constructively dismissed there has to be a last straw. In the leading case considering on this issue, ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35,*** a decision of the Court of Appeal and the judgment of Lord Justice Dyson, it is clear from the discussion of the nature of constructive dismissal, that in order for there to be a constructive dismissal where there is a series of acts, the final straw must be there, and although the final straw may be relatively insignificant, it must not be utterly trivial. There must be a final straw, otherwise there can be no constructive dismissal. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. The judgment goes on to say:

> *"A claimant cannot subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."*

Moreover, and this is an important part of the judgment:

> *"An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence have been undermined is objective."*

16. So, to the extent that the claimant might have perceived that as being the case, the Tribunal cannot rely solely on that, it must look objectively on the act complained of as being the final straw.

Discussion and Findings.

The constructive dismissal.

When and how did the claimant's employment end ?

17. The Tribunal will start with this issue as it is the starting point for the claimant's breach of contract claims, and the respondent's counterclaim. The first issue is whether the claimant resigned in circumstances that constituted a constructive dismissal, in accordance with the legal tests set out above. That requires the Tribunal to decide first the respondent was guilty fundamental breach of contract entitling the claimant to resign, and secondly that she did in fact resign in response to that breach. The third issue is whether claimant had resigned sufficiently promptly so as not to have lost the right to resign and complain constructive dismissal by reason of acquiescence, a concept which she was clearly aware given the terms of note on departure on 31 July 2018.

18. A further issue is when the claimant's employment ended. The claimant, on her claim form, at box 5.1, put as the date that her employment ended 31 July 2018. In the ET3, at box 4.1, the respondent agreed that the dates of her employment were correct. The claimant resigned giving no notice at the end of the day on 31 July 2018, by the letter she left on Catharine Crossley's desk. Her preceding document of 9 July 2018 (pages 229 to 230 of the bundle) expressly states that she is not giving notice. Her letter (page 235 of the bundle) however, can only be read as an immediate resignation.

19. In terms of the fundamental breach of contract the claimant has never really set out suddenly in her witness statement matters of which she relies constituting that fundamental breach. The term that has allegedly been breached is the Tribunal supposed, and the claimant's submissions confirmed, the implied term of trust and confidence as discussed above. In terms of the elements of the respondent's conduct which cumulatively have resulted in a breach of that implied term , the claimant has not been clear, but it is in essence , the Tribunal gleans , all the matters have been comprehensively set out in the documents and evidence before the Tribunal. In summary therefore the conduct relied upon appears to be a combination of excessive workload, excessive hours, failure to engage in constructive discussion as to help improve firm's commercial property business, failure to negotiate an improved remuneration package, an unfair bonus scheme, instructions to participate in conduct which would amount to a breach of the solicitor's Code of Conduct, and, finally, being potentially disciplined for refusal to participate in this, and for trivial alleged performance issues.

20. The claimant has not identified as such a "last straw", but given that she relies upon no single act of omission on the part of the respondent as constituting a fundamental breach of itself, she must do so. The Tribunal can only see the events of

4 July 2018 as being any conceivable last straw. Those events were, of course, the respondent's response to the claimant's document setting out her concerns about six files that she was handling, and the convening of the disciplinary hearing to consider the five matters set out in the respondent's letter of 4 July 2018. Whilst it is clear from ***Omilaju*** cited above that a last straw does not of itself have to have the character of a fundamental breach of contract, it still has to be some form of conduct on the part of the employer of a similar nature, and must not be innocuous or innocent. This is consistent with the requirement that, in order to breach the implied term of trust and confidence, the employer must not "without reasonable and probable cause" behave in the proscribed manner.

21. Regardless therefore of what preceded these events, the Tribunal's focus must inevitably be upon what the claimant herself identified in her letter of 9 July 2018 as being the reasons behind her decision to resign. Those reasons were predominantly based upon her concerns in relation to compliance with the solicitors' Code of Conduct. The other matters that she discussed related to the inputting errors that she had made. She did not dispute that there had been such errors, but she sought to explain them and put them into context. She makes no mention of the respondent's response to her document expressing concerns at a potential "corporate attack", and this does not appear to have been any part of the reason why she resigned. Whether it was or was not, the Tribunal could not regard that response as in any way constituting part of any last straw entitling the claimant to resign,

22. The question therefore is whether the invitation to attend a disciplinary hearing to discuss the five matters set out in the letter of 4 July 2019 could reasonably be regarded as a last straw. Was that letter "without reasonable and probable cause"? The Tribunal considers not. Firstly, it was only an invitation to a disciplinary hearing, it was not a disciplinary sanction. Secondly, whilst the claimant may well have had genuine concerns as to compliance issues arising from GoMoveMe , she was facing disciplinary action not for the fact of those concerns, but the manner in which she took it upon herself to disregard an instruction given by the respondent, and to take unilateral action to remove the advertising banner that had been placed in the communication systems. That was a perfectly legitimate matter for the respondent to raise with her , and explore in a disciplinary meeting, as indeed were the performance issues which the claimant acknowledged were factually correct, but which could and would have been further discussed in that meeting. Whereas there are clearly circumstances in which an employer's threat of , or abuse of , disciplinary processes can be considered to be without reasonable and probable cause, and may amount to a breach of contract, or indeed a last straw, the Tribunal does not find that the respondent's actions in this regard begin to satisfy that test.

23. Consequently, the claimant falls at the first hurdle in that she has failed to establish a fundamental breach of contract, or a last straw, in response to which she was entitled to resign.

24. If, however, the Tribunal was wrong on that, it would then have to go on to consider whether the claimant did indeed resign in response to such a breach or last straw. The Tribunal finds that the claimant did not resign in response to this breach or last straw, but did so because she no longer wished to work for the respondent,

considering that she was underpaid, and underappreciated. That she had, as emerged in the course of the hearing, been seeking alternative employment well before 9 July 2018, indeed before she even received the letter of 4 July 2018 demonstrates that she had made this decision long before the events of 4 and 9 July 2018. Indeed, the claimant's own case is inconsistent on this aspect, as on the one hand she argues that the respondent was aware from the submission that she made in April 2018, that she was going to leave, thereby in effect giving the respondent nine weeks notice from 7 May 2018. If that is right no conduct on the part of the respondent after, at the latest, 7 May 2018 can have any bearing upon the claimant's claim, as she had already decided to leave by that date.

25. The Tribunal is satisfied that the claimant was doubtless unhappy, and found aspects of the respondent's remuneration package, workload and unwillingness to expand upon the commercial property side, unsatisfactory features of her employment. It is not surprising therefore that by June 2018 she had decided to move on. The Tribunal agrees with the respondent's submission that she timed her resignation so as to ensure that she received as much bonus as possible, and when she had secured alternative employment before her resignation. The claimant was not constructively, and therefore not wrongfully, dismissed.

26. She has, of course, not pursued a claim for notice pay. Her only claim in relation to the breach of contract relates to the bonus of £1750 which she could have expected to have been paid at the end of August which was not paid. That claim has since not been pursued, and in any event must fail.

27. This finding, however, is also of relevance to the respondent's counterclaim. If the claimant did resign without notice in circumstances where she was not entitled to do so, it would be her who was in breach of contract by not giving the requisite nine weeks' notice required by her contract of employment. The claimant, however, argues that regardless of whether she was constructively dismissed, she either gave the requisite notice, or there was a variation of her contract of employment so that the express terms as to the provision of notice by her no longer applied, and she was not required to give any. This contention is set out in a paragraph (rather typically not given a paragraph number) in her statement/comments/response to counterclaim document, at page 44 of the bundle, in which she says:

> *"From 9th July there was a new rolling minute – by – minute contract for services that was terminable at any time by either party without notice. This is affirmed by the Respondent in that the disciplinary hearing on a matter for summarily* (sic) *dismissal without notice was held 'in abeyance'."*

28. That is, with respect, a wholly incorrect analysis. Firstly, the claimant presumably did not mean to say that there was then a contract for service<u>s,</u> as opposed to a contract of service, as, if she did , that would not be a contract of employment, and the Tribunal would have no jurisdiction. Rather, what she meant is that the contract of service between the parties was varied at this point by these actions. That is a wholly incorrect construction of these events. All that happened was one party told the other that she was going to leave, but was not actually giving notice at that point, and the other agreed not to proceed with a pending disciplinary process.

If anything, the implication of what the claimant wrote was that she would, at some point in the future, be giving notice, not that she no longer thought she had to. The claimant has sought to make a quantum leap, and has extrapolated from this exchange a construction that it simply cannot bear. Presumably, had the respondent then sought to dismiss her without notice, she would not then have argued that the contract had been varied in this manner, although she told the Tribunal that this was the case. There was no variation, and the terms as to notice remained. For completeness, however, if the Tribunal was wrong on this point, and on the basis that this was still a contract of service, there would still have been a requirement for the claimant to give one week's notice, deriving from s.86(2) of the Employment Rights Act 1996. If, as the Tribunal finds, she was not constructively dismissed her resignation without notice on 31 July 2018 was a breach of contract, for which the respondent could seek damages, limited, of course, to the shorter notice period of one week.

29. The claimant's contentions cannot be correct. The claimant has sought by reference to unilateral actions on her part to advance some form of implied variation of the original contract of employment. There is no basis for any such implication. This is not a matter of employment law, it is a matter of basic contract law. The claimant has not advanced any legal basis for such implication, and applying the contractual tests the Tribunal can see none that would apply. Presented, for example with the circumstances, the Tribunal cannot see how "the officious bystander" would have considered that the respondent must have agreed to the alleged contractual variations contended for by the claimant. In short, her actions were unilateral, and were not expressly accepted as variations of the contract by the respondent, which the claimant has never seriously suggested, nor were they impliedly so accepted.

30. It thus follows that as her constructive wrongful dismissal claim fails, her resignation without notice in the circumstances put her in breach of contract and the respondent is entitled to damages for such losses as can be shown to have flowed from that breach of contract.

The employer's contract claim.

31. Given the finding that the claimant's resignation was not a constructive dismissal, it follows that in not giving the required 9 weeks notice, the claimant was in breach of contract. This gives rise to a separate and distinct issue between the parties, that is quantification of the respondent's counterclaim. The counterclaim has been put on the basis of the loss of fee income as a consequence of the claimant's sudden departure from the business. Further, or in the alternative respondent seeks to recover payment of the bonus that was paid to the claimant which would not have been paid, had the claimant given her requisite notice to expire on 31 July in accordance with the contract of employment.

a) Recovery of the bonuses paid in May, June and 31 July 2018

32. Para. 10 of the response (page 26 of the bundle) sets out this head of the counterclaim. The respondent sought recoupment of three bonus payments, paid in May, June and July but appears now only to be pursuing the last one. The last one, of course, was paid the day the claimant resigned without giving notice.

33. To some extent the Tribunal can see how these claims are in response to the logic of the claimant's claims. If the claimant is contending that she had in reality given notice in May 2018, the respondent would be entitled to argue that she was not then entitled to the bonuses paid thereafter, as she had then given notice. The Tribunal, however, has found that was not the case.

34. With all due respect to the respondent, it cannot have it both ways. Having found that the claimant resigned without notice on 31 July 2018, and not earlier, the respondent cannot seek to recoup the bonuses that were paid to her whilst she was still in its employment, and had not actually given, or been given, notice. The breach was not "failing to give notice sooner", simply because, if she had done the bonuses would not have been payable, the breach was terminating without notice on 31 July 2018. The claimant had a contractual entitlement to the bonuses until she had given or been given notice, or terminated without doing so, and the respondent has no legal basis for recouping the bonuses that were paid just because, had the claimant given earlier notice, she would not have been entitled to receive them. This may be the claimant taking full advantage of her contractual position, but the claimant was, as the respondent would have been, perfectly entitled to do so. These claims fail.

b) Losses arising upon the claimant's departure without notice.

35. Dealing with the next issue, this relates to losses that the respondent has allegedly sustained by reason of the claimant's sudden and unlawful departure from the business. In cases such as this it is not uncommon to see employers seeking to recover additional recruitment or hiring costs for temporary staff taken on to replace the departed employee. No such claims are made in this case, however, the respondent limiting its claims to the loss of fee income attributable to the claimant's departure. This has been calculated by reference to the respondent's accounting records, and profit and loss accounts which have been produced to the Tribunal. The respondent did not recruit a replacement for the claimant within what should have been her notice period, and invites the Tribunal to apply effectively a pro rata approach to the reduction in fee income it claims to have suffered.

36. The evidence produced by the respondent is in the form of extracts from its accounting records. The claimant generated fees over a 12 month period of £116,162.98, an average of £9,6802.24 per month (see page 279 of the bundle). The respondent's fee income in the three months up to the end of July 2018 was, on average, £91,180 per month (pages 280, 281 and 282 of the bundle). Following her departure, to the end of December, that fee income for five months was £355,420, as opposed to an expected £445,901 based on the preceding months. The respondent contends that there is a shortfall of some £21,780 between the fee income that would have been received in that period, which it attributes to the claimant's departure.

37. The claimant has produced alternative calculations, in some detail and of some complexity, in relation to quantification of the respondent's counterclaim. Her first point is that by the time of her departure 50% of the caseload had been taken off her. She also makes the point that she had three weeks of holiday booked prior to her departure. She questions whether the respondent has shown any loss at all.

38. A number of points arise. Firstly, the burden of establishing loss lies upon the respondent. It must show what losses flowed from the breach on the part of the claimant in not giving nine weeks' notice. Secondly, it must be kept in mind that losses resulting from the failure to give notice will not necessarily occur during that period. In other words, the effects of the breach are not necessarily apparent during the period of the breach, they may well arise later. This is especially so where there is a process, a lead in time, following which bills are submitted and paid, in this case usually about three months. It is therefore, an error to focus on the immediate period of nine weeks from the date of termination, but equally an error to ignore any more immediate effects, if any are apparent.

39. The difficulty for the respondent is that it needs to show a causal link between any losses sustained, and the claimant's breach. Whilst Wayne Roberts has asserted (para. 65 of his witness statement) that the claimant's departure resulted in the remaining fee earners becoming overstretched, which "reduced their ability to take on new files", no evidence has been produced to show this decline in new instructions following the claimant's departure. All the respondent has been able to demonstrate therefore has been a reduction is fee income over the last five months of 2018. There may be many reasons for that, other than the claimant's departure, which, of course, can only be relevant for 9 weeks. Further, as the claimant established in cross – examination, there were other departures in August and September 2018, and new starters, who needed two months to get up to speed, were not taken on until October or November 2018. Given that no losses will arise until there is any reduction in new instructions, as the claimant's work in progress as at 31 July 2018 will have been completed by others and billed subsequently, the earliest that any effects of any reduction in new instructions would be felt would be November 2018.

40. Another factor to be considered is whether the respondent can simply seek the reduction in fee income as the measure of loss. It has sought to do so on the basis that the only saving on the departure of a fee earner is their salary, as all other overheads remain. The Tribunal notes, that the respondent has therefore in its calculation of the counterclaim at paras. 7 to 9 of the Counterclaim (pages 25 and 26 of the bundle) taken the claimant's average fee income figures for the preceding 12 months, taken the shortfall between the expected fee income for the firm over the next 5 months, and calculated that, of this shortfall, some £21,780.06 is attributable to the claimant's departure.

41. An examination of these figures is required. Firstly, taking the 5 month period, the respondent calculates that fee income was down by £89,661 (i.e £455,901 - £366,240 in para. 68 of Wayne Roberts' witness statement). Of this the claimant's departure is said to account for £21,780.06. That figure, it appears, is based upon her average fee income, pre – termination, of £9,860.24 per month. It may be what is thought to be 9 weeks' fee income based on that figure, but if it is, it is incorrect, as 9 weeks at £9,860.24 per month produces a figure of £20,105.11. Further, it is to be noted that whilst the claimant was one of several fee earners (the respondent has not specified how many, but it is more than four) her departure is being credited with around 25% of the reduction in fee income.

42. Another factor, of course, is that whilst the respondent has utilised an average of the claimant's contribution to fee income based on the preceding three months, in July 2018 she asked that her workload be decreased, and 50% of her files were taken off her. That would doubtless have been the position for the 9 weeks of her notice period, had she worked it, so her contribution to turnover would presumably also have reduced by 50%. of what it had been Further, in para. 8 of the counterclaim the respondent has set out what the claimant would have been paid during the notice period, £3,749.93. This is presumably based on her basic salary of £20,000. Again, this figure seems wrong, as 9 weeks pay based on £20,000 per annum is £3,461.53. This ignores, however, possible bonuses. Whilst the claimant had reduced her workload by 50%, if like is to be compared with like (i.e that is ignored) the bonuses the claimant may have earned also need to be factored in.

43. A further factor the respondent has overlooked is employer's national insurance contributions (currently 13.8% payable once earnings are above the earnings threshold).

44. What the Tribunal needed really was an assessment of the loss of profit that the claimant's breach caused to the respondent's business. There are many factors that may have led to the fee income variations, and a less than forensic approach has been taken to the calculation of the losses occasioned by the claimant's breach. Whilst there may well have been an affect upon the profits of the respondent's business, the evidence produced by the respondent falls well short of establishing , on a balance of probabilities, that this has been so, and, if so, what proper quantification of this loss should be. At best , the losses which flow from the claimant's breach are no more than speculative, and the Tribunal cannot award them on that basis.

45. For those reasons the respondent , whilst having established that the claimant did resign in breach of contract, has not satisfied the Tribunal that it thereby has sustained any financial loss, and certainly has failed to demonstrate what that loss has been, so no award of damages is made, other than an award of nominal damages in the sum of £1 (see ***Surrey CC v Bredero Homes Ltd. [1993] 1 WLR 1361***).

The claimant's other claims.

46. The above deals with the most substantial elements of these claims , and the counterclaim. Turning now to the remainder of the claimant's claims, as the Tribunal has been able to understand them, the Tribunal makes the following findings. Taking them from the claimant's document at page 28 of the bundle:

> *i)£1,750 which the Claimant could reasonably have expected to have been paid at the end of August which was not paid*

47. This has been dealt with in the dismissal of the claimant's breach of contract claim, and is dismissed.

> *ii)£1,666 basic salary (to be confirmed)*

48. This was withdrawn.

iii)£400 across two retentions

49. This claim is amplified in para. 16 on page 51 of the bundle. It relates to the respondent's agreed practice of withholding from bonus payments the sum of £200 pending registration of title at the Land Registry. Two files are referred to, one which was completed before her resignation, one which was not. As the entitlement to bonus ceased upon resignation, the latter cannot succeed. The claimant could not, or would not, identify the former, and hence has not proved the alleged deduction. These claims fail.

iv) £200 in respect of fees deducted and therefore bonus lost as a consequence of the Respondent taking £200 and failing to allow the Claimant the benefit of the firm's professional indemnity insurance

50. This claim is amplified in para. 21b. , at page 56 and 57 of the bundle. It relates to an incident where there was an error in the submission of a Form MR01, which is required by Companies House to register a charge against a limited company. As a result of an error being made, the form was not accepted, and the position then had to be rectified by the obtaining of a Court Order. The claimant's complaint is that the cost of rectifying this was deducted from her income for the purpose of calculating her bonus, and she seeks £200 as her estimate of the loss of bonus she sustained. In evidence, however, she confirmed that:

a) This had been as a result of her mistake;

b) It had occurred over 8 or 9 months before she resigned;

c) The reduced bonus she received had been paid sometime in 2017;

d) She was aware that this deduction had been made at the time;

e) She did not complain or grieve about this.

51. A number of points arise. Firstly, this claim can only be pursued as an unlawful deductions from wages claim. As such it must, by s.23(2)(a) of the ERA be presented within three months of the payment of the wages from which the deduction was made. This claim was not brought until 16 September 2018, and must therefore be considerably out of time. Whilst there is power to extend time for presentation if it was not reasonably practicable to have presented it within time, the Tribunal can see no basis upon which the claimant could argue that it was not reasonably practicable to have presented it within time.

52. Secondly, even if the Tribunal could consider it, the Tribunal sees no merit in it. It was, the Tribunal would find, an implied term of the scheme that the respondent could deduct such costs, and the fact that it need not have done is irrelevant. Given that the purpose of a bonus scheme is to reward good performance, it is entirely consistent with such a scheme that the respondent is entitled to deduct from the figure

upon which the bonus is calculated any sums which have reduced the firm's fee income by reason of any error made by an employee. This claim is dismissed.

> *v)£300 x 15 months = £4,500 for losses suffered as a consequence of the Respondent's abortive fees policy*

53. The claimant has set out this claim, and provided details of it at para. 21 c , page 57 of the bundle. Her complaint is that the respondent excluded from the calculation of bonus entitlement fees that were potentially earned in respect of transactions that were aborted. She considers this unfair, and that 10% of all files were abortive. This is thus not a complaint of unlawful deductions from wages, or even breach of contract, it is a complaint of an unfair term. The Tribunal has no jurisdiction to re – write unfavourable terms in employment contracts and this claim must be dismissed.

> *vi) Claim for additional hours worked over contracted hours (illustrative figure 23,092) or over working time regulation maximum hours (illustrative figure 12,315) where the figures given are for illustrative purposes; an accurate calculation frustrated until the respondent produces their working time regulation records.*

54. It was unclear precisely what type of claim the claimant was making by this claim. It appears to be a claim to be paid for all the hours that she worked. As such it must be an unlawful deduction from wages claim. Such claims, however, are based on contractual entitlement, i.e. a claimant claims that they were not paid what the employer had agreed to pay them. The claimant's claims here, however, are brought on the basis that she did not have any contractual entitlement to be paid for these hours, and she considers that she should have. Her complaint is that the contract did not provide for payment for these additional hours.

55. Further, in discussion with the claimant, and from other submissions she has made about working time, these may have been claims alleging breach of the Working Time Regulations. The Tribunal as limited jurisdiction in this regard. Regulation 4 of the Regulations sets the limit upon weekly working time of 48 hours. This can, of course, be subject to an opt out. Breach, however, cannot be enforced by means of a claim to an Employment Tribunal. The claims that an employee or worker can bring to an Employment Tribunal are those set out in Regulation 30. They do not include breach of Reg. 4.

56. The claimant, however, in her document at page 29 of the bundle also seeks to make claims of breaches of regs. 10, 11, and 13, which relate to daily rest, weekly rest and annual leave. Such clams can be brought under reg. 30. Her complaints, however, are not of any refusal by the respondent of any attempt by her to exercise any of these rights. The most she says in all her evidence and submissions is that she had a very high workload, worked all these hours (and, by implication, did not take the requisite daily or weekly rest breaks) , and that the respondent knew this, and did nothing about it.

57. Indeed, in para. 4 of this document (page 39 of the bundle) the claimant expressly says that she took breaks when in the office as would be expected. In terms of annual leave, she clearly took some in July 2018. Nowhere, unless the Tribunal has missed it amongst the extensive submission made by the claimant, is there any instance of the respondent refusing the claimant the right to exercise any of her WTR rights. The thrust of her argument appears to be that in order to achieve the bonus, and hence what she considered an appropriate level of remuneration, she had to work such long hours, and at weekends in order to achieve it.

58. That there has to have been a refusal of a request to exercise a right under the WTR before there can be any liability under reg.30 is confirmed by the decision of the EAT in ***Carter v Prestige Nursing Ltd UKEAT/0014/12/ZT*** where HHJ Richardson followed the previous judgment of the EAT in ***Miles v Linkage Community Trust [2008] IRLR 602*** which had similarly held that a request and a refusal were prerequisites to liability under reg.30. Thus, as the claimant cannot point to any request and refusal, but only to complaints about her working hours in general , in which she does not mention that she is unable to take daily or weekly rest breaks, or seek to do so, any claims on this basis must also fail.

59. There was also discussion as to whether the alleged requirement to work these additional hours had repercussions for whether the claimant was paid the National Minimum Wage. Again, the Tribunal has no direct jurisdiction to enforce the National Minimum Wage. It can only do so by means of an unlawful deduction from wages claim. Thus, the only relevance the NMW provisions can have will be to the issue of whether, if the claimant is not paid for the additional hours worked, that took her hourly pay to below the relevant NMW level.

60. It is to be observed also in connection with the claimant's contention that she was, or may have been, paid less than the national minimum wage, in her document of April 2018 (page 135 of the bundle) in which she set out proposals to improve the firm's commercial work, when referring to the hours that she was working at weekends, the claimant said that she worked some extra 20 hours per week , and calculated that her hourly pay on that basis was £10.57. That, the Tribunal calculates must be based on a standard week being 40 hours, so that in total the claimant was working a 60 hour week. That is, of course, well above the then applicable national minimum wage of £7.83 per hour. Applying an 80 hour week to that calculation, based on the salary she used of £33,000 per annum, produces an hourly rate of £7.93, still above the NMW.

61. The two last pay slips are July and June 2018. In the former her gross pay for the month was £3481.51 and in the latter it was £3741.31. For the claimant to have fallen below the NMW in either of those months she would need to have worked in excess of 109 hours per week in July, and 119 hours in June. In July she was on holiday for part of the month, and there is no evidence that she worked those hours in June. Any claim based upon the NMW, therefore has no reasonable prospects of success. Further, given that the claimant presented her claims on 16 September 2018, having instituted early conciliation on 2 September 2018, and received her certificate on 3 September 2018, any claim pre – dating 3 June 2018 would be out of time. Whatever claims the claimant seeks to bring in relation to these additional hours, therefore, cannot succeed and are dismissed.

vii)Damages

62. As the claimant is now aware, the "damages" that a Tribunal can award for breach of contract are limited to liquidated sums arising on, or outstanding at, the date of termination, in essence, notice pay. No other type of damages for breach of contract are recoverable.

Conclusion.

63. The Tribunal considers that this deals with all the claims that the claimant has sought to make, in her original claim form, or as advanced in her documentation submitted to the Tribunal, or in her evidence. For the avoidance of doubt, all her claims are dismissed, and the respondent's employer's contract claim succeeds, to the limited extent set out above.

Employment Judge Holmes

Dated : 9 August 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 August 2019

FOR THE TRIBUNAL OFFICE

ANNEX

The relevant statutory provisions

The Working Time Regulations 1998

30 Remedies

(1) A worker may present a complaint to an employment Tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; …

(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or

(iv) regulation 25(3), 27A(4)(b) or 27(2); or]

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) Subject to regulations 30A and 30B, an employment Tribunal] shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

(3) Where an employment Tribunal finds a complaint under paragraph (1)(a) well-founded, the Tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the Tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment Tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.

Employment Rights Act 1996

23 Complaints to employment Tribunals

(1) A worker may present a complaint to an employment Tribunal —

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

[(3A) [N/a]

(4) Where the employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

(4A) An employment Tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

(5) [N/a]