EMPLOYMENT TRIBUNALS

Claimant: Wendy Horrocks

Respondent: Stateside Food Limited

Heard at: Manchester via CVP **On**: 22 February 2022

Before: Judge Miller-Varey sitting alone

Representation

For the Claimant: In person

For the Respondent: Mr Philip Warnes (Solicitor)

RESERVED JUDGMENT

1. The Claimant's claim for unpaid arrears of wages is struck out under rule 37(1)(a) because it was presented outside the time specified in sections 23(2) and 23(3) of the Employment Rights Act 1996 and there is no reasonable prospect of the Claimant showing it was not reasonably practicable for her to bring her claim within the necessary period or that there are grounds to exercise discretion to extend time.

2. The Respondent's application to strike out the Claimant's claim for unfair constructive dismissal is refused since none of the grounds in Tribunal Rule 37(1) are made out.

REASONS

1. These reasons make reference to page numbers. Unless otherwise stated, these relate to the correspondingly numbered pages of the preliminary hearing bundle first provided for the hearing of 15 October 2021.

Background

2. The Claimant was employed by the Respondent as a quality auditor between April 2018 and December 2020. In her original ET1 presented on 2 March 2021 the Claimant seeks (a) unpaid arrears of wages and (b) compensation for constructive unfair dismissal [p.6-17]. The Respondent resists both claims [p.21].

3. A preliminary hearing took place on 15 October 2021 during which the Tribunal identified the ET1 as somewhat unclear and the claims it advanced were problematic in a number of respects. The Claimant clarified her belief that she was underpaid wages between the end of her 12-week probationary period in 2018 and the implementation (she says, belatedly) of a promised pay rise in July 2019. EJ Doyle commented that on its face this complaint was out of time and there was nothing before him to address the time limitation problem, including within the ET1.

4. In relation to the constructive unfair dismissal claim, EJ Doyle included the following within his Case Summary:

   34. The claimant says today (although less apparently in her ET1) that she resigned because she felt that her employer was pushing her out. She cites the dispute about the under-payment of wages, and then a separate dispute in or around November 2020 about the issue of a new contract of employment that incorrectly recorded that the period of notice that she was required to give to the respondent was three months rather than one month. She regarded that as the final straw.

   35. However, for the first time today, the claimant also raises a much earlier dispute about the provision and wearing of work shoes in or around December 2019 or before. There is no mention of this in the ET1. The claimant will need to provide full particulars of it and to ask the Tribunal to be permitted to amend her claim.

   36. There are two further potential difficulties with the constructive dismissal claim.

   37. First, the claimant was looking at other work opportunities and accepted an offer of employment at about the same time as her resignation.

   38. Second, it appears that the claimant makes no reference to any of the above matters in her resignation letter.

39.None of that is necessarily fatal to her position that her resignation is a constructive dismissal, but I note the evidential difficulties she might face in establishing that her resignation was a reaction to the conduct of the respondent, as section 95(1)(c) of the Employment Rights Act 1996 and its associated case law might require

5. Accordingly, EJ Doyle directed a further Preliminary Hearing to consider if the claim might be amended (paragraph 2.3) and whether the claim as whole or either of the complaints might be struck out under rule 37, or alternatively made the subject of a deposit order (paragraphs 2.4 and 2.5).

6. The Claimant was ordered to put in writing to the Tribunal and to the Respondent's legal representative the full extent of her complaints *"in sufficient detail for the Tribunal and the respondent to understand both the wages complaint and the constructive dismissal complaint."* This was to be done no later than 1 February 2022.

7. Under paragraph 7.1 of EJ Doyle's orders, the document provided by the Claimant is to be used as the basis for consideration of the various applications. The CMO devoted a number of paragraphs to where and how the Claimant could access information useful to the proceedings.

Procedural issues at the hearing

8. On 16 January 2022 the Tribunal received an email from the Claimant together with 6 attachments. This was copied to the email address of the Respondent's solicitor but did not then reach him. The email read as follows:

"I am writing information and attaching correspondence as requested.

I had my interview on the 16th of April with Charlotte Fairhurst , my pay was discussed on the Interview and i was told this would go in line with all other Qas after 12 weeks probationary period as did all other Qas on both sites.

I started work on the 24 for 3 days then did my induction on the 30th then resumed work on the 1st if May, this was due to it being my 50th birthday and me have time away with my grandchildren then friends.

The probationary meeting took place and Charlotte went on maternity leave.

In April 2019, when our pay increased , my colleague pointed out i was on lesser pay and should of gone in line with them.

This was discussed with my Manager.

After several emails and i meeting with my Managers Manager i was told i might be considered the year after.

I discussed this with the Factory Manager and in July i went in line with the other Qas, i requested the arrears and was told i would not recieve this, i then sent a letter to the Hr department and recieved a letter back , i have attached this, so you can see the start date they have written and how helpless i felt as the Hr

department are there to help, this was the reason i did not pursue the arrears further.

In Dec 2019 i was on my second pair of safety shoes, these had broken down and i was having pain in my foot.

I emailed Health and Safety several times, i spoke to my Manager and requested could i wear suitable safety shoes i had purchased myself in April , he spoke to Health and Safety and they requested the specification of the shoe i sent this to my Manager and Charlotte via whattsapp but Barbara Mioze had Charlottes phone.

I was told by Health and Safety i could not wear the shoes , i then sent them a picture of my foot and they said they would order some shoes and that the couldnt get my size i could either go up or down a size, i went up when they did come the were too big i demonstrated this to my Manager, i emailed Health and Safety and took the shoes to reception for them to collect, i did not hear from H+S again , i recieved a call from reception to pick some shoes up and they were the same shoe i had left 8 week previous i sent emails but did not hear back from H+S. I had to carry on working in the shoes and with pain in my foot

I finaly got an xray due to covid this year and had an appointment with the Muscatel team, i was refered to a consultant and given cortisone on the 14.01.2022, the foot is damaged and will be managed with yearly cortisone, and possibly surgery when i am older, i have attached the xrays.

In Nov i was given a new contract without any consultation and on investigating my notice period had been changed, i questioned this and was given no answer after requesting several times, my colleagues had stayed the same notice period only mine had been changed as all the contracts were the same document and version number, mine must have been manualy changed ,my colleague investigated this, this was the final straw for me i handed my notice in the following week .

I have copied acas in with the information ."

9. On 18 February 2022 (i.e., the Friday before the preliminary hearing scheduled for Tuesday 22 February 2022) the Respondent sent to the Tribunal and to the Claimant via email, its skeleton argument for use at the Preliminary hearing. This document asserted that the Claimant had made no attempt to comply with the order of EJ Doyle. It submitted that the default by the Claimant constituted both non-compliance with orders and a failure to actively pursue her claim such that the claims should be struck out without further consideration (paragraph 4). It went on to argue for the same outcome on the alternative basis that neither complaint has reasonable prospects of success.

10. The Claimant replied to the Respondent's email the same day. She wrote "please see attached". However, there was no attachment. Instead, the email included within the body, the text from her email of 16 January, prefaced by the words *"on the 16 Jan 2022, 22.13 [the Claimant] wrote..."*. The text that followed was identical to that in the email to the Tribunal of 16

January 2022. Emails were then exchanged between the parties in which Mr Warnes (a) indicated he had not received the email of 16 January 2022 and (b) asked if the Claimant could forward anything else she wished to rely upon. The Claimant replied but nothing further was received by the Respondent's solicitor.

11. On learning of these matters at the commencement of the hearing, the Tribunal attempted to send the Claimant's emails with their attachments to Mr Warnes. These could not be delivered and an error message was instead received. Mr Warne indicated there had been isolated, similar incidents in the past when other senders' messages had not been delivered but in those cases (as was the Tribunal's experience) the sender would be notified with an error message. The Claimant told the Tribunal she did not receive such messages.

12. The Respondent opposed the admission of the attachments on two principal grounds: (a) the parties would not be placed on an equal footing because the Respondent had not seen them and (b) any adjournment for that purpose would lead to undesirable delay.

13. In the circumstances, and in accordance with the overriding objective, I determined that for the purposes of considering the applications I should have regard to the body of the Claimant's email of 16 January ("the narrative email") but not to the attachments. The reasons follow in paragraphs 14 to 17.

14. Paragraph 7.2 of the CMO directed that the basis for the consideration of all the applications would be "the document". The onus was therefore upon the Claimant to put her case within the four corners of a document. She was given an adequate opportunity as well as suitable guidance to undertake this task. Only the email could be said to fulfil that function. None of the attachments were descriptions of the claim. Rather, the attachments (as the email makes plain on its face) were provided chiefly by way of supporting evidence.

15. The correct approach on an application to strike out is to take the allegations made by the Claimant at their highest. In other words, the assessment of prospect of success should be made on the footing that the factual assertions which the Claimant makes are capable of proof. That applies unless there are central facts which are instantly demonstrable as untrue. The Respondent has not asserted that here. It follows that the attachments - intended to be evidentially supportive of the claimed facts – could not add to the Claimant's case which is already taken at its highest, for purposes of the strike out application. The position is somewhat different in the case of the Respondent's alternative applications for deposit orders, where it is permissible to have some regard to the evidence on the merits.

16. Even though the attachments could afford limited advantage to the Claimant on the hostile applications she faced (for the reasons already given), the Respondent should nevertheless be given an opportunity to make its own assessment of them and to independently urge upon the Tribunal any issue

of weight or relevance. Logically, this could only be done with prior sight of the documents and the opportunity to take instructions. This would necessitate an adjournment with the attendant delay and costs. This was not a proportionate step.

17. This conclusion was not altered by my express finding that the Claimant had taken clear steps to comply with the order in a timely fashion.

18. Following my decision about the document, Mr Warnes formally withdrew the assertions made within his skeleton alleging wilful non-compliance by the Claimant. Rather, he now relied upon non-compliance only to the extent that the material in the narrative email did not, he argued, materially advance the Claimant's case beyond that which was in substance within the ET1. Mr Warnes submitted it was deficient because it did not allow the Tribunal and the Respondent to understand both the wages complaint and the constructive dismissal.

Amendment

19. EJ Doyle directed that the hearing should consider the question of amendment of the ET1. As a matter of fairness that question should be considered prior to the applications to strike out. That accords with it also having been discussed with Mr Warnes at the earlier PH (as he told the Tribunal on 22 February) that, contrary to the CMO, he need not file his submissions in support of the strike out application until after the Claimant had been given a chance to provide a written document in accordance with paragraph 7.1 of EJ Doyle's order.

20. There is no formal written application to amend from the Claimant but axiomatically, she would not have furnished the narrative email had she not wanted to rely upon its contents.

21. I permit the Claimant to amend her claim so that it comprises the ET1 together with the contents of the narrative email. In real terms this involves the addition of the allegation in relation to a dispute about the provision and wearing of work shoes.

22. In granting that application I have had regard to the Presidential Guidance on Case Management, Guidance Note 1 (Amendment of the Claim and Response including adding and removing parties), and weighed the relevant factors to be balanced as set out in paragraph 5 namely: the amendment to be made, time limits and the timing and manner of the application.

23. In my judgment the amendment involves the addition of new factual allegations relating to the existing unfair dismissal claim which the Tribunal considers (and the Respondent has not contested) was presented in time. It does not give rise to any new or different complaint which is likely to unjustifiably prejudice the Respondent by being added at a later stage. Of relevance here is:

- It was always clear from the existing ET1 that the Claimant relates her resignation in December 2020 to "all that she had gone through" with the Respondent in the year previous year i.e. December 2019 – to December 2020).
- The allegations about the work shoes are clearly within that time period, starting in December 2019 and extending (from the email of 16 January 2022) until well into 2020 (the Claimant refers to a period of eight weeks). This is not the aspect of the complaint which goes back latest in time – the underpayment issue identified in the ET1 goes back to 2018 and the Respondent has already found it possible to plead facts directed to events at that time in its ET3.
- The Respondent has also been on notice of the additional allegation since October 2021 when the Claimant raised it in the Preliminary Hearing. The latter occurred only 7 months after the Claim was issued. At that stage (and because of the prompt identification of the need for a Preliminary Hearing in May 2021) witness statements had not yet been exchanged.
- Whilst the allegations therefore add to the facts which the Respondent needs to consider and respond to in its evidence for trial, it does not disproportionately or unfairly burden it because it is already concerned with the Claimant's employment relationship with it over this period
- Excluding the amendment to its pleading and any disclosure additional to that provided before 12 May 2021 (if any), it has not occasioned additional avoidable work or imposed additional avoidable cost.
- On the other hand, the prejudice to the Claimant of refusing the amendment is potentially significant. At its highest, and with the amendment, she has three dominant issues from which her claim flows. An allegation that, in essence, an employer is knowingly indifferent to injury caused by its prescribed workwear and consistently fails to address it is capable of adding weight to an unfair constructive dismissal claim.

Substantive compliance with EJ Doyle's order

24. I have taken into account too that, in certain limited respects the email of the Claimant lacks optimal clarity, as EJ Doyle was clearly keen to achieve. An example is that it does not reference exact dates. However, in accordance with the overriding objective I take into account that the Claimant is not legally represented and on the evidence before me, the email reflects her best efforts to comply with EJ Doyle's order. I also consider that consistent with the narrative email, only one set of dates can be reasonably understood to apply. In my strong view the fact the Claimant's pleading is not on a par with a professionally drafted pleading is not a sound basis for either refusing to allow the additional allegation or holding that despite having furnished the email before the deadline of 1 February, the Claimant is somehow in breach of EJ Doyle's direction because of the quality of the document she has produced. In my assessment any residual uncertainties in the Claimant's

claim can be remedied by the Respondent seeking further information or her filing her witness statement first.

The strike out applications

25. Having rejected the submission that the Claimant is guilty of non-compliance, the Respondent's applications rest solely on r. 37(1)(a) i.e., that the claim or a part of it "has no reasonable prospect of success".

26. It is well settled that the discretion arising is one which should be used sparingly and with caution. Where there is a dispute of facts, a claim should be struck out in the most exceptional circumstances. This could be where there is no real substance in factual assertions because they are contradicted by contemporaneous documents.

27. I deal with the applications separately in turn, setting out something first in each case of the applicable legal principles.

The unpaid wages claim

28. It was clarified at the previous preliminary hearing that the Claimant's claim is not an equal pay claim. Under 23(2) therefore the Tribunal is without jurisdiction to consider her claim unless it is presented before the end of the period of three months beginning with the date of the payment of the wages from which the deduction was made. By s.23(3) where the complaint relates to a series of deductions, the period of three months begins with the last deduction or payment in the series. Both of these limitations are subject to s.23(4) whereby a Tribunal may still consider a complaint made out of time if two conditions are satisfied (a) it was not reasonably practicable for the claim to be presented in time and (b) it has been presented within such further time as the Tribunal consider reasonable.

29. The first payment that Claimant says the Respondent did not make was in or around July 2018 (see paragraph 35 below) and the last was July 2019. At that stage, the alleged agreed increase was implemented. Assuming in the Claimant's favour (as this maximises both the quantum of her claim and the time for presenting it), there was a series of payments, the primary limitation period expired in October or November 2019. Her pleading, even taking account of the allowed amendment, does not explain why her claim was not issued by that time or give reasons why the complaint was not then brought for a further 15 or 16 months. She was directed to deal with this aspect in her amendment document (paragraph 7.1 of EJ Doyle's order). It was also explained, fully and clearly, the potential limitation issue she faced.

30. In the circumstances, and on the material advanced, there is no reasonable prospect of the Claimant establishing that the Tribunal has jurisdiction to hear her claim. It is also proportionate to strike it out since it will save avoidable time and expense at trial by the parties - especially the Respondent – having to deal with the Claimant's actions in relation to issuing her claim.

The claim of constructive unfair dismissal

31. I derive from the case law the following principles of general applicability to a claim for constructive unfair dismissal:

- Whether there has been a repudiatory breach of contract should be objectively assessed and the employer's subjective intention is not relevant (**Leeds Dental Team Limited v Rose UKEAT/0016/13/DM**).
- The breach may be of a particular express term (e.g., agreed wages) or of an implied term, including the duty not to undermine trust and confidence.
- A breach may be actual or anticipatory. It is anticipatory where, before performance of the obligation is due, the employer indicates that it does not intend to honour the term(s) of the contract at the moment when performance is due. An anticipatory breach will still entitle the employer to treat the contract as discharged if it is unequivocally expressed.
- In general, there is well established distinction between cases where the fundamental breach is comprised of a course of conduct taken together and cases where a one-off, single act by the employer is relied upon as fundamentally breaching the contract. In particular the following principles are relevant:
- The act precipitating the resignation in a last straw case need not itself be a breach of contract (**Lewis v Motorwold Garages Ltd 1986 ICR 157 AC**)
- The last straw, if an incident which is part of a course of conduct that together constitutes a breach of the implied term of trust and confidence, will revive the employee's right to resign. In that situation it does not matter that they worked and affirmed the contract after earlier incidents forming part of the course of conduct (**Kaur v Leeds Teaching Hospitals NHS Trust 2019 1 ICR 1, CA)**
- The last straw does not need to be proximate in time or of the same character to the previous act of the employer (**Logan v Celyn House Limited EAT 0069/12** and **Omilaju v Waltham Forest London Borough Council 2005 ICR 481**). It need not be blameworthy or unreasonable but must contribute to the breach of the implied term.
- An act which is entirely innocuous cannot be a final straw, even where it is interpreted by the employee as hurtful and destructive of his trust and confidence. (**Omilaju**).

32. There are two overarching bases to the application to strike out the unfair constructive dismissal claim. The first is that the Claimant's case *cannot* be a last straw case. The Claimant resigned in December 2020 which the Respondent says was more than a year after the wages and shoes issues arose. The fact that in the meantime she attended work and performed her duties and raised no grievance, mean, the Respondent says, that she has affirmed the contract. Further, the near 12-month gap between the alleged

final breach (contract with extended notice period) and penultimate breach (work shoes) mean it cannot reasonably be argued that there was a series of minor breaches culminating "in the last straw".

33. The second submission is that the single breach which post-dates affirmation of the contract is *not* itself capable of amounting to a breach of contract causing resignation. The Respondents says here:

- On no assessment can it be characterised as an actual breach which could have caused a resignation - the extended notice period could not have been triggered *until* her resignation.

- It was not an anticipatory breach akin to the situation in which an employer threatens to lawfully terminate the employee

- The cause of the erroneous notice provision being inserted was, the Respondent says, straightforward error which as a matter of evidence the Claimant has not countered. In his oral submissions Mr Warnes said this was something the Claimant would *"have to accept"* which I take to mean that the Claimant is not now and will never be in a position to gainsay the evidence of the Respondent on this matter, being ultimately one within its knowledge.

34. Since I have granted leave to amend, I must make my evaluation of the prospects taking into account the amended claim and assuming that the Claimant's allegations are all capable of proof to the requisite standard.

35. It is helpful here to record and analyse the amalgam of the facts asserted across the ET1 and the Claimant's email of 16 January, relevant to the question of breach and of affirmation. I summarise them chronologically as follows:

- She enjoyed a contractual right arising from a direct verbal agreement in April 2018 to be paid an equal amount to other quality assessors beginning 12 weeks after her probationary period [ET1, p. 12, paragraph 1, narrative email, paragraph 2].

- She complained in various ways about this between April 2019 (when she learned her pay was not equal – narrative email, paragraph 5) and July 2019 [narrative email paragraphs 5 – 8 and ET1, p.12 paragraph 6]

- By July 2019 the Respondent had committed through its management to the position of not paying the arrears but implemented the increase [ET1, p12, paragraph 6].

- The Claimant then corresponded with Human Resources (HR) who were unhelpful to the Claimant and did not cause the outcome to alter. This caused her not to actively pursue the arrears further during her employment [narrative email, paragraph 8].

- In December 2019 the Claimant's second pair of work shoes had failed, she had foot pain and sought permission repeatedly to wear shoes she herself had purchased. This was declined and she was promised some new shoes by the Respondent, albeit not in her exact size. They were unsuitable and returned. The unsuitable footwear was re-presented to her in around February 2020. The Claimant continued to chase this but her emails went unanswered. She was forced to carry on working in unsuitable shoes, with pain in her foot [narrative email, paragraphs 9-12].
- In November 2020 she was issued a new contract in which her notice period had been extended from one to three months. To her then knowledge, she was the only one of her colleagues affected and owing to the contracts being "document managed", the amendment to her notice period, was done "manually" [p.12 ET1, paragraph 7 – 9].
- She relies on investigation of this by her colleague [penultimate paragraph, narrative email]. She also sought an explanation "several times" about why her contract was now drafted in this way which were unanswered over the period of a week prior to her resignation [p.12 ET1, paragraph 10, narrative email, penultimate paragraph].
- (It is also relevant to mention here that the Response asserts that the Claimant was told the insertion of the clause was in error after she left her employment. This in turn, was because, the Respondent says, she had not raised it with the Respondent prior to leaving.)
- The Claimant says at this stage she was offered regular shifts at a hospital. She handed in her notice because she could not go through all she went through the year before and did not know what to expect next (ET1, p.12 paragraphs 12 and 13).

36. I am satisfied that the Claimant has *some* prospect of showing there was a series of breaches culminating in a last straw. I accept the Respondent's submission that the final straw cannot be entirely innocuous or utterly trivial following **Omilaju.** The straw that broke the camel's back in that case was the employer not paying the Claimant for leave taken to attend his own employment tribunal. However, this was in accordance with the express terms of the contract since the Claimant had not sought paid leave (as was his right in the case of attending a Tribunal). It was found to be both in compliance with the contract and objectively reasonable conduct, by the first instance Tribunal. This was not disturbed by the Court of Appeal. Factually therefore it is distinct from this case where the Respondent does not seek to answer for its behaviour by reference to the contract; it does not assert a right to unilaterally extend the notice period by 300% nor any express provision within the employment contract which somehow protects an unexplained mistake of that nature from breaching its duty of trust and confidence. The key ratio of the **Omilaju** is set out in these paragraphs which I reproduce here for ease (my emphasis):

"19. The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the Woods case at p 671f-g where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. ***The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.***

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. 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. ***Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these 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.***

22. Moreover, 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 has been undermined is objective (see the fourth proposition in para 14 above)."

37. From this I accept that the test is objective and not dictated by the hurt the Claimant may have felt. However, they key question in my view is has the

Respondent shown, indefeasibly, that its actions are "entirely innocuous" or that the Claimant has no reasonable prospect of showing that they were, objectively, other than of that nature? It is clear from **Omilaju** that "entirely innocuous" is not synonymous with blameless.

38. Two points are relevant. First, although the prospects are in my judgment slim, the Claimant may, perhaps with the benefit of disclosure relating to the Respondent's document control processes and/or through witness evidence of her former colleague who she says investigated, be able to demonstrate that the contractual amendments could only have been done by an individual rather than through some automated process. It does not follow from it being done manually, that a mistake is negated and a deliberate attempt to treat the Claimant unfavorably is shown. Naturally, however, it reduces the probability of a mistake being the cause, and certainly calls for a greater explanation from the Respondent. I reject therefore that the Respondent's factual position that a coincidental error occurred (as in, coincidental to the other disputes with the Claimant) is somehow incontrovertible. The conclusion here will depend on the evidence advanced on both sides, and that is quintessentially fact sensitive. Of course, the Claimant undoubtedly faces a challenge in proving her case; the fact that the Respondent ultimately did not hold the Claimant to 3 months is persuasive but not conclusive. That only arose after she had tendered her resignation.

39. Second, it also seems to me that the Claimant's case of last straw does not depend exclusively on showing bad faith, albeit that seems to have been her subjective inference of the last act. The Respondent is clear that the fact of the new notice period being an error was not directly communicated to the Claimant until after she tendered her resignation. They have not pleaded the fact of a mistake was or should have been otherwise manifest. The Tribunal at trial will be concerned with the objective interpretation of the Respondent's actions and the Claimant's response up until and including the moment of resignation. That will be seen through the prism of their extant relationship – as it was by reference to the terms of the employment contract in **Omilaju.** However, if the Respondent is shown, for example, to have fostered such a climate of distrust and then to have recklessly released a revised contract that uniquely prejudiced the Claimant's position compared to her peers *and* to have withheld from promptly allaying legitimate concerns of the Claimant about it as she alleges, it seems to me this may be capable of founding a breach – even though the actual motivation for the change may not have been unfair or indeed, intended. That is not the same as saying the Claimant's subjective interpretation is what counts.

40. I deal then with the Respondent's argument about the length of time between the alleged second and third breach. I cannot accept the submission that there was in excess of a year between the wages and shoes issues (paragraph 6 of the respondent's skeleton), and the tendering of her resignation. It is clear the Claimant alleges that there was less time than that. For example, she talks in her narrative email about an eight week wait after December 2019. There is no authority of which I am aware which

indicates as a rule of thumb or otherwise, a gap in time between alleged breaches beyond which a claim of a course of conduct cannot be made out. Dyson LJ (as he then was) rejected in **Omilaju** that *"an act in a series"* had a technical meaning. I also consider the nature of the breach in relation to the unsuitable and (on the Claimant's case) injury-causing work shoes may be found to be ongoing. I say this not in reference to the point about affirmation. As a matter of law, the effect of the last straw is to revive the right to resign. If, however, the Respondent is right, and there needs to be a sufficient temporal connection, the evidence about this will need to be examined to determine how long the period of time actually was. Such an issue is not suitable for summary disposal.

41. The Respondent's second overarching submission in these circumstances cannot take its application further and I do not deal with it therefore.

42. For all of these reasons, the Respondent has not shown the Claimant has no reasonable prospect of demonstrating a series of breaches cumulatively amounting to a repudiatory breach of contract.

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Tribunal Judge A Miller-Varey
(acting as an Employment Judge)
15 March 2022

Sent to the parties on:
21 April 2022

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For the Tribunals Office

Notes

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