# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Singh
**Claimant by respondent's contract claim:** Optimal Claim Limited (t/a Optimal Solicitors)

**Respondent:** Optimal Claim Limited (t/a Optimal Solicitors)
**Respondent to respondent's contract claim:** Miss L Singh

**Heard at:** Remotely (by CVP) **On:** 30 August 2022
13 December 2022 (In Chambers)

**Before:** Employment Judge Holmes (sitting alone)

**Representatives**
For the claimant: Mr T Kenward , Counsel
For the respondent: Mr F Jaffier, Advocate

# RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1.The claimant was constructively, and hence wrongfully, dismissed.

2.The claimant is entitled to damages for breach of contract, in the form of notice pay of **£1,315.08.** This is a net sum, and no deductions for tax and national insurance should be made from it.

3.The respondent made unlawful deductions from the claimant's wages in the sums of **£973.03** and **£255.00**, which sums the respondent is ordered to pay to the claimant. These are net sums, and no deductions for tax and national insurance should be made from them.

4. The respondent's contract claim is dismissed.

## REASONS

1. By a claim form presented to the Tribunal on 18 March 2022 the claimant brought claims for notice pay, deductions from wages, and holiday pay. She resigned from her

employment with the respondent on 13 December 2021, and claims that she was constructively dismissed.

2 The respondent in its response and Grounds of Resistance dated on 31 May 2022 denies that the claimant was constructively dismissed, and, further raises an employer's contract claim, in which it seeks to recover from the claimant some £2401.97, being the balance of the cost of the claimant's practising certificate and recruitment fee that the respondent contends the claimant is liable to repay to the respondent following her resignation. Whilst this respondent's contract claim ought to have been processed by the Tribunal as a separate claim , with its own case number , it has not been. The claimant has responded to this claim, however, and her response is at pages 55 to 58 of the bundle.

3. The "Code "V" in the heading indicates that this was a remote hearing by CVP **,** to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the hearing remotely.

4. The claimant gave evidence, but called no witnesses. For the respondent Stephanie Matthews, a solicitor and the claimant's line manager, gave evidence. There was an agreed bundle, and references to page numbers are to that bundle. The evidence was concluded within the one day allocated for the hearing, but there was insufficient time for submissions. The parties' representatives accordingly made written submissions.

5. The respondent's written submissions were received on 16 September 2022, but the claimant's were not received until 16 November 2022. The Tribunal considered its judgment in Chambers on 13 December 2022, by which time the respondent's application to adduce further evidence had been received. The Employment Judge apologises for the delay in promulgation of this judgment , occasioned by , in part, the application made by the respondent, and , in part, by the pressure of judicial business.

***The respondent's application to adduce further evidence.***

6. The reason for that delay , in part, was that an application was made by the respondent, by letter of 6 September 2022, for the Tribunal to receive into evidence and consider in its deliberations further documents, being a "redacted grievance investigation" document , a "Lauren Singh - response to SARs" document, and a "Grievance Questions Email".

7. By email of 16 September 2022 the claimant (acting herself, for Mr Kenward is retained on direct public access) wrote to the Tribunal objecting to the application. This application led to the claimant not submitting her submissions, in the belief or expectation that this application should be determined first.

8. Mr Jaffier's email of 6 September 2022 is rather brief. He says very little in support of the application. He appreciates that the documents were not put to the claimant in cross – examination, and advances them in support of the respondent's contention that there were continuing exchanges between the claimant and Stephanie Matthews, who was trying to support her.

9. By contrast, the claimant's response on 16 September 2022 is rather more detailed. In it she makes the following points. Firstly , the application (for that is what it is) is made at a very late stage in the proceedings, when both sides have closed their respective cases.

10. Secondly, she says this:

*"The e-mail attaches the proposed additional evidence which is in the form of documentation relating to the detailed answers provided by the Respondent's witness, Stephanie Matthews, to questions which were asked of her as part of the Respondent's grievance investigation. In addition to the detail of the answers which are provided in a document of some nine pages, Stephanie Matthews had also (it seems) included extracts from approximately 30 file notes or task notes and had cut and pasted these extracts into the body of the document. The answers also provided detailed information from at least five numbered case files. In the references made to the information from three of these numbered case files (at the end of the document) Stephanie Matthews was seeking to rely (for the purposes of responding to the grievance) on matters which she claimed had come to her attention after the end of the Claimant's employment."*

10. She goes on to observe that this is material which could potentially have been included in the witness statement of Stephanie Matthews but was not. She is not in a position to deal fully or adequately with this new evidence at this stage, not having access to the files and / or files notes in question other than to the extent that the document cuts and pastes highly selective extracts from the file notes in question.

11. She goes on to point out that there has been no prior other relevant disclosure as to these issues, putting her at a massive disadvantage , as the respondents have access to the source documentation and she does not. This, she goes on to note, is against the background of the history of disclosure by the respondent , which was discussed in some detail in the course of the hearing, and of which she reminded the Tribunal.

12. In short, the respondent could also have introduced the matters set out in the additional documentation as part of the witness statement of Stephanie Matthews. It did not do so

13. She concluded by contending that she would be significantly prejudiced by the respondent seeking to adduce new evidence at this late stage of the proceedings, and went on the raise the issue of proportionality, and costs.

14. In reply, Mr Jaffier on 16 September 2022, objected to the suggestion that the claimant would be significantly prejudiced by this new evidence. He acknowledged that the claimant was not cross – examined upon it , and went on to say how he did not anticipate that the Tribunal would give the documents too much weight, and that, therefore the claimant's case could not be prejudiced.

***Ruling.***

15. The Employment Judge apologises that this issue had not been determined ahead of the chambers deliberations, but it appears not to have been re-referred. Now

that the claimant has provided her submissions, whilst slightly delayed, this has not hampered the process. The Employment Judge's decision upon the respondent's application to adduce further evidence after the close of each party's case is that it is refused. The reasons for its refusal are all those cogently advanced by the claimant , to which the Employment Judge would add a further reason, which is the complete absence of any explanation by the respondent for this relevant material not being disclosed previously, or for why it was not included in the witness evidence of Stephanie Matthews. Given the other unsatisfactory history of disclosure on the part of the respondent in these proceedings, the respondent has given no compelling reason why this late evidence, which was available from the very start of the proceedings, should now be admitted. That it may not carry great weight is not the issue. The claimant has been deprived of the chance to consider this evidence as part of her case, and it is no support for the admission of this evidence for the respondent to say that whilst it is relevant, the Tribunal may not put much weight upon it.

16. A further and relevant consideration is that the claimant claims wrongful, not unfair dismissal, and the respondent counterclaims contractual damages. Were the claims to have included unfair dismissal, this additional material may have been relevant to issues on remedy, such as ***Polkey*** , or reduction in the basic and/or compensatory awards for contributory conduct. None of those issues, however, arise, and the respondent is solely seeking to advance it in support of its case that there was no fundamental breach of the employment contract. As will be apparent, given the Tribunal's findings as to the seriousness of one major aspect of the respondent's admitted conduct, this material can have no bearing on that aspect of the claim either.

***Findings.***

17. Having heard the evidence before it at the hearing, and disregarded any further evidence that the respondent has sought to put before it, the Tribunal finds the following relevant facts:

17.1 The claimant qualified as a Solicitor on 7 August 2020. She applied for the vacancy with the respondent as a Family Solicitor through a recruitment agency, SaccoMan in May 2021 . She was interviewed by Stephanie Matthews , Team Leader of the Family Team , and two others, on the 26th May 2021.

17.2 The claimant had under 1 year's post-qualification experience at that time. She was offered the post (this is not documented in the bundle) and started her employment on 6 September 2021.

17.3 The following were express terms of the claimant's contract of employment (pages 76 to 94 of the bundle) :

*Clause 4.2*

*"The first three months of your employment will be a probationary period. During the first month of the employment, the employer may terminate the employment without a period of notice. Once you have been continuously employed for at least one month the Company may terminate your contract at time on one week's prior notice. You may terminate your contract within this time with one months' notice. We may, at our*

*discretion, extend your probationary period for up to a further three months during which time your performance and suitability for continued employment will be monitored. However, if your work performance is not up to the required standard, or you are considered to be generally unsuitable, we may either take remedial action (extend your probationary period) or terminate your employment without recourse to the capability, or if a conduct matter, the disciplinary procedure."*

*Clause 11:*

*"The Employer reserves the right to make deductions from your salary or other sums due to you at any time throughout your employment and also from any final monies owed on termination of employment. Such deductions may be made, for example, in respect of:*

*• Recoupment of salary/wages advances;*
*• Payroll errors resulting in overpayment;*
*• Holiday taken over and above entitlement;*
*• Recovery of the cost of professional fees*
*• Loans;*
*• Cash shortages, advances or other deficiencies;*
*• Cost incurred for assistance with professional qualifications/training*
*• Damage to company property where this is as a result of your negligence*
*• Any loss to the company which is a result of your failure to follow rules, or procedures.*
*• Unretumed company property, including any uniform or PPE supplied to you.*
*• Recruitment costs*

*This is not an exhaustive list"*

*Clause 29:*

*"29.1 1f you terminate your employment without giving or working the required period of notice you will have an amount equal to any additional cost of covering your duties during the notice period not worked deducted from any termination pay due to you. You will also forfeit any contractual accrued holiday pay due to you over and above your statutory holiday pay if you fail to give or work the required period of notice.*

*29.2 If you were recruited for the position via a recruitment agency, you will be held responsible for all recruitment fees if you resign from the position or if you face dismissal for gross misconduct within the first twelve months of employment. The organisation operates a sliding repayment scale, so that the amount that the employee is required to repay is reduced by one twelfth at monthly intervals."*

*Clause 30.3:*

*"30.3 The organisation reserves the right, on the employee's resignation, to require him/her to repay the employer for training/recruitment agency costs that he/she owes from his/her final salary payment. "*

17.4 In an email dated the 5th October 2021, the Claimant was notified that the respondent had received an invoice with regards to her recruitment fee. Amongst other things, the email made reference to 29.2 of the Claimant's contract of employment and the total invoice was £4,500.00. The Claimant was also advised that if she had any questions in relation to the email, she should contact Amy Berry (HR Assistant) (page 95 of the bundle ).

17.5 The claimant had made it clear that she had not had conduct of a financial case from start to finish, and did not have much experience of dealing with financial provision in matrimonial cases. Her CV (pages 66-70 of the bundle) which was sent to the respondent when applying for the role clearly stated that she assisted senior fee earners with ancillary relief matters but had experience in drafting the core financial documents. The covering letter attached to the claimant's CV , however, stated that "Lauren has had some cases over the £1 million threshold". This comment was misleading, but was prepared by the Recruitment Agent, SaccoMan. The claimant was not aware this had been sent to the respondent prior to her interview . She was assured by the respondent that cases would be allocated to her appropriately and that she would be provided with support.

17.6 The claimant was also told that she would be able to work at the Respondent's office. This was important to her, so that she would have appropriate training, supervision and support.

17.7 Upon commencing employment, and thereafter, she was not encouraged to attend at the office and it was preferred at all times for her to work remotely from home. She was informed by her Team Leader, Stephanie Mathews, that she could attend the office should she wish. The rest of the team would not be working from the office at any point and the claimant would be there on her own. She was also informed that there was no designated desk for her.

17.8. Within two or three days of starting her employment, approximately 30 cases were allocated to her, many of which were matrimonial financial cases. At the point in which cases were allocated to her she had spoken with Stephanie Matthews and explained that she was worried about the number of financial cases she had been allocated and that she would require support and guidance with the management of them. She was informed that she would be supported.

17.9 One of those cases was particularly complex, involving a matrimonial home, each party having their own business, and property abroad which had been valued in excess of £3,000,000. The client was also particularly difficult. The claimant felt very overwhelmed and out of her depth, given her level of experience. The file in question had previously been handled by two different fee earners.

17.10 A hearing had been listed by the court to deal with the client's application to rely on evidence and the other party's application for a Penal Notice to be endorsed to a court order against the client. The claimant was not aware whether the hearing was an in person hearing or a remote hearing , and had made several attempts to contact the court days before the hearing requesting this information. She received a response from the court the afternoon before the hearing advising it was a remote hearing. She therefore filed the appropriate contact details for the hearing within 30 minutes of

receiving confirmation. Counsel had been instructed for the hearing and on the morning of the hearing Counsel had asked if she had received the link for the hearing.

17.11 She had not , and therefore attempted to telephone the court, but could not get through. The upshot was that she could obtain the link in time for the hearing, which went ahead with no attendance on behalf of the claimant's client. A Penal Notice was endorsed to the previous court order against the client, the client was to pay costs and the client's application to rely on the evidence was struck out.

17.12 The client made a complaint, and the claimant asked Stephanie Matthews if they should seek Counsel's advice to appeal the court decision, and was advised by her to appeal the decision but to draft the papers herself. She was not confident in doing this, and not happy at the advice she was receiving from Stephanie Matthews about this process, and how to go about it. In the end Counsel was instructed for the appeal.

17.13 The claimant was set, the respondent agrees, a monthly billing target of £8,000 . The claimant found that she could not achieve her target. Whilst she did the work, and recorded it, the respondent regularly issued bills to the client for a fraction of what the amount should have been billed by reference to the time recorded working on the file. This was done without her knowledge.

17.14 The claimant felt that she had to work long hours to make up for the written off hours, which left her feeling very disheartened, undermined and upset, as well as creating unnecessary additional stress to her. me. On one occasion, when she had asked Stephanie Matthews how her billing was progressing , she told her what she had billed for the month. The claimant considered it acceptable , and said this to Stephanie Matthews, who stated "well you should be billing £8,000.00 a month".

17.15. The claimant's employment was subject to a three-month probationary period. The relevant clause of the contract of employment (clause 4.2) (pages 76-94 of the bundle) stated that if her work performance was not up to the required standard, or she was considered to be generally unsuitable, the respondent was entitled to take remedial action by extending her probationary period.

17.16 Around three months into her employment the claimant had her first appraisal. On the 1st December 2021, the claimant attended her 3 months' probation appraisal meeting where she and Stephanie Matthews, with Amy Berry of HR in attendance , went through the content of the appraisal form. In an email dated the 1 December 2021, the respondent provided the claimant with a copy of the appraisal form. The claimant was advised to let the respondent know if she had any further questions (page 99 of the bundle). That form (page 100 of the bundle) had columns which the claimant was to fill in, effectively appraising herself, with a range of scores from A to D against each topic, A signifying "urgent improvement required" , B "minor improvement required", C "working at expected standard", and D "exceeding expectations". The headings were "Capability", i.e the performance area that was being assessed, then "Personal Review A – D" , which the claimant filled in, then "Manager's Review A – D" , then "Manager's Comments" and finally "Manager's Comments".

17.17 The claimant filled in the two columns provided for her use. She scored herself largely at B – minor improvement required, and in some instances at C – working at

expected standard. She did not score herself any lower that a B, nor any higher than a C.

17.18 The claimant attended the review meeting, via Teams, on 1 December 2021, with Stephanie Matthews, and Amy Berry , HR Assistant in attendance. Stephanie Matthews had completed the Manager's sections of review form. Whilst she had scored the claimant the same under most headings, she had scored her down , to an A , against "Time Management" (page 101 of the bundle) , "Meeting deadlines" , where she had put A/B, and IT skills, where she had put a B where the claimant had put a C. She had also completed the Manager's Comments columns.

17.19 In the "Client Care" boxes, where the claimant had scored herself a C, Stephanie Matthews scored her a B, and in the comments section wrote:

*"We have lost a couple of clients due to lack of a response, or there has been a minor complaint on another file. We need to make sure we reply to clients emails even if its to*

*say a response will follow"*

17.20 The claimant was unaware of this complaint against her, and did not consider that the clients who were lost were due to her handling of their matters. In relation to one client where there was a problem, the client in question had stated that the claimant had not advised him there was a remote hearing taking place. She had sent this client a letter confirming the hearing date and time and explained it was a remote hearing. She had marked in bold and underlined that he did not need to attend the court in person. She also enclosed a copy of the court order for his attention which also stated it was a remote hearing. The client was historically slow in replying to her with his instructions. In a message (the screenshot is at page 125 of the bundle) between the claimant and Stephanie Matthews she had told her that she had sent robust emails to this client , and she replied "thats all we can do". She advised that she wanted to protect herself from any complaints and Stephanie Matthews replied " absolutely". This matter, however, was now raised in the claimant' appraisal.

17.21 In box 2 on page 5 of the document (page 104 of the bundle) Stephanie Matthews wrote further comments, making reference to three instances where the claimant had allegedly not ensured that there was representation at court hearings.

17.22 In a letter dated the 1st December 2021 (page 106 of the bundle) , Amy Berry sent a copy of the probation review form to the claimant "for her records". This written record did not accurately represent what was discussed at the appraisal meeting and contained statements which were untrue, for example, it stated that because of a complaint made against her by a particular client, that client terminated his retainer with the respondent. The client's termination of the retainer had nothing to do with the complaint that had been made. It also stated within the probation review form (pages 99-106 of the bundle) that "we have lost a couple of clients due to a lack of a response, or there has been a minor complaint on another file". That however was the matter where Stephanie Matthews had agreed that it would be the client's own downfall for his lack of response to the respondent, and yet this was raised in the probation review form as a client making a minor complaint about her.

17.23 The letter also stated that "we have mutually agreed" to extend the probation period by a further three months (page 106 of the bundle). The claimant had, in fact, not agreed to the extension of her probationary period. Box B6 on the appraisal form (page 105 of the bundle) does not expressly state that the claimant agreed to extend her probation for a further three months, and she did not.

17.24 Further, whilst in the box on the sixth page of the document (page 105 of the bundle) the claimant's name had been entered, as if she had signed the form, she had not done so, and this was, in effect a forgery, albeit an electronic one, and misrepresentation of what he had agreed to. Stephanie Matthews explained this in her evidence that this occurred because of the remote nature of the meeting. She agreed that the claimant could have been sent an email asking her to sign the meeting record. She said that it was merely acknowledging that the claimant had been at the meeting. The Tribunal does not accept that, it conveyed an agreement to the contents of that record of the appraisal.

17.25 The claimant began to seek alternative employment. She contacted an employment agency , and was informed by telephone of a vacancy at Tracey Millar solicitors. An interview was quickly arranged, and she was successful, and was verbally offered the job..

17.26 The Claimant contacted a work colleague, Hannah Mason, on the 13th December 2021 where she said the following:

*"It's nothing personal to any of the team why I am leaving. I had a job interview on Thursday and was offered the job on Friday morning."*

17.27 In an email dated Monday 13 December 2021, the Claimant took the decision to terminate her contract of employment with immediate effect. The Claimant, amongst other things, claimed that she felt that her relationship of trust and confidence had broken down with the firm (page 107-108 of the bundle ). She expressed her concerns in her letter of resignation (page 107-108 of the bundle).

17.28 The decision made by the respondent to extend her probationary period by a further 3 month (page 99-106 of the bundle), indicating that her performance was not up to the required standard was, she considered, an unduly harsh decision. Despite the assurances from Stephanie Matthews that she could not have done anything different on the file referred to above , it was still mentioned within the decision to extend the claimant's probation.

17.29 The decision to extend her probation in this manner was the last straw effect for the claimant.

17.30 In her resignation letter on 13 December 2021 (page 107 of the bundle ) that the claimant said this:

*"Please accept this email as formal resignation from my position as Family Law Solicitor.*

*Given that I am still within my probationary period, I understand my notice period shall be one month. However, I would request that this takes effect immediately as i feel my relationship of trust and confidence has broken down with the firm.*

*I would like it noted that I was not given the opportunity to review the comments made by my Team Leader before the probationary meeting on 02.12.2021 which Amy was present at. The first opportunity I have had to review these comments was after the meeting when Amy emailed me the probationary form, by which point the form had already been signed on my behalf by Amy. I do not agree with the comments raised on the probationary form and I do not think it is appropriate for a document to be signed on my behalf without the opportunity to read it first."*

17.31 She went on to set out her refutation of some of the matters raised in the review as justifying the extension of her probation. In particular she explained the circumstances of the case where the Court had not provided a link for the hearing, and how she had been assured that there was nothing that she could have done differently. She considered that she had not been given any advance warning that this matter would be raised again, or used as a ground to extend her probation. She reiterated that she felt that trust and confidence had broken down.

17.32 By letter dated 13 December 2021 the Amy Berry of the respondent accepted her resignation (page 109-110 of the bundle), and informed her that, pursuant to clause 29.2 of her contract of employment (Page 76-94of the bundle), she was responsible for 'all recruitment fees' if she resigned from her employment within the first 12 months of employment (subject to a sliding scale). She was told that she was liable to pay a percentage of the recruitment fee charged to the Respondent by a recruitment agency. The percentage fee payable was stated to be £3,375.00 , and was told that this was to be deducted from any monies owing to her which were due to be paid at the end of December 2021. She was also told that, following that deduction, she would still be liable to pay the Respondent the sum of £2,401.97.

17.33 On or around 15 December 2021 the claimant submitted a formal written grievance about various aspects of her employment, as well as the deductions which were going to be made to her final salary payment. Her grievance was heard at a meeting on 20 December 2021 .

17.34. The claimant's December 2021 payslip (page 118-121 of the bundle) identified a total payment of £1,499.99 (gross) in respect of outstanding salary and payment in lieu of accrued but unused holiday. However, the whole amount was reduced to nil by virtue of the respondent's deduction from those payments. The respondent deducted £973.03 in respect of the recruitment fee and £255.00 in respect of a practising certificate fee.

17.35 In a letter dated the 16th December 2021, the Claimant was invited to attend a grievance hearing on the 20th December 2021 (page 111 of the bundle). This was chaired by Kerry Harding, Head of HR. In a letter dated the 4th January 2022, the claimant was provided with an outcome to her grievance complaint (pages 116-117 of the bundle). In her grievance complaint, the claimant raised 6 points as set out on pages 116 of the bundle. Following a full investigation into her grievance complaint, 5 of her complaints were dismissed and one partially upheld, namely , point 2, that Stephanie

Matthews had not raised performance concerns with her prior to the probationary appraisal.

18. Those, then are the relevant facts. There has been some issue upon the facts, and the claimant has invited the Tribunal to prefer the evidence of the claimant where there is a conflict. The basis for this is set out in para.39 of Mr Kenward's submissions where he relies upon a lack of transparency which he submitted was not just a feature of the appraisal process and probationary period decision-making process, but has also been a feature of the Tribunal proceedings .

19. In support of that he set out the history of disclosure, and how request was specifically made for disclosure of documents which would have been relevant to the issues in the case, including the matters relied upon by the respondent in its probationary period decision and on the probationary review form, so that the evidence requested included the following:

• evidence of the total amount billed by the claimant during her employment;
• reports regarding her performance;
• evidence of the training the claimant undertook regarding the case management software, Pro-Claim;
• correspondence between the Stephanie Matthews and HR regarding the decision to extend the claimant 's probation period;
• evidence of complaints raised by clients in respect of the claimant , as stated on the probation review form;
• evidence of the "couple" of clients lost due to the claimant as stated on the probation review form;
• evidence of bulk renewal fee for practising certificate.

20. Despite the respondent stating that a reasonable search would be undertaken for the documents sought , it did not thereafter revert back to the claimant . The bundle was prepared , and making reference to exchanging Statements, but without having made any further reference to the requested disclosure. The claimant chased up the outstanding disclosure in August 2022. The respondent replied on 23 August 2022, setting out the same list as had previously been supplied, stating that it was the respondent's position "*that these documents cannot be located or they do not exist*".

21. .Mr Kenward invites the Tribunal to consider this when assessing the credibility of Stephanie Matthews. The Tribunal does, and also notes the application made after the hearing referred to above, in which the respondent sought to admit the very documents disclosure of which the claimant had been seeking. Again, no explanation of the reason why these documents were not disclosed at the appropriate stage has been proffered .

22. There are other reasons which have led the Tribunal to question the reliability of Stephanie Matthews as a witness. Both the Grounds of Resistance filed by the respondent and her witness statement fail to address some quite significant parts of the claimant's case. The former does not condescend to particulars in response to those matters set out in some detail in para.1 of the Grounds of Claim, the latter does not deal at all with the allegation that the claimant was told that there was a client complaint against her, for the first time, in her appraisal meeting, nor with the contention that the

claimant's electronic signature was forged on the appraisal document. This, coupled with the respondent's readiness effectively to forge the claimant's electronic signature on a document she had not signed or agreed leads the Tribunal to prefer the evidence of the claimant to that of the respondent where the two conflict.

**The submissions.**

23. For the claimant Mr Kenward provided written submissions on 16 November 2022. It is not intended to repeat them here, they are the Tribunal file.. Suffice it to say that he took the Tribunal through the relevant law on constructive dismissal, the implied term of trust and confidence, and the tests to be applied in respect of the respondent's counterclaim. He made submissions as to why the Tribunal should, in its fact finding , prefer the evidence of the claimant to that of Stephanie Matthews. He also set out the effect of the Tribunal's findings , if in the favour of the claimant , in terms of the claims she makes, and the counterclaim.

24. For the respondent Mr Jaffier also made written submissions , on 16 September 2022. Likewise they will not be repeated here. He made much of the claimant's failure to raise a grievance, which she accepts she did not do. He seeks to persuade the Tribunal to infer from this that the claimant did no really have issues with her employment. He points out that the claimant does not, in her grievance , expressly say that she did not agree to the extension of her probation. He goes further, and says that she agreed to it. His submissions, however, do not directly address the issue of the forgery of the claimant's electronic signature on the record of the appraisal. He submitted that the real reason that the claimant resigned was that she had found another job, and that she was claiming constructive dismissal to avoid her liabilities to repay the sums that the respondent was claiming against her.

***The Law.***

25. Section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of he employer's conduct.

26. 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 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 acts or omissions which, the claimant says, individually or cumulatively amounted to a fundamental breach. The Tribunal, therefore must firstly decide whether the employer was guilty of conduct which was 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.

27. 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.

28. It is 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. Indeed in the leading case which the Tribunal is 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 in that case 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."*

***Discussion and findings.***

29. The claimant has relied upon a course of conduct , going back to the start of her employment as cumulatively constituting the fundamental breach of contract on the part of the respondent that she relies upon. The claimant contends that the respondent was in repudiatory breach of the implied term of trust and confidence through the series of actions set out in paragraph 2.2 of the Grounds of Claim , as set out below:

(a) in not allowing her to work from the respondent's office (where she would be better placed to have appropriate training, supervision and support (with this also alleged to be in breach her contract of employment at clause 19 although it should be noted that the contract has a typographical error as a clause numbered as clause 13.1 then appears under clause 19); and / or

(b) in unreasonably allocating complex and / or high value cases to her given her level of experience: and/or

(c) in grossly under-billing clients in relation to cases allocated to C making it impossible for her to reach her billing target, and therefore directly impacting on her financial performance; and/or

(d) in making unfair and untrue statements in the written record of her appraisal; and/or

(e) in unreasonably extending her probationary period.

30. In approaching these issues, the Tribunal has had to resolve some conflicts of evidence, but in overall terms it is clear that the job that the claimant took up with the respondent turned out not to be what she expected. That is not, of course, in itself enough to amount to a fundamental breach of contract , and the Tribunal bears in mind the words "without reasonable and probable cause" in the formulation of the implied term of trust and confidence.

31. It also bears in mind that in order for the term to be fundamentally breached, there must be serious damage to the relationship. As was stated in ***Frenkel Topping Ltd v King UKEAT/0106/15/LA*** by Langstaff P at paras. 11 to 14:

*"11. The Claimant could only claim to have been unfairly dismissed if the employer had broken its contract with her, if the breach was sufficiently serious to be a repudiatory or, to use another description, fundamental breach of the contract, if she had resigned at least partly in response to the breach, and if before doing so she had not by her actions or inaction affirmed the contract. As to that, the Claimant alleged that there had been seven matters, each of which individually or all of which cumulatively constituted a repudiatory breach. The thrust of her case was that the breach or breaches upon which she relied were breaches of the implied term of trust and confidence. It is worth restating the classic formulation of that term, as derived from* ***Malik v BCCI [1997] UKHL 23*** *though this formulation derived in turn from earlier cases, including in particular* ***Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84****:*

*"… the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

*12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of* ***BG plc v O'Brien [2001] IRLR 496*** *at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in* ***Malik v BCCI [1997] UKHL 23*** *as being :*

*"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."*

*13.Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in* ***Morrow v Safeway Stores [2002] IRLR 9****.*

*14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In* ***Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347*** *it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in* ***Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420,*** *is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."*

32. Similarly in ***Croft v Consignia [2002] IRLR 851*** Lindsay,P. said, at para. 69 of his judgment in the EAT:

*"Ms Croft asserted a breach of the implied term of trust and confidence. It is an unusual term in that it is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. Ms Croft relied on the Post Office's discriminatory handling of the toilets problem (as she asserted it was) and their attitude to medical information as the causes of the serious damage she needed to assert."*

33. Applying that stringent test , the Tribunal finds that much of what the claimant complains of at items (a), (b), and (c) above can be viewed as unfortunate if disappointing aspects of the reality of the job that she had successfully applied for. New employment is always something of a leap in the dark, and it does not amount to a breach of the implied term of trust and confidence that the job, or the conditions in which it is carried out , are not quite what the employee expected, or even that they may have been led to expect.

34. That the claimant was working alone, because few other colleagues were coming into the office, for example, is not a breach of the implied term. It was not without

reasonable and probable cause (given the impact of COVID on working practices), even if it disappointed the claimant and hampered her development in her new role.

35. In terms of the claimant's other complaints about workload, file complexity, billing requirements , and general lack of support ,these , the Tribunal considers are the types of "lesser blows" identified by Lindsay P. in ***Croft*** cited above which the parties to an employment contract are expected to have to absorb. The claimant's expectations of the job, and the respondent's expectations of her, were , the Tribunal considers, something of a mismatch, but all this would not, in the view of the Tribunal, have been enough to establish a fundamental breach of the implied term of trust and confidence.

36. Where, however, as was recognised in the grievance outcome , the respondent accepts that there was some conduct of which the claimant could complain, is in the failure to raise with her at the time, matters which were likely to affect her probationary review. She was therefore unaware of these issues, and how they might affect her probation. This is particularly true of the alleged complaint made by a client, which was not raised with the claimant at the time, but was brought up, with no prior warning, in the appraisal. In short, therefore, its inclusion in the probationary review was something of an "ambush".

37. That, coupled with other instances where the respondent accepted in the grievance outcome that the claimant should have been given more warning and feedback , begin to form the basis for a finding that the respondent had , to a degree, so conducted itself in a manner , if not calculated to, likely to ,destroy or seriously damage the relationship of trust and confidence between employee and employer.

38. That, however, is only the beginning, as then, having invited and obtained the claimant's comments on the appraisal form, and having the meeting on 1 December 2021, the respondent then produced the completed review form, with Stephanie Matthews' scores and comments thereon, after the meeting. It was not provided to the claimant for comment, but as an agreed document, with her purported signature (if electronic) upon it.

39. This is an aspect of the conduct of the respondent which, the Tribunal considers , if taken alone, regardless of whether there was any antecedent conduct which could contribute to a cumulative fundamental breach of contract on the part of the respondent, amounted in itself to a fundamental breach of the implied term of trust and confidence. It is item (d) of the claimant's particulars. Whilst not so expressed, this amounted the forgery (i.e the completion electronically of her name in a signature box) of the claimant's name on the probationary review document (page 105 of the bundle) . That was admitted by the respondent not to have been signed or authorised by the claimant, and to that extent was a forgery. This was no technicality, or of no consequence, its effect (and possibly its purpose) was to make it appear that the claimant had agreed to things proposed in her probationary review, particularly its extension, when she had not.

40. It is hard to imagine anything more likely to seriously damage the relationship of trust and confidence between employer and employee than forging internal documents to give a misleading impression of what was agreed in a meeting to consider extending the probationary period. That this should be done by a firm of solicitors , from whom the

claimant would be entitled to expect the highest standards of probity (although the forgery was probably actually done by Amy Berry of HR, from whom the Tribunal did not hear) rather reinforces how damaging this was for the employment relationship.

41. That , the Tribunal concludes would have been enough in itself to constitute a fundamental breach of the implied term of trust and confidence. Coupled with the unfair appraisal by ambush , it is certainly more than enough of a last straw to constitute a fundamental breach of the implied term of trust and confidence. It is also of note that tis issue is not addressed at all in Mr Jaffier's written submissions, or Stephanie Matthews' witness statement.

42. That, however, is not the end of the matter, as the claimant must resign in response to the fundamental breach. The respondent contends that she did not do so, arguing that she resigned because she got a new job, or that she delayed too long in resigning.

43. The law on affirmation or the effect of delay in a constructive dismissal claim was considered in ***Chindove v William Morrisons Supermarkets Limited [2014] UKEAT/0043/14/BA*** , cited by Mr Kenward, where Langstaff,J said this:

*"He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of* ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121*** *, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test".*

44. The claimant started looking for new employment after her probation was extended on 1 December 2021. She obtained an offer of employment on or about 9 or 10 December 2021, and resigned on 13 December 2021. That is only 12 days, of which only 9 were working days. 1 December 2021 was a Wednesday and 13 December 2021 was a Monday. The Tribunal does not consider that the claimant by delaying her resignation that long, whilst she found alternative employment, affirmed the contract, or waived the breach. Nor does it consider that the claimant resigned because she had found another job. She only started searching for another job after the probation review

on 1 December 2021. The breach was the reason for looking for another job, and was the reason for the resignation. The claimant was accordingly constructively dismissed.

***Remedy and the effect on the respondent's contract claim.***

45. Mr Kenward submits that the effect of the Tribunal so finding will be as follows:

a.)The deductions made in the December payslip (page 121 of the bundle) of £973.03 in respect of the recruitment fee and £255 in respect of the practising certificate fee so that the net pay of the claimant was reduced to nil, were unlawful . The claimant seeks the repayment of the sums of £973.03 and £255 as unlawful deductions. Mr Jaffier accepts that if the Tribunal finds that the claimant was constructively dismissed, the respondent cannot justify these deductions, and these sums are due to the claimant.

b)The heads of claim in respect of the final 9 days worked in the sum of £1038.46 gross and holiday pay in the sum of £461.53 gross (making a total of £1,499.99) are effectively duplicate claims as these are the gross sums from which the deductions in the December payslip were made, so that restoring the unlawful deductions effectively puts the claimant in the position of having been paid the pay and holiday pay to which she was entitled. No further award is therefore sought.

c) The claimant also claims for notice pay in the sum of £1,793 net on the basis that the claimant would have been entitled to one months' notice pay under the contract of employment , but for the constructive dismissal which took effect immediately. It can be seen that her taxable gross pay for a month was £2,500 and her net pay £1,793.04 (page 119 of the bundle). However, her new employment started on 5 January 2022, 23 days after her resignation, so that she accepts that she would need to give credit for her net pay for 8 days in her new job which would be £477.96 (the net monthly figure can be seen in the payslips at pages 122 and 123). On this basis the claimant would be entitled to an award of £1,315.08 for notice pay.

d) The issue as to whether or not the claimant is entitled to notice pay ultimately depends upon the Tribunal determining whether the effect of the correspondence on 13 December 2021 (pages 107 to 110 of the bundle) involved the claimant having waived any right to notice. For the respondent Mr Jaffier has not addressed this issue either in his written submissions.

46. The Tribunal's view is that the claimant is entitled to notice pay. When an employee accepts a repudiatory breach on the part of an employee, they can resign with or without notice. The claimant did the former. Had she done the latter, she would then have been susceptible to the argument that in giving notice, she affirmed the breach, and lost the right to claim constructive dismissal. As it was she faced that argument after 13 days, giving notice would have been even more perilous for her. In those circumstances the Tribunal finds that she was indeed entitled to one month's notice pay, less what she earned in mitigation.

47. It follows, of course, that the respondent's contract claim must fail, as Mr Kenward submits , on the grounds that the respondent's repudiatory breach will mean that it

cannot rely on the terms of the contract under which it is alleged that the sum being counterclaimed has become payable., or the alternative plea that that the respondent cannot rely upon any clause entitling it to recover any payment for the reasons advanced in the Response to the Counterclaim at paragraphs 9 to 12 as summarised below. He relies upon the cases of ***Holmes v Tellemachus Limited [2022] EAT 71*** and ***Ali v Petroleum Company of Trinidad and Tobago [2017] IRLR 432, PC*** in support of the implication of a term that disentitles the employer when itself in breach from enforcing such contractual obligations. Mr Jaffier has not dissented from this proposition, and the respondent's contract claim therefore fails with the success of the claimant's constructive dismissal claim, and is dismissed.

Employment Judge Holmes
DATED: 15 March 2023

RESERVED JUDGMENT SENT TO
THE PARTIES ON
17 March 2023

FOR THE TRIBUNAL OFFICE

All 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.

# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2402039/2022**

Name of case: **Miss L Singh** v **Optimal Claim Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

**the relevant decision day** in this case is: 17 March 2023

**the calculation day** in this case is: 18 March 2023

**the stipulated rate of interest** is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

# GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.