



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4100319/2021**

**Hearing held by Cloud Video Platform (CVP) on 17 and 18 August 2021**

**Employment Judge: B Campbell**

10 **Ms Margaret Wood**

**Claimant  
Represented by  
Mr Alasdair Bryce,  
Solicitor**

15 **The Food Train Limited**

**Respondent  
Represented by:  
Mr Steve McGuire,  
Solicitor**

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**JUDGMENT**

The Judgment of the Employment Tribunal is that:

1. the claimant was constructively unfairly dismissed contrary to section 94 of  
25 the Employment Rights Act 1996; and
2. The respondent is ordered to pay the claimant the sum of £16,403.74 by way  
of compensation.

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## REASONS

1. This claim arises out of the claimant's employment by the respondent, which began on 18 April 2016 and ended on 26 October 2020 with her resignation. The claimant alleges that she resigned in response to a material breach of her contract by the respondent, and therefore was constructively unfairly dismissed. The respondent denies that it constructively dismissed the claimant and maintains that she simply resigned through choice.
2. The claimant gave evidence at the hearing. On behalf of the respondent evidence was given by Ms Michelle Carruthers who is its CEO.
3. The parties had jointly prepared a paginated bundle of documents which was referred to in evidence, and where appropriate references are made below to page numbers of that bundle in square brackets. This included a schedule of loss and material in relation to the claimant's losses and mitigation efforts.
4. A joint list of issues was also provided.
5. Owing to pressure of time the parties provided written submissions after the hearing, which were considered in reaching the conclusions below.

## LEGAL ISSUES

6. The legal questions before the Tribunal were as follows:
  - 6.1. Was the claimant entitled to resign from employment by reason of the respondent's conduct and, as such, was the claimant constructively dismissed by the respondent in terms of Section 95(1)(c) of the Employment Rights Act 1996 ('ERA')?
  - 6.2. If so, was the claimant's dismissal fair or unfair in terms of section 98(4) ERA?
  - 6.3. In the event of the claim being successful, to what remedy should the claimant be entitled?

## APPLICABLE LAW

### Constructive unfair dismissal

- 5 7. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.
  
- 10 8. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or repudiatory, breach of the contract. The breach may take place or be  
15 anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. A last straw in this context may not be a breach in itself but it should not be innocuous. The employee must resign in response to the breach, and not delay unduly in doing so or they may be deemed to have accepted or affirmed the breach.
  
- 20 9. Should dismissal be proven by a claimant, then unless the reason for dismissal is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. If it is able to do so, the dismissal will potentially be fair.
  
- 25 10. Whether a dismissal is direct or constructive, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4) ERA, taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the

substantial merits of the case. The onus of proof is neutral in that consideration.

11. Further specific case law authorities are discussed below in the context of the particular evidence and issues in the claim.

5 **FINDINGS OF FACT**

12. The following findings of fact were made as they are relevant to the issues in the claim.
13. The claimant was an employee of the respondent from 18 April 2016 until her resignation date of 26 October 2020.
- 10 14. The respondent is a registered charity in Scotland. It supports members of the community, primarily older people who live at home with activities such as grocery shopping, odd jobs and repairs, and befriending. It has a number of branches throughout Scotland.
- 15 15. The claimant was a Service Administrator & Co-ordinator. She had held that role since March or April 2018. She was based at the respondent's Dumfries and Galloway branch, which was its head office. Her role involved carrying out administrative duties for various of the respondent's offices. A note of her job description was produced [136-138]. It was a full-time role involving 35 hours of paid work per week. Her line manager was the Regional Manager for Dumfries and Galloway, Ms Helen McAnespie who was based in Annan. The claimant was also answerable to other managers within the business who came to her.
- 20 16. The claimant had performance appraisal conversations with Ms McAnespie approximately every six months up until 1 October 2019. She was seen to performing to a good standard. The claimant's working relationship with Ms McAnespie up until that time was positive.
- 25 17. Part of the claimant's duties involved managing the accounts of customers who were unable to deal with their own money and balancing of the shopping accounts. This was where volunteers to the service collected money from

customers by cash or cheque to pay for their grocery shopping and brought it into the office. The sums had to be properly recorded against each customer and banked.

- 5 18. In September 2018 another member of staff was brought in to share the claimant's responsibilities. That individual left after a reorganisation in 2019. The claimant was again the sole person responsible for those duties. Some other responsibilities which had sat with a Development Officer were also given to her.
- 10 19. The claimant had been given a written 'contract of employment' on joining the respondent. This was dated 2 May 2016 [81-90].
20. The respondent operates a 'Positive Disciplinary Policy' [91-95]. It is non-contractual. It also has a Finance Policy [91-95].

### **Cheque and cash tally sheets and the National Finance team**

- 15 21. The respondent uses daily 'cheque and cash tally sheets' (referred to below as 'cash sheets') to record financial details relating to the shopping service provided to customers. Various people in the claimant's office used them, including her. The sheets record the amounts of money charged to and by each supermarket visited, delivery charges, details of any memberships, amounts received from customers, amounts of cash held and cash banked.
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22. The entry in the sheet reading 'to bank' should match the amount of cash held or returned. Occasionally the two amounts would not match, for example if someone had made a mistake with buying a customer's shopping or there had been some spoilage. It was generally accepted that these things would happen and an informal tolerance of a maximum of £10 was generally accepted.
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23. If the sheet did not balance as above then an entry would be made in an 'over/under book' to explain the occurrence. This would involve a member of staff going through each delivery sheet for each customer to see if there was

an entry which had not been properly picked up, such as a delivery charge. This could be a time-consuming task. The claimant was frequently required to undertake these checks.

24. The respondent had a National Finance team which was also based in the Dumfries and Galloway office but served the whole of the respondent's organisation. It was headed up by Ms Shona Sloan, National Finance Manager. A Ms Sandra Todd worked with her, as well as other administrators. The claimant was not part of that team but liaised with them. They were viewed as senior to her.

### **Injury and absence**

25. In March 2020 the claimant fell and injured her knee. She was absent from work for three weeks between 16 March and 6 April 2020 while recovering.

26. At that time the claimant's view of her workload was that it was manageable and there were no particular issues. She was not aware of whether anyone in particular covered her duties when she was absent.

27. However, when the claimant returned to work there were some significant backlogs. A little of her work had been done but there was much still outstanding. In addition, the Covid-19 pandemic had affected the country and that, and measures imposed in response to it, had caused extra disruption to the respondent's operations.

28. At this time the claimant was not aware of any issues other than the volume of work she had to catch up on. She was not told about any concerns on the part of her manager or the Finance team, for example.

### **Emails from Fran Thow and discussion - May 2020**

29. The claimant received an email on 5 May 2020 from Ms Fran Thow, the respondent's National Support Manager [35] who was based in Stirling. Ms Thow was senior to the claimant. The copy produced contained the wording

of that email, but it was being sent by Ms Thow to Ms Carruthers for information. It was agreed that the claimant received an email with the same text on that day.

5 30. In the email Ms Thow was bringing to the claimant's attention a number of concerns that had been raised by Ms McAnespie and the finance team about *'your ongoing performance, and your ability to work at a reasonable pace to stay on top of your workload'*. Reference was made to a backlog of work and essential financial year end tasks, as well as inaccuracies in her work.

10 31. The email went on to say that Finance had taken over some of the claimant's functions during her absence and had raised issues of the above nature. Ms Trow said that *'It has been highlighted that you fail to take responsibility for office/branch tasks in the absence of your co-workers and do not follow instructions given by your manager.'*

15 32. There was reference to the respondent's 'Positive Disciplinary Policy' and the claimant was invited to a virtual meeting with Ms Trow the following day to discuss the concerns and respond.

20 33. The email listed areas said to be of immediate concern, which were (i) VT payments being in arrears, (ii) VT payments not being added to QuickBooks in a timely manner, (iii) Year 20/21 CHiS entries not being added to a spreadsheet in real time, (iv) Financial year end paperwork and Quickbooks not yet being finalised and being beyond the deadline for completion in time for year end, and (v) persistent failure to follow various instructions from her line manager indicated to be a priority.

34. The email also set out some six further areas to be investigated.

25 35. The claimant replied to say she would prefer to have the discussion by telephone and a call took place. The day was moved to Friday 8 May 2020.

36. The discussion was civil and amicable. Ms Trow asked the claimant to consider it an informal conversation. It was not framed as being part of a disciplinary process. The claimant felt that her points were well recognised,

such as the volume of responsibilities she had and that she had returned from a three-week absence to find little of her work actioned by colleagues. At this time she was working her normal hours and additional hours one evening a week to address the backlog. She was supporting new members of staff who were learning their roles.

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37. Ms Thow emailed the claimant on 11 May 2020 [37-38] to thank her for the discussion the previous Friday and set out her response to the points the claimant had made. She considered that there were some shortcomings in the claimant's performance but she also recognised some particular challenges which impacted on that. She decided to give the claimant 4 weeks to improve her performance and deal with the backlog of her work tasks, plus create a system to ensure she stayed up to date. She also identified particular areas where the claimant should receive training.

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38. The claimant did not recall any discussion of any of the significant failures on her part detailed in the third paragraph of the email. It is most likely therefore that they were not discussed, but this was the view held by Ms Thow at the time and she was repeating it. The claimant welcomed the opportunity to receive further training.

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39. On receipt of Ms Thow's email of 11 May 2020 the claimant described herself as distraught. She felt that in addition to having a large workload and insufficient time to deal with it, she was being asked to record and report what she was doing, creating more work in the process.

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#### **Emails from Finance team June 2020**

40. The claimant received an email on 2 June 2020 from Ms Sloan. It raised five instances of shopping account entries in QuickBooks not reconciling with the cash banked in March 2020. She asked the claimant to investigate those and for relevant explanatory entries to be added to QuickBooks. Ms Sloan mentioned a further two instances of bills from stores not matching amounts paid out of individual customer bank accounts in March. She asked the claimant to correct the bank spreadsheet for these and asked the claimant to

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report when all of the above were dealt with, as the Finance team were trying to finalise the respondent's financial year end accounts.

41. The claimant took steps to investigate the five deposit discrepancies. They had arisen during her absence, which was recognised by Ms Sloan. The claimant wished to find out who had dealt with the transactions and entries in the daily cash sheets which did not balance but nobody out of the Support Workers and Development Officers she spoke to could recall. She undertook some investigation and believed that she had clarified and documented what had happened to cause each one.
42. The claimant was also able to rectify the two separate discrepancies related to card payments from individual accounts.
43. Ms Sloan emailed the claimant again on 15 June 2020 [40]. She thanked the claimant for sorting out the card payment discrepancies. Still outstanding were three of the five identified errors in deposits - on 17, 19 and 31 March 2020 £50, £49.94 and £300 respectively had been underbanked. Ms Sloan said that when there was a discrepancy between the amount of cash recorded as collected and the sum banked, it was not enough just to correct the amount in QuickBooks. The claimant had to investigate why the discrepancy had arisen provided the amount was over £10.
44. The claimant accepted that the Finance department were entitled to ask her to investigate and clarify aspects of the transactions conducted from the Dumfries office, and how they were recorded. She recognised that they had their own duty to ensure the respondent's accounts were correct and to identify potential irregularities, theft and fraud.
45. However, she thought that she had adequately identified and recorded the three errors which Ms Sloan said were still outstanding. She had done as follows:

45.1.17 **March 2020 cash sheet** – a member of staff had wrongly recorded a cheque deposited with the bank on the cash sheet as being for £98.91 when the cheque was to the value of £48.91. The

bank had telephoned the respondent to report the error. The claimant wrote on the daily cash sheet *'The QB entry has been adjusted to reflect the amount in the bank'* [134];

5 45.2. **19 March 2020 cash sheet** – similarly to 17 March, the value of a cheque for £29.44 deposited at the bank was wrongly entered in the daily cash sheet as £79.39. Again the bank had spotted this and telephoned the respondent. The claimant added a note to the daily cash sheet saying *'QB [entry has - the words are difficult to make out but assumed in the context] been adjusted to reflect the amount banked'* [104];

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45.3. **31 March 2020 cash sheet** – cash received by a staff member on 25 March was banked directly on that day but erroneously entered on the daily sheet for 31 March. The amount (in three entries of £100 each) was entered on the sheet for 25 March and bank statements corresponded to that. Someone had written on the daily cash sheet for 31 March *'Shouldn't be here was deposited into bank on 25/3 and added then to QB as 3 individual deposits'*. Someone else (or at least not the claimant) had written *'wrong code change to 3810'*. The claimant wrote next to that *'Done!'*.

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20 46. She did not make any investigation notes as she did not understand them to be necessary, and they had not been requested. She discussed the matter verbally with the Finance team. She considered that the resolution of each item was adequately explained in the above.

25 47. The claimant had either taken the above steps around April 2020 after her return to work from injury or after receipt of Ms Sloan's email of 2 June, but before her email of 15 June.

30 48. Ms Carruthers evidence on this matter was consistent with what Ms Sloan had said, namely that what the claimant had done was to correct the errors but not explain what had actually happened. There was a 'Memos' section in QuickBooks where comments could have been added to clarify or explain the

entries themselves. The claimant could have used that but didn't. By July 2020 the Finance team had worked out why the initial errors had been made. There was no suggestion of dishonesty on the claimant's part.

49. The versions of the cash sheets Ms Carruthers recalled seeing did not have any comments written on them and she was unsure who had written each comment on the versions before the tribunal. She was not aware of any conversations between the claimant and any member of the Finance team over the matter. She could only go by what Ms Sloan said in her emails, which was that adequate clarification had not been provided.

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#### **Written warning issued by Fran Thow and appeal**

50. On 18 June 2020 Ms Thow emailed the claimant with reference to her performance over the previous four weeks. Ms Thow considered there were still areas of concern relating to the claimant's capability and understanding of financial processes and error rate.

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51. The email was to be taken as a level 2 written warning under the respondent's disciplinary policy. It was to remain live for 12 months. The specific aspects which were said to be of concern were:

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51.1. Unacceptable error rate from QuickBooks entries, missing data, missing entries, entries not matching sums banked;

51.2. Failure to maintain accuracy of CHiS monies into and out of the bank and in QuickBooks;

51.3. Failure to follow correct investigatory processes and resolve when the cash sheets showed an over- or under-banking;

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51.4. Failure to thoroughly investigate discrepancies when QuickBooks doesn't match what was banked;

51.5. Failure to satisfactorily check bank statements;

51.6. Editing cash sheets and QuickBook entries to match payment into the bank without any investigation to understand the discrepancy.

52. Ms Thow wished to see improvement within the next four weeks, by 17 July 2020. If adequate improvement was not achieved, action under stage 3 of the disciplinary policy could be considered. That carried the possible sanction of a final written warning. If the claimant considered she needed training or support she was to let Ms Thow know.

53. The claimant was upset at receiving the warning. She had thought she was doing everything asked of her. She appealed against the issuing of the warning, as was her right within the respondent's policy. She did so by letter of 22 June 2020 [44]. She said that the ACAS Code of Practice on disciplinary and grievance procedures had not been followed. In particular, she had not been made aware that disciplinary action was being taken or invited to a disciplinary hearing. She did not get the opportunity to present evidence in her favour or be accompanied at the meeting.

54. Ms Thow emailed the claimant on 29 June 2020 to say that, on reflection, she accepted that she had conflated informal and formal procedures as they were provided for in the respondent's disciplinary policy. She therefore rescinded the warning and said that she would pass responsibility for the claimant's performance management to Ms Carruthers.

### **Second absence and return**

55. The claimant was absent from work a second time in 2020, from 30 June until 7 September 2020. The reason for her absence as stated on the fit notes she provided was '*work related stress and anxiety*'. The claimant said in evidence this was the stress she was being put under by the communications from the finance team and Ms Thow, as described above.

56. By email of 17 August 2020 Ms Carruthers invited the claimant to a meeting on 20 August to discuss her illness. The claimant accepted and the meeting took place between the two in the Dumfries office.

57. A note of the meeting, prepared by Ms Carruthers, was produced [58]. It is a typed page of text and dated 20 August 2020. The claimant does not recall Ms Carruthers taking any notes during the meeting. Ms Carruthers prepared the document shortly after the meeting from her recollection of the discussion rather than a set of notes taken in the meeting. A copy was not provided to the claimant.
58. The claimant disputed that there was any discussion of the nature described in the third last paragraph of the note, which began '*I asked Margaret to recall her reaction...*'. Ms Carruthers maintained that she did discuss the matter. Whether anything was said in the meeting comes down to the question of which of the two attendees has the best recollection. It is found that on the balance of probability Ms Carruthers' recollection is correct in this regard. Her note was contemporaneous and is likely to be more accurate. There was no reason to suppose she had knowingly added an exchange which didn't take place.
59. The note therefore is found to be a generally accurate summary of the discussion rather than a verbatim record.
60. The claimant agreed a phased return to work involving her starting back on 7 September and building up her working time until 28 September when she would be working all of her hours.
61. When the claimant came back to work on 7 September 2020 she noticed changes in the layout of the office and some of the people working there. She completed her phased return without any setbacks and was positive about being back at work. Ms McAnespie reported to Ms Carruthers on the claimant's first day back. She described it more positively than the claimant's own recollection of the interaction between the two of them [61].
62. The claimant could not recall whether she told Ms McAnespie that she had found her workload too great before going off ill. However her duties during the phased return were at a reduced level. Ms McAnespie told the claimant to call her if she needed any help or support. The claimant did not need to do so

at any point. In addition she was reticent as her relationship with Ms McAnespie was fragile and she was disappointed that Ms McAnespie had not called her.

### **Disciplinary invitation and first resignation**

5 63. On 30 September 2020 Ms Carruthers sent the claimant a letter inviting her to a disciplinary hearing which was to take place on 7 October 2020 [62]. The reason given was that the claimant was alleged not to have followed the respondent's Finance Policy in relation to investigation of the three banking discrepancies on 17, 19 and 31 March 2020, as had been described in Ms Sloan's email of 15 June.

64. As such this was a revisiting of some of the elements of the Stage 2 warning which had been issued to the claimant by Ms Thow and then rescinded on appeal.

15 65. The claimant was reminded that all disciplinary sanctions were possible, including dismissal. She was permitted to have a colleague or trade union official accompany her.

66. In her evidence Ms Carruthers believed that a number of outcomes were possible and that a warning would possibly have been issued to the claimant. She understood that the claimant had initially put the wrong amounts into QuickBooks for the three transactions, then changed them.

20 67. On 1 October 2020 and in response to receiving the disciplinary hearing letter, the claimant wrote to Ms Carruthers to say she was resigning with immediate effect [63]. She explained her position as follows:

25 *'I feel that I am left with no choice but to resign in light of my recent experiences which include:*

- *allegations of poor performance which were unfounded;*

- *your failure to follow a fair and transparent disciplinary process on more than one occasion;*
- *unreasonable delay in disciplinary proceedings;*
- 5     • *intimidation and harassment, one example of this was you informing me that I only got the job over Stephanie due to my length of service with the company; quote "we have to offer you this because of your length of service";*
- *unrealistic demands in workload;*
- 10    • *neglected your employers duty of care on health and well-being of employees, all of this has resulted in me suffering with work-induced stress and anxiety;*

15     *Due to your behaviour as outlined above, I believe the employment relationship has irrevocably broken down and I resign as a result of the fundamental breach of the employment contract. I consider this to be a fundamental breach of the employment contract on your part, in particular the duty of mutual trust and confidence.*

*I would be grateful if you could acknowledge this letter at the earliest available opportunity.*

*Yours sincerely,'*

- 20    68.    The fourth bullet point was a reference to the reorganisation in 2019 when the claimant's colleague had been made redundant. The claimant had been told at the time that she would be the one retained owing to her longer service.
69.    In her evidence the claimant said that she thought she would have been dismissed had the hearing gone ahead.
- 25    70.    Ms Carruthers wrote back to the claimant on 5 October 2020 [64-65] to say that she was very concerned at the claimant's reasons for resigning and suggesting there may have been some confusion. She reiterated that the

invitation to a disciplinary hearing was effectively to allow the allegations to be discussed and responded to by the claimant, and that no decision had been made on any sanction.

5 71. She went on to say that she was merely attempting to address the claimant's performance issues and, if founded, decide on what actions, including support, could be put in place. It is noted that this is a change of tone from the disciplinary invite letter which was couched entirely in the terms of imposition of possible disciplinary sanctions and did not refer to support measures.

10 72. The claimant was asked to reconsider her resignation and confirm her final position by 8 October, which was later extended to 15 October 2020.

### **Return to work and second resignation**

15 73. The claimant confirmed by email of 14 October 2020 that she wished to rescind her resignation decision. She said she would return to work on 20 October and understood that she would have to attend a disciplinary hearing as proposed in Ms Carruthers' letter of 30 September. This was accepted and accordingly the claimant's continuous service was not broken. The claimant in evidence said she wished to give the respondent a chance to change, taken to mean a change in its approach to her and a move away from disciplinary action. She did not however ask the respondent to take a different approach to her in any specific way.

25 74. On her return to the office, the claimant found the atmosphere to be strained between Ms McAnespie and herself. Ms McAnespie had moved from the Annan office to the Dumfries office and was occupying a desk close to the claimant. The claimant felt she could not speak to colleagues the way she would normally have done. The claimant was asked to return her office keys. She had been used to opening up the office in the morning on occasion. She was given a set of tasks by Ms McAnespie to focus on in the initial days back at work. The claimant felt that she had to address her existing backlog of work as well, at least partly as that was what she was being accused of not doing

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in the disciplinary process. She was asked to go through her emails and identify priorities. A number of her passwords and permissions no longer worked on the respondent's computer system, as a result of her intimating her resignation. She could access emails but had to ask colleagues for help doing other tasks such as using QuickBooks and accessing bank accounts.

75. Ms Carruthers rescheduled the disciplinary hearing for 27 October 2020 and the claimant confirmed she would attend. The invitation letter was in the same essential terms as that of 30 September 2020. Ms Carruthers did not consider changing it. The claimant asked if she could bring a family member due to experiencing heightened stress levels. Her request was not granted and Ms Carruthers reiterated she could bring a colleague or a trade union representative. The claimant emailed back to say she would therefore attend alone, as she was not a member of a union and felt it to be an imposition to ask a colleague to attend with her.

76. On Monday 26 October 2020 at 18:33 the claimant emailed Ms Carruthers [75-77] to say that she had found herself in an intolerable atmosphere in the office. She was therefore confirming for a second time that she was resigning from her employment with immediate effect. She mentioned that she had returned to her GP who had certified her as unfit to work.

77. The email itemised by way of bullet points the matters which the claimant said contributed to her resignation, from Tuesday 20 to Friday 24 October, the previous working week. Those are considered in more detail below.

78. The claimant then said that due to all of those matters, and also *'the humiliation, lack of trust, unfriendly atmosphere in the office and the heightened levels of stress that I was put under'* she was asking that her resignation be accepted. She again said that her working relationship with the respondent had broken down irrevocably and that she was resigning as a result of the alleged fundamental breach of the employment contract.

79. The claimant also addressed the subject of the proposed disciplinary hearing. She described it as a 'sham' as she was not at work at the time the

discrepancies arose, and she said someone else should have picked them up. She said she was following the direction of the finance team and did not depart from the Finance Policy. She said the policy did not stipulate how investigations would be carried out and who had certain responsibilities.

5 80. Ms Carruthers acknowledged the claimant's letter and accepted her resignation on 28 October 2020. She again expressed that she had hoped the disciplinary hearing would have addressed the claimant's performance issues and the parties could then have moved on with any necessary support measures in place. She did however respect the claimant's decision and would arrange for her final pay and P45 to be prepared.

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81. The events of the week beginning Monday 19 October 2020 included the following.

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82. The claimant returned to work on **Tuesday 20 October**. She found that Ms McAnespie had moved into her office from the Annan office and was sitting at a desk close by. This was said to be in order to support the claimant but it had the effect of making the claimant feel more restricted and stressed. She described the atmosphere as 'unbearable'. Ms McAnespie rarely made eye contact. She spoke freely to a Development Officer but not the claimant, even to ask how she was. The only conversation she initiated with the claimant was to remind her that she owed some lottery money. She did not offer any help to the claimant. Her demeanour was different to before. The claimant had a large volume of emails to read through given that she had been away from work since around 1 October. She discovered that her accesses and passwords had changed or been removed. She understood that such precautions would be normal for a person who resigned, but expected they would have been reinstated since she confirmed she was returning. The claimant had a brief meeting with Ms McAnespie about how her duties had been reduced. Ms McAnespie also raised that the claimant had refused to set up a franking machine, had not been answering her telephone and had not dealt with some aspects of organising an AGM to her satisfaction. The claimant was not accustomed to setting up franking machines and needed

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assistance. She believed she had answered her phone whenever she could. She later had to deal with an unexpected event when a volunteer wearing a lanyard connecting her to the respondent had collapsed in a supermarket and been admitted to hospital. The claimant made efforts to have her and her next  
5 of kin identified and notified.

83. On **Wednesday 21 October** the claimant was still busy with various tasks and catching up on matters arising during her absence. Ms McAnespie asked the claimant what she was doing and she gave a report of her activities. Ms McAnespie told the claimant to transport a set of financial papers to the Annan  
10 office using one of the respondent's vans. She was not offered any help with the task. The claimant did as she had been asked. It involved a number of boxes of material being moved. She had to wheel them to the van, empty the van of its contents to make space, load the van up and then drive to Annan where she had to unload the boxes onto the pavement outside the office and  
15 bring them up sets of stairs to the office in stages. When she got back to Dumfries she was told by Ms McAnespie that the next day she would have to help with making deliveries of shopping and drive in order to do so. She was to be at Morrisons supermarket for 9am. She was apprehensive as she had not driven the van which would be used before, and it was larger than she  
20 was used to. The claimant worked on her list of tasks for the rest of the day but also had to deal with a customer complaining about a delayed food delivery earlier in the week. She completed some more tasks, locked up the office and went home.

84. On **Thursday 22 October** the claimant attended Morrisons supermarket as  
25 she had been asked. She arrived at 8.30am. One all of the shopping orders had been completed by the various volunteers, the claimant went with one volunteers to drop the deliveries off at customers' homes. She returned to the office and was asked by a volunteer to make a further delivery of some frozen goods. She agreed to do so. Her working day involved starting 30 minutes  
30 early, finishing 30 minutes late and having no lunch break. She could not complete any of her normal tasks, some of which had been described before as urgent.

85. On **Friday 23 October** the claimant was on a pre-arranged day of annual leave. She went into the office to check her emails for a response to her request to bring a family member to the disciplinary hearing which had been scheduled for the following Tuesday. She was asked to contact Ms  
5 McAnespie which she did. Ms McAnespie said she was concerned at the claimant coming into work on her leave day to check emails. She would forward the necessary email to the claimant's personal account along with some meeting notes which had been requested. The claimant agreed and went home. She felt she had not been trusted and that she could not carry on  
10 working under those circumstances.

### **Post-termination matters and mitigation of loss**

86. The claimant did not apply for any new roles in the three months following her resignation as she was said to be medically unfit to do so. After that she  
15 applied for five roles which were detailed in her schedule of loss, but without success. She said she continued to review employment websites to identify local vacancies. She also said she was particularly concerned at the prospect of the respondent giving her a negative reference during an application process, which caused her further stress.

20 87. The first role the claimant secured was as a Covid-19 testing operative with a start date of 7 June 2021. The contract was on a six-month fixed term but she was hopeful it would be extended. Her pay was £190.34 per week net and therefore less than her earnings with the respondent.

## 25 **DISCUSSION AND CONCLUSIONS**

### **The parties' submissions**

88. The claimant alleges that the respondent subjected her to a continuing course of conduct involving multiple breaches of contract. These were said to have

the effect of destroying the bond of mutual trust and confidence. They were said to be:

- 88.1. The imposition of a stage 2 disciplinary warning by Ms Thow on 18 June 2020;
  - 5 88.2. Ms Carruthers' conduct of the disciplinary process, as detailed in her letter of 30 September 2020 inviting the claimant to a disciplinary hearing;
  - 88.3. The similar and further conduct of Ms Carruthers in relation to the continued disciplinary process, including her second disciplinary hearing invite letter of 20 October 2020; and  
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  - 88.4. The behaviour of the respondent's management towards the claimant upon her return to work on 20 October 2020, as referred to in her resignation letter of 26 October 2020.
89. In anticipating the respondent's argument that by rescinding her first  
15 resignation on 14 October 2020 she affirmed any breaches of her contract by the respondent before that date, the claimant argues that the terms on which she agreed to return made clear, or at least left open, that she had not forgiven the respondent for any such breaches, but rather wished to address them after being reinstated to her role. Her agreement to return was contingent on  
20 the respondent not repeating its unreasonable treatment of her.
90. On that basis, the claimant maintains that the claimant's treatment between  
20 October 2020 and her second resignation were further acts or 'straws' going towards a cumulative breach of mutual trust and confidence, failing which they were significant enough breaches in their own right to justify the  
25 claimant resigning.
91. The claimant accepts that initiation of a disciplinary process in itself will not undermine mutual trust and confidence. However, she says, the respondent departed from its own disciplinary policy and procedures, or otherwise acted irregularly. By way of example, it was said that Ms Carruthers had effectively

acted as investigator as well as disciplinary decision-maker, and she had not investigated the matters making up the disciplinary allegations properly. Had she (or someone else with the task) spoken to the claimant at the investigation stage the matter could have been resolved and continuation of the disciplinary process would not have been required.

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92. It was also suggested that Ms Carruthers had not adequately provided the claimant with the details or evidence relating to the allegations and she had ignored the respondent's disciplinary policy where it stated that no employee would be dismissed for a first offence unless amounting to gross misconduct, by stating in her disciplinary invite letters that dismissal was a possible outcome for the claimant.

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93. It was also argued that the respondent's initiation of a disciplinary process was unnecessary. The claimant had identified the nature and cause of the three banking discrepancies and in each case had made a note on the cash tally sheet for the relevant day and adjusted the entry in QuickBooks to reflect the true amounts banked. She had spoken to the Finance team about her findings and actions. Overall she had done enough to resolve those issues. Nothing was said in either the Finance Policy or disciplinary correspondence to explain what more the claimant ought to have done. Nor was Ms Carruthers able to explain that now to the tribunal. The claimant was not responsible for the errors in the first place as she had been absent when they had been made by others.

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94. The claimant invited the tribunal to find her a credible and reliable witness, whereas the evidence of Ms Carruthers could not be relied upon so readily, as she played down her own and her colleagues' failings in respect of the claimant's treatment.

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95. It was also submitted that the claimant had adequately mitigated her losses and had demonstrated this to the tribunal, given the authorities on the matter. She had made sufficient efforts and if the respondent wished to challenge her on that issue, the onus was on it to persuade the tribunal of that rather than falling on her to prove the alternative.

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96. Mr McGuire for the respondent submitted that there was no conduct on the part of the respondent which went towards justifying the claimant's resignation. In particular, the claimant was unable to demonstrate any unreasonable conduct towards her from the point of her return to work on 20  
5 October until she submitted her resignation email on 26 October 2020. The best she could do was to refer to being uncomfortable about her line manager Ms McAnespie moving into the same office space as her, but this was too insubstantial and the claimant never reported feeling adversely affected at the time. She never raised a grievance despite being aware that the respondent  
10 had a policy.
97. He also submitted that, in relation to the first resignation, both Ms Carruthers' invitation to the claimant to reconsider, and the claimant's response, indicated an understanding between the two that the planned disciplinary hearing would still take place and the claimant would have the opportunity to hear and  
15 answer the respondent's concerns. The claimant did not think to ask that something different should happen. It therefore followed that by reconvening the hearing the respondent could not be in repudiatory breach of conduct.
98. After a discussion of some relevant case authorities it was argued that rather than act in a way suggestive of no longer wishing to be bound by the  
20 employment contract, in the terms of ***Western Excavating Ltd v Sharp [1978] ICR 221***, the respondent's actions showed that it wished to go on being bound by the contract even when the claimant wished to bring it to an end.
99. It was raised that in the course of being managed back to work by Ms Carruthers, the claimant did not raise that she had been subject to  
25 unreasonable demands and that she knew she could call Ms McAnespie if she felt she required help. The claimant had confirmed that up to the completion of her phased return at the end of September 2020 she was pleased with how things had gone. Altogether an adequate support strategy had been put in place.
- 30 100. It was also submitted that the claimant's understanding of the respondent's use of support workers was wrong, in that they were available to assist her

contrary to her belief that they weren't, and that no plans were in place to remove them on the basis of their cost.

5 101. Reference was also made to the respondent's Finance Policy and specific aspects of that which applied to the claimant's role. It was submitted that the respondent's demands of the claimant regarding the investigation, reporting and rectification of accounting discrepancies were reasonable in that context. The claimant recognised the respondent's right to have her do that for discrepancies above a de minimis amount of £10. She had not adequately explained any findings she had made in relation to the transactions raised by the Finance department, or at least her colleagues there did not understand the reason for the discrepancies.

10 102. It was argued that no act on the respondent's part amounted to a repudiatory breach in itself, or contributed to a cumulative repudiatory breach by way of a course of conduct. Specifically and in any event, the claimant had affirmed any breach before 14 October 2020 by indicating on that day that she wished to revoke her resignation. Further, she could not say that any individual matter arising between 20 and 23 October 2020 amounted to a material breach of her contract. There was a lack of evidence of any hostile atmosphere in her workplace, humiliation or lack of trust in her. Any understanding of there being an expectation to return to her full duties, including addressing any backlog of work, dealing with VAT payments, reviewing bank statements and reconciling shopping spreadsheets came out of the claimant's misplaced assumption that this was what the respondent required of her, when Ms Carruthers' understanding was that the claimant was to do significantly less to begin with and 'get back to basics'.

20 103. Finally, Mr McGuire asserted that the claimant had not adequately mitigated her losses. She had only applied for a job a month on average and by her own admission had not pursued other opportunities because of a fear that the respondent would give her a negative reference. This was not a sufficient reason not to proceed with an application.

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## CONCLUSIONS

### **Nature of alleged breach - mutual trust and confidence – and whether such breach occurred?**

104. A breach of contract founded upon to support a constructive dismissal claim  
5 may be the breach of either a specific term or the underlying obligation to maintain mutual trust and confidence. The concept of the latter is described in *Malik v Bank of Credit and Commerce International SA [1998] AC 20*. It is this term which the claimant alleges was fundamentally breached by the respondent.
- 10 105. The onus falls on a claimant in such cases to prove that there was a repudiatory breach of contract.
106. The claimant's evidence was that there had been a sustained and unnecessary campaign against her involving effectively the whole management team of the respondent. She believed that she had adequately  
15 complied with the requests of the Finance team despite the issues not being of her making in the first place, and therefore thought it unjust to be given a disciplinary warning by Ms Thow. She was relieved when the warning was withdrawn but then disappointed to find that rather than this be the end of the matter, further and potentially more severe disciplinary action was proposed.  
20 She could not understand why her managers saw it necessary to do so. Even when accepting that a disciplinary hearing would be rescheduled following the withdrawal of her resignation, she could not understand why. No account was taken of the effect of the process on her health and the whole matter was unnecessarily prolonged. When she returned to work on 20 October 2020 she  
25 kept being asked to do things which were not part of her normal duties and which prevented her from doing the core tasks and priorities she was tasked to do.
107. On the contrary, the respondent's perspective was that it had patiently dealt with the claimant's absences due to illness, it had made reasonable requests  
30 of her initially by asking her to investigate some accounting discrepancies,

that she had not adequately investigated or at least explained the nature of those errors despite repeated requests, and that therefore the respondent was entitled to address the issue by way of its disciplinary process. The respondent had not wished the claimant to resign and therefore persuaded  
5 her to change her mind. She appreciated however that it was still appropriate to deal with the issues via a disciplinary hearing, and therefore to reschedule it until after her return was appropriate. She was given alternative and lighter duties to deal with on her first week back in October 2020 and the availability of her line manager to support her, and any sense of pressure or expectation  
10 to carry out further work was her understanding alone, but not one shared by the respondent. As such her second resignation was equally surprising and disappointing.

108. This is a finely balanced case. Considering all of the evidence and the parties' submissions, it is found that the respondent did fundamentally breach the  
15 obligation to maintain mutual trust and confidence by its conduct over a period of time and comprising:

108.1. The issuing of a disciplinary warning which it later accepted was inappropriate on 18 June 2020;

108.2. The initiation of a disciplinary process by way of an invitation on  
20 30 September 2020 to a disciplinary hearing;

108.3. The issuing of the second disciplinary hearing invitation on 20 October 2020; and

108.4. Aspects of the claimant's treatment between 20 and 23 October  
25 2020, which were the 'last straw' in the repudiatory course of conduct.

109. Each of those matters is considered below.

110. The issuing of the 'Stage 2 Written Warning' formed part of the respondent's course of conduct for fairly self-explanatory reasons. The warning had been issued outside of the procedure said to have been followed and it was

unnecessary, or at least premature. In particular, it was issued on the basis of partial information and it was unclear what investigation Ms Thow had undertaken, or understanding of the details she had. The claimant was not given the opportunity to answer the allegations against her, whether at a hearing or otherwise. Only by the claimant appealing did the respondent accept that the warning was inappropriate and should be revoked. Ms Thow accepted her 'haste' in trying to address the claimant's performance, and that she had combined informal and formal parts of the process.

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111. A further contributory act by the respondent was the issuing of the disciplinary hearing invitation letter on 30 September 2020. Whilst it may have been appropriate generally to have some type of meeting with the claimant following completion of her phased return from illness to discuss any outstanding queries that the Finance team had, there are some specifics of this step which were not appropriate. First, the subject matter of the proposed disciplinary hearing was by that time historic, or stale. The errors occurred in March 2020, six months before the invitation letter. The claimant had investigated them and quickly ascertained that in each case a simple recording error had been made on the daily cash sheet, creating a difference between the day's takings figure as recorded and the amount of cash taken to the bank. The claimant added a note to each cash sheet as appropriate to indicate what had happened. She discussed the errors with the Finance team.

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112. This should have been adequate, but even if it was not for the purposes of the claimant's colleagues in the Finance department there was no procedure in the Finance policy that she was to have followed, and which the respondent could therefore accuse her of departing from. At its highest this ought to have been the subject of an informal and constructive conversation or treated as a training need, but not a misconduct charge to be dealt with in the more formal setting of a disciplinary hearing.

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113. Further, by Ms Carruthers' admission the matter did not warrant the threat of possible dismissal when considered against the terms of the respondent's disciplinary policy. That was a threat that the claimant took seriously. Ms

Carruthers sought to emphasise in her letter to the claimant of 5 October 2020, issued in response to the claimant's resignation, that the purpose of the hearing was to allow the claimant to respond to performance issues and, if any were identified, to decide what support or other actions should be put in place. However that is a different approach to the one conveyed in the disciplinary invitation letter itself, which is very much couched in the language of a potentially punitive disciplinary process and not a performance management and improvement procedure.

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114. Part of the problematic nature of Ms Carruthers' proposed approach appeared to be that if she wished to deal with the matter within a disciplinary process, no proper investigation had been undertaken. Had there been one, ideally conducted by another person, the nature and significance of the issues would have been better focussed and appreciated, and the claimant would have been able to explain her position before any decision as to the need for a hearing were taken.

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115. Many of the problems with the first disciplinary hearing letter were repeated and compounded by the second letter, issued in substantially identical terms on 20 October 2020 – the claimant's first day back at work after the revocation of her resignation. The claimant's resignation offered an opportunity for the respondent to conduct a sense check of its actions. Although the claimant did not request that disciplinary action be abandoned, the respondent should have reflected on whether that was an appropriate approach given that the claimant's resignation referred to, among other complaints, unfounded allegations of poor performance, failure to follow a fair or transparent disciplinary process on more than one occasion and unreasonable delay.

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116. The last straw came courtesy of the events of 20 to 23 October 2020. First, two things should be made clear. Not every matter raised by the claimant from this period, either referred to in her resignation letter or in her evidence before the tribunal, went towards establishing a last straw, which needn't be of the magnitude of a repudiatory breach in itself but equally should not be innocuous. Also, it is clear that part of the reason why the claimant found

herself in such an unhappy state of mind by the end of that week was related to her perception of what she was required of her. Whilst the respondent may have made clearer that she would not have to begin immediately addressing the backlog of her normal tasks which had built up during her absence, she was mistaken about what she was expected to do in her first week back, which was less than she understood and at least intended to involve less daunting or demanding duties. Similarly, it is unclear whether the claimant made Ms McAnespie aware of how challenging she would find some of the tasks she was given, or could have asked for help, as opposed to simply performing them however difficult they got.

117. That said, the particular aspect of that time period which is held to amount to a last straw is essentially the conduct of Ms McAnespie towards the claimant. Rather than assist and support the claimant she made it more difficult and stressful for the claimant to be back at work. This pervaded the whole four day period and took in Ms McAnespie's general conduct towards the claimant in her presence and the way in which she interacted with the claimant over the instructions to deliver papers to the Annan office on the Wednesday and to drive the respondent's van in order to make grocery deliveries on the Thursday. It also affected the way the claimant was dealt with when she attended work on the Friday to check her email for a response from Ms Carruthers.

118. Ms McAnespie's conduct did not cross the threshold of becoming a breach of contract in its own right, but it was significant enough in the context to amount to a last straw. She may not have intended to have that effect, but whether a breach, or a last straw, occurred is to be tested objectively and on that basis it is found that a last straw was established.

119. A question arose, recognised and addressed by both of the parties' representatives, over whether any of the respondent's conduct before the claimant rescinded her resignation on 14 October 2020 could then be relied on by her to establish a breach of mutual trust and confidence. Mr Bryce

naturally submitted that this was still possible to do and Mr McGuire understandably argued that such an approach should not be taken.

120. Reference is made to the Court of Appeal decision in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** on this point. The Court held that earlier repudiatory conduct on the part of an employer which had been affirmed by an employee could later be referred to in support of a claim where there had been further conduct by the employer amounting to a last straw. Effectively, the later conduct revived the right to rely on the earlier conduct, notwithstanding the interim affirmation.
121. This principle is taken to be binding to the effect that if the claimant's resignation and reinstatement involved affirmation of anything which had gone before, it is still competent to revisit those events and argue that they formed part of a course of conduct culminating in a subsequent last straw – the claimant's primary case.
122. Following ***Kaur***, whether or not the claimant affirmed any breach before 14 October 2020 is not determinative if the last straw is seen as part of the overall course of repudiatory conduct. As stated above, that is the case here.
123. In summary therefore it is considered to be both competent and appropriate to make a finding that there was a repudiatory breach of contract by the respondent by way of the events as outlined above.
124. Considering all of the above, the tribunal's finding is that the respondent did act in a way calculated or likely to destroy the relationship of mutual trust and confidence between the claimant and itself.

**The reason for the claimant's resignation – was it in response to a repudiatory breach?**

125. The claimant's reason for resigning was set out in her letter of 26 October 2020. She described an *'intolerable atmosphere in the office'* since she returned on 20 October. She had gone to her GP again to be certified as unfit

to work. She described her *'recent experiences'*, i.e. the events of Tuesday 20 to Friday 23 October which she itemised. Those matters, together with *'the humiliation, lack of trust, unfriendly atmosphere in the office and the heightened levels of stress I was put under'* were said to be the motivation for her second resignation. She described the proposed disciplinary process as a sham as the original errors should have been picked up by others while she was absent from work, because she had complied with the requests of the Finance team and since the finance policy did not set out an approach which she could have followed.

10 126. The resignation letter makes it sufficiently clear that the claimant was resigning as an immediate reaction to her experience on her return to work, but that this was part of a longer-running narrative going back to how the accounting errors should have been dealt with from the outset.

15 127. As such it is consistent both with a finding that there had been a course of conduct on the part of the respondent which had the cumulative effect of amounting to a repudiatory breach of contract, with the last straw being by way of the events of 20 to 23 October 2020, and also that this was the reason why the claimant resigned.

20 **Did the claimant resign promptly in response to a repudiatory breach of her contract?**

128. The claimant resigned on 26 October 2020 after a last straw that existed and continued between 20 and 23 October 2020. It is held that the claimant did not unduly delay in communicating her resignation.

25 129. Accordingly it is found that the reason for the claimant's resignation was the repudiatory breach of mutual trust and confidence described above, and therefore she was constructively dismissed.

**Was the claimant's dismissal fair in terms of section 98 ERA?**

130. Recognising that a constructive dismissal is not automatically unfair, it is necessary to consider whether the claimant's dismissal in this case was for a fair reason within the terms of section 98(1) and (2) ERA and, if so, whether the respondent acted reasonably in implementing the dismissal according to the requirements of section 98(4) ERA.

131. The onus falls on the respondent to establish a potentially fair reason for dismissal.

132. The point was not directly raised in the respondent's submissions and so it is difficult to be clear what its case is in this regard. On the evidence, it could only realistically be argued that the claimant was dismissed by reason of either capability or conduct. In each type of situation there are well established processes and principles courtesy of case law, guidance such as the ACAS code of practice on disciplinary and grievance procedures, and other generally recognised guidance and good practices. The respondent did not comply with either body of practice and principles in the steps it did take, and as discussed above appeared not to be clear which type of issue it was addressing. It is therefore found that the respondent did not discharge the onus of proof on it to show that the claimant's constructive dismissal was for a potentially fair statutory reason.

133. In any event, for similar reasons it is held that the respondent did not comply with the requirements of section 98(4) ERA. It did not follow a reasonable procedure, whether a disciplinary procedure or a performance management process. It did not undertake adequate investigation. Dismissal for either reason would not have been a proportionate decision to take, as the claimant was not so evidently incapable of doing her job and nor by Ms Carruthers' admission was she guilty of anything approaching gross misconduct.

134. Therefore it is concluded that the claimant was unfairly constructively dismissed.



135. It is accordingly necessary to consider questions of loss, mitigation and compensation.
136. A schedule of loss was included in the joint hearing bundle.
137. The claimant had worked for the respondent for four complete years. Her gross and net weekly pay were £380.77 and £328.96 respectively. Her date of birth is 16 January 1955.
138. A basic award is calculated as **£2,284.62** based on the above. There is no reason to make a deduction from that in the circumstances of this case.
139. The claimant seeks a payment of **£500** to cover the loss of her employment rights. That figure is at the higher end of a typical range for such an award, but at the same time she may well find it more difficult to find other long term work than a younger employee, and by doing so build up service and acquire employment rights and protections. The figure is therefore considered to be reasonable overall.
140. The claimant seeks compensation for her full net weekly pay between the date of her dismissal and the start of her current role on 7 June 2021 – a period of 32 weeks at £328.96 amounting to **£10,526.72**.
141. She seeks the difference between her net weekly pay with the respondent and her current weekly pay, calculated at £138.62, from the start of her new role until the anniversary of her resignation – i.e. for 20 weeks. That amounts to **£2,772.40**.
142. Finally she requests compensation for loss of pension contributions at £10 per week for the 32-week period she was out of work, making **£320**.
143. The above sums claimed are reasonable in the circumstances. The claimant is likely to sustain ongoing losses beyond the period claimed for, and may not continue to be engaged by her current employer beyond the beginning of December 2021. She had made adequate efforts in the circumstances before then to secure an alternative role. The onus of proof falls on a respondent to

demonstrate a failure to mitigate and there was no sufficiently compelling evidence to suggest that she had not done enough.

144. Accordingly, the claimant is granted compensation as above, the total of which is **£16,403.74**.

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Employment Judge: Brian Campbell  
Date of Judgment: 29 September 2021  
Entered in register: 07 October 2021  
and copied to parties

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