Case Number: 3300204/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Goburdhan	v	Stuart Harris Associates Limited

Heard at: Watford, by CVP **On**: 13 and 14 December 2021, and 14-16 February 2022

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Mr Ian Rees Phillips, of counsel
For the respondents: Ms Bianca Venkata, of counsel

JUDGMENT

1. The claimant was dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996").

2. That dismissal was unfair within the meaning of section 98 of that Act.

3. The claimant's conduct in no way caused or contributed to her dismissal, and it is not just and equitable to reduce either the basic award payable under section 119 of the ERA 1996 or the compensatory award payable under section 123 of that Act.

4. The basic award payable to the claimant by the respondent under section 119 of the ERA 1996 is £4,035.

5. The compensatory award payable to the claimant by the respondent under section 123 of the ERA 1996 is £42,427.84.

6. The respondent must pay the claimant £10,000 (in total) by way of a contribution towards her costs.

REASONS

The claim

1 In these proceedings, the claimant claimed that she was unfairly dismissed by the respondent. Her claim was that she was dismissed "constructively", i.e. within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996"). She was employed by the respondent as an accountant. The respondent is a limited company controlled by Mr Stuart Harris.

The procedural history

2 The claimant's claim was listed to be determined on 13 and 14 December 2021, but there was insufficient time on those two days for me to do more than read the documents, hear oral evidence (I heard oral evidence from the claimant and from Mr Harris) on liability, and receive and read some written closing submissions from both counsel. I did not have time to hear oral submissions from both counsel. I therefore had to adjourn the hearing and by agreement with the parties I adjourned it to 14 February 2022, with a time estimate for the resumed hearing of three days.

3 After 14 December 2021 and before 20 December 2021, I carried out some research into the law relating to income tax. I then wrote and sent to the parties on 20 December 2021 an unusually long record of the hearing of 13 and 14 December 2021 as a case management summary, with a view to (1) assisting the parties to prepare for the resumed hearing and (2) ensuring fairness to the parties. In that document, I recorded

3.1 the factual background to the claim as I understood it before the resumption of the hearing but without making any findings of fact;

3.2 the documents before me at the hearing on 13 and 14 December 2021;

3.3 what happened at that hearing (including the making by Ms Venkata on behalf of the respondent and the rejection by me of an application for permission to rely on an expert report relating to the proper completion of income tax returns);

3.4 Mr Harris's evidence as given to me at that hearing and in the documentary evidence before me about a key factual issue, namely the use of estimates for the costs incurred in earning the remuneration stated in clients' income tax returns;

3.5 the results of my researches into the law relating to that issue and the practice of Her Majesty's Revenue and Customs ("HMRC") in regard to that issue; and

3.6 the claimant's oral evidence as to her reasons for resigning.

4 I also stated in that document my then-current view on the question whether the claimant had been dismissed constructively, and my reasons for that view.

5 At the resumed hearing, Ms Venkata put before me some further written submissions and a document which purported to be an expert's report about the law relating to income tax. The document was written by a specialist tax counsel, Mr Barrie Akin, who had also qualified and practised as an accountant. In her further written submissions, Ms Venkata sought permission to rely on that report as an expert report.

6 I then referred Ms Venkata to paragraphs 33-106 to 33-109 of the current (20th) edition of *Phipson on Evidence*, and said that I could not see how Mr Akin's report could conceivably be admissible as an expert report but that she could rely on it as a set of submissions. Ms Venkata then she did not press her application for it to be so admitted. Rather, she relied on what was said in it in support of the proposition that my provisional view that the claimant had been dismissed constructively was arrived at on a flawed basis. Having read that report, and having considered what was said in it, I accepted that in one respect my provisional view was arrived at on a flawed basis.

7 I then heard oral submissions from both counsel, including in response to each other's written closing submissions and on the question whether, if I found that the claimant had been dismissed within the meaning of section 95(1)(c) of the ERA 1996, that dismissal was unfair. That took until 15:34, when I adjourned the hearing to the next day. I resumed the hearing shortly after 10:00am on the next day, 15 February 2022, and announced my decision on liability, which is as stated in paragraphs 1 and 2 of the above judgment.

8 Having done that, I adjourned the hearing to read the documents relating to remedy. I then resumed the hearing. Ms Venkata then called Mr Harris to give some more evidence with a view to satisfying me that the claimant's conduct was such that it would be just and equitable to reduce, possibly to nil, the financial compensation which would otherwise have been payable to her. I then heard oral evidence from the claimant. I did so until 17:08, at which point I adjourned the hearing to 2pm on the final day of the resumed hearing, 16 February 2022, and directed the parties to put before me written closing submissions on remedy by 10.00am on the next day. They both sent me such written submissions during the morning of 16 February 2022.

9 At 2pm on 16 February 2022, I resumed the hearing and heard oral submissions from both counsel on the issues relating to the compensation which the claimant should receive for her (as I had found) unfair dismissal. I then gave judgment on that issue and stated my reasons for it. The judgment was as stated in paragraphs 3-5 of my above judgment.

10 Both parties then made applications for their costs of the proceedings, the respondent on the basis that it had made a substantial offer to settle the claim (albeit

without any admission of liability and albeit that the offer was less than the total amount of the financial compensation which I had on 16 February 2022 concluded the claimant should receive) after receiving my case management summary of 20 December 2021. I then rejected the respondent's application for its costs and granted the claimant's application for her costs, albeit only for a part of those costs.

11 The terms of my judgment set out at the start of this document were signed by me on 16 February 2022 and sent to the parties without written reasons.

12 On 17 February 2022, the respondent's solicitors wrote to the tribunal asking for my written reasons on liability, remedy and costs. These are those reasons.

My findings of fact

The claimant and the respondent

13 The claimant commenced her employment with the respondent on 1 November 2014. One of the main aspects of the business of the respondent is preparing and submitting to HMRC self-assessment income tax returns for clients. The claimant is a qualified accountant, as is Mr Harris. They are both Chartered Certified Accountants and are both members of the Association of Chartered Certified Accountants ("ACCA").

The claimant's knowledge of income tax law when she started to be employed by the respondent

14 Before she started working for the respondent, the claimant had little experience of the application of the law relating to income tax. She and Mr Harris had worked for another firm at the same time, but in different departments. Mr Harris had then left that firm and established the respondent. The claimant joined the respondent on the understanding that she did not have any material experience of the law relating to income tax and that she was employed by the respondent principally to assist Mr Harris in his work as a tax accountant.

A summary of the manner in which the respondent required the claimant to compile and submit income tax returns

15 Until 2020, the claimant, at the direction of Mr Harris and on the basis that he assured her that it was appropriate to do so, followed a practice which I can summarise as one of calculating clients' taxable remuneration by using an estimate for the clients' expenses (which was always higher than the amount stated to the respondent by the client as the client's expenses; it was never lower than that amount) without drawing that fact to the attention of HMRC when either

15.1 the client had stated in terms precisely what the actual known amount of the expenses was, or

15.2 the client had that year given to the respondent incomplete (or even no) documentary evidence to show that expenses had been incurred.

The development of the claimant's understanding during the first part of 2020 of the legality of that practice

16 During 2020, the claimant became aware that the tax return of one of the respondent's clients (to whom I shall refer as KT; where initials are used below in square brackets that is because I have replaced a name with initials) had been investigated by HMRC and that HMRC had refused to accept the figure given by the respondent for the client's expenses. The claimant referred to KT as being a self-employed bricklayer, but Mr Harris referred to him in oral evidence as a plasterer. The claimant described the situation relating to KT's tax affairs in the following passage of her witness statement, which I accepted.

> "13. In 2015 or the early part of 2016, I requested some records from a client called [KT], who was a self-employed bricklayer. He informed me that he was awaiting the outcome of an HMRC investigation into his 2014 tax return. Following that Stuart [i.e. Mr Harris] informed me that he was dealing with that HMRC investigation and he boasted that he had a unique way of dealing with HMRC investigations and that was to ignore the HMRC's letters and generally the HMRC then left him alone after chasing him a few times. [KT]'s tax return was then sent to Stuart for review and Stuart then instructed me to include in it the same 'estimated expenses' as the 2014 tax return, save that the use of home expense should be reduced to £240. He said that he had agreed all this and this inclusion of these 'estimated expenses' with HMRC. Unbeknown to me at any time prior to the disciplinary meeting referred to in paragraph 25 [i.e. the one which led to the written warning of 23 June 2020 to which I refer in paragraph 43 below], from the disclosed correspondence passing between Stuart and the HMRC that starts at page 131, it is in fact untrue that the HMRC ever agreed Stuart's use of 'estimated expenses' in [KT]'s 2014 tax return.
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> 14. During February or March 2020 (after my two weeks holiday in February 2020 but before the Covid-19 lockdown on 23rd March 2020), I had a telephone conversation with Stuart. During that conversation, we discussed a client's tax return and at first, Stuart blamed his need to further review that tax return on the client. I felt that was unfair on the client and I said to Stuart that the need for the further review may be because Stuart had not share[d] his workings with clients. Stuart conceded that to share the working would be helpful for this client. He then went off to my mind on a bit of a tangent by saying that the government's plan for 'Making Tax Digital' (i.e. the use of digital records and use of approved accounting software packages only) would be problematic for the continued use of 'estimated expenses'. I did not understand the relevance of that but then

> Stuart followed it by stating that the HMRC investigation into [KT]'s 2014 tax return had '*been a one off*' and there was a currently a low risk of HMRC investigating any client's tax returns. He said that he had negotiated a settlement with the HMRC on [KT]'s 2014 tax return.
>
> 15. The conversation and in particular the reference to problems with the use of 'estimated expenses', an alleged negotiated settlement and the words '*been a one off*', left me with the distinct impression that none of the 'estimated expenses' used in [KT]'s 2014 tax return had in fact been allowed by the HMRC. I then began to think, if that is the case, then surely the use of 'estimated expenses' in [KT]'s subsequent years' tax returns was wrongful accounting practice and that it was also wrongful practice to use 'estimated expenses' in all the other clients' tax returns. It started to dawn on me that the routine use of 'estimated expenses' was wrongful accounting practice and a means to inflating a client's allowable expenses and thereby wrongfully reduce the client's tax bill."

17 I should say that that passage was not the subject of cross-examination, and when I pointed that out to Ms Venkata after giving judgment on liability on 15 February 2022, and said that in it the claimant had said that Mr Harris had said that "the government's plan for 'Making Tax Digital' would be problematic for the continued use of 'estimated expenses'", she said that Mr Harris did not accept that he had said that. However, in part because that was not put to the claimant, but also and mainly because of what Mr Harris said as I record in paragraph 33 below, I concluded that he did indeed say that "the government's plan for 'Making Tax Digital' would be problematic for the continued use of 'estimated expenses'".

The tax position of KT

18 During Mr Harris's cross-examination he agreed (and I found as a fact) that KT had in his self-assessment tax return for 2014 claimed to have incurred expenses of £17,944, but (1) KT had put before HMRC documents evidencing expenses of only £7,977.20 (so that the difference was an estimated sum for expenses, i.e. £9,966.80, which was not supported by documentation of any sort), and (2) HMRC had allowed only £3,950 since the true amount had not been capable of being verified so HMRC had used a figure of "10% of the declared turnover on a without prejudice basis". Those quoted words were in the letter at pages 189-189a (i.e. pages 189-189a of the main hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle) dated 12 September 2016 from a Mr D Preston on behalf of HMRC to the respondent. The letter contained this passage:

> "I will summarise the key points of the case as I understand them. We contacted [name blanked out but it was plainly KT] in August 2015 to ask for evidence in support of the expenses claimed on his 2013-14 SA [i.e. self-assessment] return along with mileage logs showing the nature of the business journeys

undertaken. You provided a copy of the accounts for the period ending 31 March 2014.

You then supplied some receipts and advised that some of the expenditure items were estimated owing to [KT's] domestic issues. I am sorry to hear that, but however unfortunate, such problems do not absolve customers of their obligation to keep proper supporting records. We suggested that [KT] may have been able to evidence the items in question by supplying bank statements. Whilst you declined to explore that option, it does appear to me that may have been useful.

Contrary to what you say, we have looked at the information provided carefully. The fact remains that some items are un-vouched and some appear to relate [to] non-business items of expenditure. In order to consider the motoring position for example, we would need to establish exactly when and where [KT] actually worked, i.e. mileage logs. We have not seen that information. We made all this pretty clear in our letter of 29 February 2016.

When we spoke to [KT] on 23 March 2016 he said he would look into the matter further but we have received nothing else from him. We have therefore reduced the expenditure figure to 10% of the declared turnover on a without prejudice basis. You have now lodged an appeal and are therefore free to put your arguments and further evidence to a reviewing officer or tax tribunal for their consideration. That is a matter for you and I cannot speculate here what the outcome will be.

Having reviewed the correspondence I find no evidence that the enquiries are in any way unreasonable as contended. We had perfectly reasonable concerns and you had ample opportunity to fully evidence all of the expenses claimed but you have not done so. I am not critical of our officers undertaking their duties diligently."

19 At page 160 there was a letter dated 29 February 2016 from HMRC to Mr Harris, in which this was said:

"**Information we need**

Tools, Equipment and Materials.
Your client has claimed £1.800.00 for materials and £1888.00 for tools and equipment totalling £3,688.
The receipts and invoices provided to us do not cover the full amount which is being claimed. Please provide us with a breakdown of the purchases made and any further receipts or invoices for these expenses, if no further receipts or invoices are available please send us copies of your client's bank statements showing highlighted transactions which relate to this expense.

Please note we can only allow expenses which we can see have been incurred and paid wholly and exclusively for the purpose of the business."

20 There was at pages 181-181d a letter from HMRC to KT dated 30 August 2016 in which the writer said on page 181a: "We consider that your behaviour was 'careless'. This is because you did not take reasonable care to make sure that your Self Assessment tax return was correct". That word "careless" used in a particular, technical, sense to which it is not necessary to refer here.

The claimant's continued development of her understanding of the legality of the practice summarised in paragraph 15 above

21 The claimant's witness statement continued after the passage set out in paragraph 16 above (and at the hearing she made some substantive corrections to paragraph 24 of her witness statement which I have made in the paragraph with that number as set out in the following passage without showing those corrections; I have on my own initiative made some other, minor textual, corrections and shown them in square brackets):

> "16. Given the lockdown caused by the Covid-19 pandemic, I was slow to think further on the issue of the regular use of 'estimated expenses'. On 27 May 2020, Stuart received an email from a client called [KN], in which [KN] raised a few queries on her tax return and its related calculations that were sent to her. Particularly, she queried why from her records, her total website expenses for the tax year came to £409.26 but those website expenses were stated as being £924. She also queried why from her records her print, film, photo and stationary expenses came to £467.50 but these were shown as being £1,297. Stuart emailed back a reply on 27 May 2020 in which he stated 'Essentially, we take your figures and then add a bit more by way of estimates'. I also responded by basically stating that Stuart had instructed that these 'estimated expenses' be included and were the same 'estimated expenses' used in the previous year's tax return but increased by 5% and £10. Copies of the emails on this are at pages 46 to 48 of exhibit 'AB1'. [Sic; that should have been a reference to AG1.]
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> 17. This was the first time that I'd become aware of a client querying Stuart on his inclusion of 'estimated expenses'. It [led] me to believe that Stuart was not always being transparent with the clients about his inclusion of 'estimated expenses' in tax returns. I decided then to contact the ACCA to take advice on this routine inclusion of 'estimated expenses' in tax returns. At page 227 is a copy of my email sent on 29 May 2020 to the ACCA. The advice that I received back from the ACCA that was confirmed in the email at page 230 that I received from them was clear. The practice of inclusion of 'estimated expenses' was a matter I should report to the NCA [by which the claimant meant, I understood, the National Crime Agency]. The subsequent emails at pages 231 to 232 passing between me and the

ACCA contained advice from the ACCA that I should exclude the 'estimated expenses' from the tax returns and keep any emails I received Stuart [sic; the word "from" may have been omitted, but I suspect that the word "received" should have been "sent to"] on why I was excluding them. This advice from ACCA I adhered to, although I did not at this stage report the matter to the NCA.

18. On 3 June 2020, Stuart sent me the email at pages 246 to 247 [in fact, that email was at pages 245-246]. In that email he instructs me to include in a tax return for a client called [AM], certain 'estimated expenses' including for example, an 'estimated expense' of £469 for insurance. I cannot see why Stuart is adding and thereby increasing insurance with an extra 'estimated expenses' of £469. Instead, the figure for insurance should be based on the client's record for it, which will be the insurance schedule and/or bank statement showing the premium paid for the insurance.

19. On 4 June 2020, I sent the email at page 249 in reply. In my email, I query whether the 'estimated expenses' Stuart want included for [AM] would be allowed by HMRC, given that similar 'estimated expenses' were disallowed by HMRC for [KT's] 2014 tax return.

20. Stuart['s] reply is at page 250. In it he states referring to [KT's] 2014 tax return that the HMRC '*still allowed some estimates i.e. a settlement was negotiated*'. However, I reiterate that my belief from reading the correspondence passing between Stuart and HMRC is that at no time did Stuart refer the HMRC to the inclusion of 'estimated expenses'. There is nothing stated by the HMRC that they are aware of the inclusion of 'estimated expenses'. It cannot be the case therefore that the HMRC has allowed Stuart's 'estimated expenses'. Instead, HMRC want records to be provided to them in support of Kelly's accrued expenses. This being a spot check made by HMRC. Stuart seemingly tries to deflect away from this by raising a complaint of how his type of client (sole traders) are treated less favourably by the HMRC than multinational companies and he seeks to use that complaint as leverage to get the HMRC to negotiate with him over the amount of tax [KT] is to pay. He also at no time furnishes the HMRC with copies of the relevant records in support of the allowable expenses used for the tax return, blaming their absence on them being lost. However, the HMRC's response to all of that is the records should be available at least in the form of bank statements.

21. Stuart goes on in his email about the expense of use of home. He always includes a large amount for that, typically anywhere between £1,800 to as much as £3,000 for any given tax year. That is much more than HMRC published guidelines on that expense, a copy of which can be found at pages 49 to 51 in exhibit 'AB1'.

22. As stated above, Stuart however never flags to the HMRC on any clients' tax returns (either in the 'white box' or at all) any breakdown for the allowable expenses and what he has included by way of 'estimated expenses'. The HMRC do not have the resources to do spot checks and request and review the records for clients' tax returns. An HMRC spot check is very rare. The HMRC are therefore completely unaware of Stuart's use of 'estimated expenses' and even what he includes for a client's use of home expense. Hence, Stuart's assertion stated above that there is a low risk of HMRC investigating any client's tax returns. Instead, the HMRC are dependent on accountants and their clients producing an accurate total figure only of the client's accrued expenses and not a breakdown of those accrued expenses. What the HMRC do not want to happen is for expenses to be inflated by 'estimated expenses' and for too little tax to be paid. Neither do I believe is the HMRC in habit of negotiating over what a client pays in tax.

23. On 5 June 2020, Stuart sent the email at page 251 to me. This is an email that relates to the client called [PG]. In the email he again instructs me to include certain 'estimated expenses' including again for example an 'estimated expense' for insurance of £308. In the email he goes on and instruct me '*For other jobs, can you please put through estimates as per previous years*'. My reply at page 253 was that I was not willing to do that and in a further email at page 254, I state that I would not be following his instructions to post the 'estimated expenses[']' as they were '*unsubstantiated deductions in the accounts*'.

24. On 8 June 2020, Stuart sent me the email at page 255 that states my refusal to follow his instructions on including his 'estimated expenses' is a disciplinary matter. In the email he goes on to suspend me from work. Following that I spoke with the FL Memo again and my note of advice the FL Memo gave me then is at page 257.

25. Stuart then convened a disciplinary meeting by Zoom on 15 June 2020. He sets out in an email at page 263 what the case is that I am to answer at that meeting. Prior to that meeting on 10 June 2020 I spoke with FL Memo, who are an advice hotline that the Respondent subscribes to. A copy of my note of the advice FL Memo gave me is at page 270."

22 The notes at pages 257 and 270 were brief and handwritten. If they were accurate, then they showed that the advisers were in agreement with the claimant's analysis of the situation.

Mr Harris's evidence about the use of estimates for expenses

23 Mr Harris included in his witness statement his reasons for asserting that the use of estimates in the circumstances which I have summarised in paragraph 15 above

without informing HMRC in the tax return or anywhere else that an estimate had been used was appropriate, but those reasons were as far as I could see in part contradictory and in some cases unsustainable or incomprehensible. The reasons he gave were these (with the paragraph number in which the words appeared stated after the paragraph, followed by my reasons for including the paragraph in the following list):

23.1 'On or about 29 May 2020 the Claimant contacted the ACCA stating that the Respondent had "for years put through accounts with various deductions" which she said were unsubstantiated (page 227). This statement was factually incorrect; her error was to describe these deductions as unsubstantiated. An estimate is an estimate and therefore cannot be substantiated by physical documentation.' (Paragraph 7; on its face, that is simply unsustainable: if an estimated figure is incapable of substantiation then the figure used for the expenses is unsubstantiated.)

23.2 'An example of an estimate that may be used in accounts is where a business also trades from home and HMRC allow use of home to be claimed as an estimate in the accounts. Other examples of the use of estimates include: where records have been lost, small expenses where receipts weren't kept, expenses paid by a business owner out of personal funds etc.' (Paragraph 8; underlining added by me because I could not understand the basis for the assertion.)

23.3 'The Manual states that "returns which include provisional or estimated figures should be accepted provided they can be regarded as satisfying the filing requirement". Page 51. Accordingly the decision as to whether the estimated figures satisfy the filing requirement is a matter for HMRC. Prior to the filing of a tax return, clients are made aware that estimates are being used either in writing and /or verbally and they formally approve the use of the estimates and the submission of the tax return. In her claim, the Claimant states that that [sic] I was instructing her to file a significant proportion of tax returns with estimated figures and without an explanation for the use of these estimated figure. I do not agree with this. The Claimant was instructed to and indeed put through estimated expenses as a matter of course without any prior objection during the 6 years of her employment.' (Paragraph 12; emphasis by underlining added by me. The first set of underlined words states what I believe to be the case, and I understand that Mr Harris was at some points saying something to the contrary. I believe the second set of underlined words to be factually correct, and I cannot understand why Mr Harris said in the next sentence: "I do not agree with this." The subsequent and final sentence was to my mind irrelevant to the question of the appropriateness of the practice which had been followed in the preceding years of the claimant's employment.)

23.4 'In my email of 5 June 2020, I reassured the Claimant that I reviewed the issue of estimates in her postings and that they had been approved by clients. Page

252 page 251. I also reassured her that I had spoken to [a] number of accountants and tax consultants including ex-HMRC Inspectors who stated that there was nothing untoward in the policy of using estimates.' (Paragraph 18; in the absence of evidence about the manner in which Mr Harris had referred to the use of estimates when speaking to "accountants and tax consultant including ex-HMRC Inspectors", their assurances will have been of no value to the claimant and were certainly of no relevance to my determination of the claim before me.)

23.5 'On 8 June 2020 the Claimant advised me by email that she was unable to process the insertion of estimates: stating [in] the case of PG "I have been advised that I should not be following your instructions to continue to post unsubstantiated deductions in the accounts", and in the case of AN she stated "I am unable to process these adjustments". Page 253-254 The Claimant again misrepresented the position by referring to these entries as unsubstantiated deductions when in fact they were estimates.' (Paragraph 24; the last sentence stated Mr Harris's position, which was no more than an assertion, that an estimate for which there was no supporting evidence was not unsubstantiated.)

23.6 'The disciplinary hearing took place by video on 15 June 2020. During the course of the hearing, the Claimant sought to justify her refusal by referring to a conversation concerning the client KT, but on a date that she could not recall. In fact, the outcome of that case had been misinterpreted by the Claimant; estimates had been allowed by HMRC. The Claimant had not read the whole file and did not appear to accept that the principle of estimates was confirmed, and that simply the amounts had been changed by agreement.' (Paragraph 30; as can be seen, I have in paragraphs 18-20 above set out extracts from the documents showing the true position concerning KT.)

23.7 'On 22 June 2020 I received written confirmation of the position from Yogesh Dhanak. Page 302-303 The email of the 22nd June 2020 stated "reasonable estimates are acceptable". It went on to confirm that "HMRC internal manual SM 121190 does indeed confirm that reasonable estimates are acceptable in returns, where a taxpayer does not have sufficient information to enable him to complete a tax return in the time allowed".' (Paragraphs 32 and 33)

24 The latter quotation was a partial quotation and was in the circumstances misleading. The whole of the relevant passage on page 302 was this:

"Reasonable estimates – HMRC internal manual SAM121190 does indeed confirm that reasonable estimates are acceptable in returns, where a taxpayer does not have sufficient information to enable him to complete the tax return in the time allowed. The expectation is that he should include either a best estimate or a provisional figure. The taxpayer should not either leave a box blank or enter 'details to follow' as HMRC will regard this as an incomplete Return and the taxpayer will be liable to penalties for late filing. You should be

aware that the penalty regime since 2010/11 tax returns is based on behaviours such as reasonable care, careless, or deliberate, etc. Refer to HMRC Compliance Handbook CH81000 onwards.
SAM121190 makes an important distinction between estimated and provisional figures. A provisional figure is one which is the best available at the time the Return is submitted (e.g. the business accounts are not yet signed off) and will be revised. An estimated figure is one which is the best figure that will be available at any time (e.g. the records have been lost). Note that in many instances, sole traders will not need to mark figures as provisional or estimated, provided that they meet generally accepted accounting practice (GAAP). Profits of a trade must be calculated in accordance with GAAP unless the trader has elected to opt for the simplified cash basis.
It should be added that HMRC does not accept that the use of estimated or provisional figures is justified if the taxpayer makes little or no effort to obtain the final figures before the filing deadline and may challenge the completeness of the Return if it is suspected that this may be the case. If an amendment is made to the return following an enquiry into the return, there could be a penalty payable on the additional tax assessed (see CH81000 referred to above). ...

2. Fraudulent expenses – for all taxes, receipts should be obtained and kept as evidence that expenses are deductible, to be produced in the event of an HMRC enquiry. The requirement for receipts also assists to ensure that expenses claimed have actually been incurred. Claiming expenses that have not actually been incurred would be considered fraudulent and you would need to consider ACCA's AML guidance, which every practice is required to adhere to. I would also refer you to guidance on the Professional Conduct in Relation to Taxation (PCRT)."

25 Mr Harris, in cross-examination, stated that his reasons for believing that it is lawful for a taxpayer to use an estimated figure for expenses without saying that the figure is the result of an estimate, even where there are known figures for expenses actually incurred, were (as noted by me and tidied up for present purposes) these. (The following subparagraphs were included in my case management record of the hearing of 13 and 14 December 2021 and they were not disputed by the respondent when the hearing resumed in February 2022.)

25.1 "If the circumstances are correct then it is appropriate to put through estimates."

25.2 "There are number of genuine reasons why it could be appropriate to use an estimate."

25.3 "In a number of genuine and reasonable circumstances you can use an estimate."

25.4 "There are things that clients forget."

25.5 Those things include things that clients have bought in the course of incurring personal expenditure such as in a supermarket when buying groceries and household items.

25.6 HMRC does accept estimates, and there can be a difference of opinion on the amount of the estimate.

25.7 There are genuine reasons why clients do not record everything that they should.

25.8 HMRC does not expect taxpayers to keep 100%, i.e. complete, records of expenditure.

25.9 Whether or not what the parties called the "white box" on the tax return (box 19) should have in it the information that an estimate has been used is a matter about which an accountant "can make a judgment" which is about "materiality".

26 When it was put to Mr Harris that HMRC will not know that estimated figures have been used unless that fact is stated in box 19 of the tax return, he said:

> "I cannot comment; it is a narrative box; I am not sure that they can read it. They analyse the numbers and HMRC sometimes say they cannot read the box."

27 I could not escape the conclusion that that answer was evasive and wrong. That was because it appeared to me that there was only one logical answer to the question, and it was "yes".

28 The best way of explaining how Mr Harris in practice used and required the use by the claimant of estimated figures for expenses was by reference to the situation of the client to whom the email exchange on page 66 of the witness statement bundle related, and to which the claimant referred in paragraph 16 of her witness statement (which is set out at the start of paragraph 21 above). That email exchange (which was all in one document, which was the result of several emails having had text added to them and sent on; it was at pages 65-67 of the witness statement bundle, which were pages 46-48 of AG1) showed this:

28.1 The taxpayer in question, KN, had checked the proposed tax return prepared for her by Mr Harris.

28.2 She had given Mr Harris a figure for her "total website costs", which was £409.26, but he had put into what appeared to be her accounts a figure for those costs which was £924.00. She had also given Mr Harris the figure of

£467.50 for her "Print, film, photo and stationery" costs, but he had put in the figure of £1297.00.

28.3 She had queried those figures, and the claimant had been asked by Mr Harris to respond to the queries and copy him in. The claimant had written in reply to KN in response to both queries: "The difference is the amount Stuart instructs to include, ie last year's figure plus 5% plus £10". In the case of the figure for Print, film, photo and stationery costs, there were in addition these words after those which I have just quoted: "giving £821.03 and per your spreadsheet £8.70 postage". The total of those two figures added to £467.50 gave a figure of £1,297.23, which had evidently been rounded down.

28.4 In addition, there was this question asked by the taxpayer: "Where is the repairs & renewals amount from (£844.00)?" The answer given by the claimant was this: "From your spreadsheet, equipment under £250". I could not see how the figure of £844 had been arrived at.

28.5 The taxpayer had said that she would "do this option", of "[Reducing] the upcoming payment due on/before 31/7/20, ie only pay £1,833.85 (£5,278.89 - £3,445.04)". The taxpayer had then asked "Do I need to sort this out my end?" and someone (probably Mr Harris; although during the hearing I highlighted the lack of clarity about who wrote this, he was not asked about it) had written:

> "Noted. You just need to pay the £1,833.85 and everything will 'sort itself out in the wash'".

28.6 There was also this query at the end of the email, which appeared to have been written purely by KN:

> "Also when I am letting our mortgage advisor know about my net profit, the correct one to use for that is the NET PROFIT FOR TAX PURPOSES: £35278.00? I think they'll look at the net profit per the accounts ie £39,949. This is better!!! Just let me know if you/they require anything."

29 On page 67 of the witness statement bundle, Mr Harris had written this to KN:

> "Hi [KN]
>
> Essentially, we take your figures and then add a bit more by way of estimates
>
> This is to cover the bits and pieces that clients often forget to record
>
> Are you happy with this and/or do you want us to revert to your figures
>
> Re the mortgage : £39,949 is the profit figure at the bottom of page 3 of the accounts"

30 Thus, it appeared that Mr Harris had reduced KN's net income for tax purposes from £39,949 to £35,278, and it was clear from the evidence before me that Mr Harris was planning to file the tax return on KN's behalf without making it clear that he had done that by estimating her expenses at a sum which was £4,671 more than she had herself recorded, and for which there was no supporting evidence of expenditure. Mr Harris was in the meantime saying that the figure to use for the purposes of a mortgage application was the higher one of £39,949.

31 Mr Harris's explanation for doing that was that KN might have forgotten something that she had spent on the cost of earning her remuneration and that it was a matter of judgment as to whether it was a material matter which needed to be brought to the attention of HMRC by a note in box 19 on the tax return.

What happened during the disciplinary hearing of 15 June 2020

32 In paragraph 26 of her witness statement, the claimant said this:

> "There is a transcript of the disciplinary meeting at pages 278 to 290. At the meeting Stuart admits that 'lots' of 'estimated expenses' have been included in clients' tax returns. He also accepts that his 'estimated expenses' are unsubstantiated and that he accepts that his practice is that the 'estimated expenses' are inflated by 5% and £10 each year. He also states that in relation to HMRC's investigation into [KT's] 2014 tax return, [KT] supplied all the records the HMRC wanted to substantiate his allowable expenses. However, that is not correct as the correspondence passing between Stuart and HMRC states otherwise. He also states that the ACCA have given me wrong advice and had confirmed that to him and probably were going to issue him with an apology. However, he does not back that up with anything. I dispute the ACCA's advice to me is wrong."

33 As can be seen from paragraph 23.6 above, the disciplinary hearing was held by video. That video hearing was recorded by Mr Harris. The transcript of the hearing was prepared by (or on behalf of) the respondent. The transcript fully supported what the claimant said in paragraph 26 of her witness statement. I saw in addition that Mr Harris was recorded at page 284 to have said this:

> "I get what you're saying, you're not happy with the inflation of 5% and £10. So the reason for that 5% is inflation, inflated by 5%, and the only reason I stuck the 10 quid in is just to rough it up a bit."

34 The conversation continued in this way on that page:

> "[Claimant] So you're saying 5% each year represents inflation.

[Mr Harris] Yes, well it varies between 2 and 3% doesn't it, so, an estimate is an estimate.

[Claimant] So you're coming from the viewpoint, estimates are allowed. I'm aware estimates are allowed, I'm saying that the amount for KT, £1,800 was not allowed, so I did not put that through.

[Mr Harris] I'm fine with KT but it's not applicable to AN or PG [i.e. the two other clients of the respondent in relation to whom the claimant had refused to use estimates as required by Mr Harris, as recorded in the middle of page 281].

[Claimant] I used that scenario and applied it to others.

[Mr Harris] You've applied it to two in the previous week, so I'm saying why don't you apply the same principle to 2019, 2018, 2017.

[Claimant] Because we had the conversation after 2019, 2018, 2017.

[Mr Harris] But again you're talking about a conversation that neither of us can really remember.

[Claimant] I can remember enough to know that I had to look into it."

35 At page 282 Mr Harris said in answer to the question from the claimant "So do you agree they are unsubstantiated?":

"That's what an estimate is."

36 Mr Harris repeatedly asked the claimant why she was querying the use of estimates when she had for the previous five years used them, and she said that it was because he had instructed her to use them, and, in effect, that she did not know any better until the issue had arisen in the case of KT. At page 285, she is recorded to have said that she had not had any personal tax experience in her work before starting to work for the respondent. The exchange was in these terms:

"[Claimant] OK, but when I came on board, I did say to you my personal tax experience is virtually nothing. KG I didn't do anything, but you won't know that because we didn't work together.

[Mr Harris] But we're not ...

[Claimant] And, and and the HL job I had for four years or so, had their own personal tax team, so I wasn't involved in tax, and in fact personal tax prior to the job I had coming to you. I didn't have any at all, the previous job I was there for 10 months and my

personal tax experience was entering figures for P60s dividends interest and they did, not once did I come across having to put in estimates, so I don't know why you think I would know this information.

[Mr Harris] The estimates would be in the accounts, not the tax computations.

[Claimant] Well, nothing there were no estimates in the accounts and nothing was added back, well there's no estimates, there's no estimates. I don't know why you think, you keep saying I should know, I should know, I should know, I'm wondering why it is you think I should know.

[Mr Harris] Because you've been doing tax computations for the last 5 years.

[Claimant] I have been following your instructions for 5 years."

37 Paragraph 29 of the claimant's witness statement was in these terms, and it was not challenged:

> "I would also like to add that at no time either during the disciplinary or the course of this tribunal case has Stuart ever explained why it is acceptable practice to ever estimate an expense such as insurance, when there will be a corresponding record either in the form an insurance schedule or bank statement to substantiate it. He has also not explained why it is reasonable for example for him to arbitrarily increases [sic] (or in his words '*add a bit more*') to an actual expense such as insurance and inflate such expenses by an arbitrarily [sic] 5% plus £10 each year."

38 At the top of page 279, Mr Harris is recorded to have said that the claimant was

> "missing the point on KT, HMRC pulled a fast one and we had to make a formal complaint, have you looked at that correspondence?".

39 Further down the page, Mr Harris is recorded to have said this:

> "That really is the bottom line, HMRC allow estimates."

40 He then said that the claimant "should have looked this up" and referred her to SAM121190 and repeated that "this [was] all stuff that [she] could have looked up ages ago". He then said this (at the bottom of the page, i.e. 279):

> "we've been putting estimates through for how ever many years, you know, you've put them, you've put through estimates in previous firms, you've

> certainly put estimates through you know, you've been employed with us since 01.11.2014. Why has it suddenly become an issue in 2020?"

41 On the next page, Mr Harris is recorded to have said this:

> "All the other cases that we've put estimates through, they've [i.e. HMRC] allowed them."

My conclusion on the accuracy or otherwise of the passage of the claimant's witness statement which I have set out in paragraph 21 above

42 In the circumstances, I accepted the paragraphs of the claimant's witness statement that I have set out in paragraph 21 above. For the sake of completeness I record that if and to the extent that there was a conflict between what the claimant said in those paragraphs and what Mr Harris said in his witness statement or otherwise in oral evidence, I preferred her evidence in those paragraphs to his. I did so not only because I found the claimant to be an honest witness, doing her best to tell the truth, but also because what she said in the passage set out in paragraph 21 above was both cogent and coherent.

What happened next

43 The claimant was given a first and final written warning on 23 June 2020. That was for refusing to continue to follow the practice summarised in paragraph 15 above. The claimant appealed that warning. Mr Harris, on 10 July 2020, rejected that appeal. The claimant then, on 20 July 2020, stated a grievance. It was at page 80 of the witness statement bundle and concluded: "*I feel that I have been set up to be dismissed at raising my concern in failing to compromise my professional ethics and choosing to protect myself and this firm from such conduct*". That grievance was also rejected by Mr Harris. That rejection occurred on 22 July 2020. There were then discussions about the possibility of the claimant leaving the respondent's employment by agreement. On 28 July 2020, the claimant informed Mr Harris that she would be taking five days' holiday, on Monday 3 to Thursday 6 August and Monday 10 August 2020. Mr Harris did not then say to the claimant that she could not take that holiday before she commenced it. On 4 August 2020, after the claimant had started her holiday, Mr Harris sent the email at page 357, referring to a missed deadline for responding to what was evidently a compromise offer (the deadline was stated to be 5pm on Friday 31 July 2020) and saying that while he appreciated that the claimant was on holiday, "this week, returning Tuesday next week", "it is also noted that your holiday leave was unauthorised and at very short notice, as evidenced by your e-mail of 28/7/20."

44 The claimant returned to work on 11 August and resigned on 17 August 2020 with immediate effect. She did so via her solicitors, who, in the email at pages 368-368a, wrote this (and only this) to the respondent's solicitors:

> "As you will be aware, we act for Anita Goburdhun and she is pursuing a claim for constructive dismissal against your client Stuart Harris Associates Ltd.
>
> Your client is however still requesting that our client carry out certain duties/work. Our client is however treating her contract of employment with your client as having been terminated. In other words, she has resigned in response to your client's repudiatory breach of her employment contract. She will not therefore be carrying out any further duties/work for your client."

45 In paragraph 36 of her witness statement (the substance of which was heavily challenged by Ms Venkata in cross-examination, putting it to the claimant that she simply no longer wanted to work for the respondent), the claimant said this:

> "Given all the advice I had been given from FL Memo and the ACCA and the pure logic that had dawned on me by 17 August 2020, that no accountant should be arbitrarily and routinely increasing their clients' expenses, I lost all faith and confidence in Stuart as an employer. My belief was and remains to this day that he is involved in wrongful accounting practices by increasing the clients' expenses to defraud HMRC and as he describes '*save*' the clients tax. I could no longer work with him as I felt I was completely and professionally compromised."

46 I accepted that evidence of the claimant.

The issues and the relevant case law

The issues

47 The primary issue in this case was whether or not the claimant was dismissed within the meaning of section 95(1)(c) of the ERA 1996. If she was, then in theory (see paragraph 56 below) the question whether that dismissal was unfair arose.

48 The claimant was not seeking reinstatement so, if her dismissal was unfair then the only remaining issues related to the basic and compensatory awards payable under (respectively) sections 119 and 123 of the ERA 1996 unless there was some justification for no such awards being made.

49 The question whether or not the claimant was dismissed within the meaning of section 95(1)(c) of the ERA 1996, or "constructively", was determinable by reference to the following case law.

Case law concerning claims of "constructive" dismissal

When is an employee dismissed within the meaning of section 95(1)(c) of the ERA 1996?

50 In *Western Excavating v Sharp* [1978] ICR 761, at page 769A-C, Lord Denning MR in said this:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

51 Here, the claimant relied on the implied term of trust and confidence. That is the obligation not, without reasonable and proper cause, to act in a way which is calculated or likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between employer and employee as employer and employee. A breach of that term is (see for example the decision of the Court of Appeal in *Omilaju v London Borough of Waltham Forest* [2005] ICR 481) repudiatory. Thus one main issue here was whether or not what Mr Harris required the claimant to do by way of the inclusion in income tax returns of calculations of remuneration based on estimated figures for the expenses incurred in earning that remuneration (estimated, that is to say, in the manner summarised in paragraph 15 above), was likely seriously to damage or to destroy the relationship of trust and confidence that should exist between employee and employer and, if it was, whether there was reasonable and proper cause for that requirement.

52 In paragraph 50 of its judgment in *New Southern Railway Ltd v Quinn* [2006] IRLR 266, the Employment Appeal Tribunal ("EAT") said this in relation to the possible impact of a delay in resigning in response to conduct which it is claimed was a repudiation or fundamental breach of the contract of employment:

> "We now turn to deal with the second ground of appeal that relates to constructive dismissal. Mr Short submitted, and we are minded to agree, that the principles relating to affirmation by an employee where there has been a repudiatory breach of the employment contract, are not controversial. They may be summarised as follows:
>
> (i) Where there has been a repudiatory breach of the contract of employment the innocent party can choose whether to affirm the contract or accept the breach and treat the contract as discharged;

(ii) Once the contract has been affirmed the right to treat it as repudiated has gone;

(iii) Delay in itself does not constitute affirmation but may be evidence of implied affirmation;

(iv) If the innocent party calls upon the employer to perform, that will normally be taken to be an affirmation because it would be conduct consistent only with the continuance of the contract.

(v) The right to accept a repudiatory breach is not lost if the innocent party performs a contract for a limited time while reserving the right to accept the repudiation or only continues with the contract while affording the guilty party the opportunity to remedy the breach."

53 The approach to take in deciding whether an employer has breached the implied term of trust and confidence is stated particularly helpfully in paragraphs 14-16 of the judgment of Dyson LJ (as he then was) in *Omilaju*. The question whether there has been such a breach is determined objectively, i.e. by applying an objective rather than a subjective approach, so that the test is not determined by reference to whether or not either party has lost trust and confidence in the other but, rather, by reference to the question whether, looking at the matter objectively, either party has done something for which there was no reasonable and proper cause and which was calculated or likely seriously to damage or to destroy the relationship of trust and confidence that exists or should exist between employer and employee. An accumulation of conduct may be relied on as constituting a breach of the implied term of trust and confidence. If so, then the employee must leave in response to that accumulation, which may include a "last straw". The so-called "last straw doctrine" as explained in *Omilaju* was discussed by the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, which concerned principally the question whether an employee can rely on a breach of the implied term of trust and confidence after which the employee has affirmed the contract of employment. In paragraph 55 of his judgment in that case, Underhill LJ (with whom Singh LJ, the only other member of the court, agreed) said this:

'In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) [Endnote: I have included "repudiatory" in the interest of clarity, but in fact a breach of the trust and confidence term is of its nature repudiatory: see per para 14(3) of Dyson LJ's judgment in *Omilaju* [2005] ICR 481.] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.'

54 In paragraphs DI[495]-[506] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"), there is an illuminating passage concerning the question whether or not an employer can properly be regarded as showing an intention no longer to be bound by the terms of the contract of employment in some essential respect (and so be repudiating it) by stating an intention to do something which the employer believes it is lawful to do but which is eventually found to be, or to have been, unlawful. The passage ends with these two paragraphs:

'[505]
To complicate matters, however, in *Bridgen v Lancashire County Council* [1987] IRLR 58, CA, a case of alleged constructive dismissal, the Master of the Rolls commented, obiter, that:

> "The mere fact that a party to a contract takes a view of its construction which is ultimately shown to be wrong, does not of itself constitute repudiatory conduct. It has to be shown that he did not intend to be bound by the contract as properly construed."

[506]
If these words are intended to mean that an employer can be in actual breach of contract but that it will still not be a repudiatory breach if he genuinely considers that he is not in breach, it reaffirms the *Punch* decision. However, none of the other cases referred to above were cited to his Lordship, and it would be unwise to place too much emphasis on these comments. Moreover, as seen above, the weight of authority is now against *Punch* as was affirmed by Slade J in the EAT in *Roberts v Governing Body of Whitecross School* (above).'

55 In this regard, Ms Venkata relied on the approach taken by the Court of Appeal in *Tullett Prebon plc v BGC Brokers LP* [2011] IRLR 420 as shown by the following passage in the headnote, which I accepted was applicable, and which I agreed showed the right approach to take:

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It a highly context-specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract-breaker towards the employees is of a [sic] paramount importance."

The fairness of a constructive dismissal

56 In the notes to section 95 of the ERA 1996 in *Harvey*, this is said (in my view accurately):

> "The fact that a dismissal is constructive (within sub-s (2)(c)) does not per se mean that it will be held to have been unfair (though in practice that will often be the case); the tribunal must still go on to consider fairness in the normal way: *Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166, CA, approving previous EAT decisions in *Logabox Ltd v Titherley* [1977] IRLR 97, [1977] ICR 369, EAT; *Industrial Rubber Products v Gillon* [1977] IRLR 389, EAT; *Derby City Council v Marshall* [1979] IRLR 261, [1979] ICR 731, EAT; *Genower v Ealing, Hammersmith and Hounslow Area Health Authority* [1980] IRLR 297, EAT and *Allders International Ltd v Parkins* [1981] IRLR 68, EAT; see also *Stephenson & Co (Oxford) Ltd v Austin* [1990] ICR 609, EAT and *Wells v Countryside Estate Agents* UKEAT/0201/15 (11 February 2016, unreported). Although it may be awkward for the employer to argue both no dismissal and, in the alternative, that it was fair, that exercise must still be undertaken and if the employer wishes to rely on the latter it must plead it at the outset: *Retirement Security Ltd v Wilson* UKEAT/0019/19 (11 July 2019, unreported)."

The law of taxation

Introduction; the reason why the law of taxation was relevant

57 Here, Mr Harris said that what he was requiring the claimant to do was lawful and that she was accordingly in repudiation of the contract of employment in refusing to do it. She said that what he was requiring her to do was unlawful and that he was in repudiation of the contract for requiring her to do it. Mr Harris was in addition saying that what he had done was in accordance with generally accepted accounting principles, or GAAP. However, no document recording any part of those principles

was put before me, and all that Mr Harris was able to say to me was that those principles permitted the use of estimates. That was in my judgment plainly insufficient to justify or even enable me lawfully to decide that what he did by way of instructing the claimant and then disciplining her for refusing to comply with his instructions was (1) not likely seriously to damage the relationship of trust and confidence, or, if it was so likely, (2) was done for reasonable and proper cause.

58 Rather, as far as I could see, the question whether or not what Mr Harris required the claimant to do and then disciplined her for refusing to do it was something which it was a breach of the implied term of trust and confidence to require her to do, had to be determined by reference to the law of taxation and relevant statements of principle made by HMRC. The latter statements were in my view relevant because they were capable of binding HMRC as statements which gave rise to legitimate expectations in public law terms.

The statutory basis for the requirement to complete an income tax return

59 Mr Akin's report contained this passage about the legal obligation to file an income tax return, which I accepted was an accurate statement of the applicable law.

> '**The Obligation to File a Tax Return**
>
> 8.1 The starting point here is s. 8, Taxes Management Act 1970 ("TMA"), which lays down the requirements for individual taxpayers to file tax returns:
>
> > "(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment and the amount payable by him by way of income tax for that year, he may be required by notice given to him by an officer of the Board–
> >
> > (a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, and
> >
> > (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."
>
> 8.2 Subsection (2) says:
>
> > "Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete."

8.3 Section 9 TMA goes on to require that every return under section 8 must include a self-assessment of the amounts of tax (income tax and capital gains tax) to which the person making the return is liable.

8.4 The first point arising out of s. 8 is that it is up to HMRC to say – invariably via the wording on the return form itself – what information they require the taxpayer to provide on the return. A taxpayer who wilfully omits required information from his return, or includes information that he knows to be incorrect and in either case signs the declaration set out in s. 8(2) above, leading to a potential loss of tax to the Crown, commits a number of criminal offences, as does an individual who assists him [Footnote: For example, the common law offence of cheating the Public Revenue, False Accounting under s. of the 17 Theft Act 1968 and Fraudulent Evasion of Income Tax under s. 106A TMA.] Although the word "unlawful" is not often used in a tax context, there is in my opinion no doubt that if Mr. Harris had asked the Claimant to make entries on tax returns which Mr. Harris knew or believed to be false, he would have been asking her to commit an unlawful act in tax terms."

Relevant case law and HMRC statements concerning income tax returns; relevant statements of principle in *Simon's Taxes*

60 In *Dunk v General Commissioners for Havant* [1976] STC 460, Goulding J said this:

> "What the taxpayer has to declare is 'that the return is to the best of his knowledge correct and complete'. If (and I express no view, because it is not for me to go into the evidence on it, whether special difficulties arise in this particular case) a taxpayer finds particular circumstances that make the best of his knowledge more than usually unreliable, it is open to him to put against his figure for a particular item of income some such words as 'Estimated', 'See accompanying memorandum', or something of that kind, and explain the circumstances. If he has done his best – and, of course, he is under a duty to use all proper sources of knowledge – he will not, in my view, be guilty of making a false statement providing, as I say, he puts in a genuine estimate and, if necessary, explains that it is not very reliable."

61 In *Alexander v Wallington General Commissioners and Inland Revenue Commissioners* [1993] STC 588, Lloyd LJ, with whose judgment Butler Sloss and Roch LJJ agreed, said this about those words of Goulding J:

> "I hope that the taxpayer will pay good heed to those words, because they represent a correct statement of the English law and practice on this subject."

62 In paragraph B2.102 of *Simon's Taxes*, this is said:

> "The profits of a trade must be calculated in accordance with generally accepted accounting practice, unless a person is eligible for and elects to calculate profits on the cash basis for income tax purposes (see B2.112). There are also exceptions for barristers in certain circumstances (see B5.610) and for Lloyd's underwriters (see Division E5.6). 'Generally accepted accounting practice' for this purpose means UK generally accepted accounting practice [Income Tax Act 2007, s. 997(1)-(3)]. 'UK generally accepted accounting practice' (UK GAAP) means generally accepted accounting practice in relation to accounts of UK companies (other than accounts prepared under international accounting standards) that are intended to give a true and fair view. It has the same meaning in relation to individuals, entities which are not companies, non-UK companies and UK companies. UK GAAP generally requires account to be taken of debtors, creditors, and of the value of stock and work in progress."

63 In paragraph B2.104 of *Simon's Taxes*, this is said:

> "There is no tax statute stipulating the form that accounts are to take. The emphasis is on presenting accounts that show the correct profit figure, calculated in accordance with GAAP, subject to exceptions for those using the cash basis, for example (see B2.102).
>
> Rather than prescribe the form of accounts that should be delivered to HMRC, the tax legislation provides for penalties for errors in accounts and other documents (see B2.106)."

64 In paragraph B2.106 of *Simon's Taxes*, this is said:

> "It is almost impossible to ascertain the amount of the profit of a trade to be assessed under ITTOIA 2005 [i.e. the Income Tax (Trading and Other Income) Act 2005] without a profit and loss account [*Usher's Wiltshire Brewery Ltd v Bruce* [1915] AC 433]. The exception to this is where a cash basis election has been made (see B2.112).
>
> Although there is no requirement in the tax legislation for a trader to prepare such an account (but see below regarding certain partnerships), there is a requirement to keep and preserve records of amounts received and paid out in the course of the trade, records of sales and purchases of goods where appropriate, and all supporting documents (including accounts, books, deeds, contracts, vouchers and receipts [Taxes Management Act 1970, s.12B(6)]) relating to such items [Taxes Management Act 1970 s.12B(3), (3A)].
>
> There is a relaxation of the requirement to preserve records for a sole trader or partnership with an annual turnover below the VAT registration threshold [See HMRC Tax Return Guides SA150 and SA850]. Such traders need not itemise their expenses in the self-employment pages. They may show instead only

> their turnover, total business purchases and expenses and net profit. Even so, it will be necessary for them to keep records to substantiate the figures in the return if necessary.
>
> Penalties may be imposed, under the regime introduced by FA 2007, if a person makes errors in certain documents (including accounts) sent to HMRC [FA 2007, Sch 24 with effect, broadly, from 1 April 2008 in relation to relevant documents relating to tax periods commencing on or after that date]."

65 In paragraph B2.108 of *Simon's Taxes*, this is said:

> "Wherever an income tax or corporation tax statute refers to 'receipts' or 'expenses' in the context of the calculation of the profits of a trade, then unless otherwise provided this is to be interpreted as references to items brought into account as credits or debits when calculating the profits. The use of these terms is not to be taken as an implication that the amounts have actually been received or paid [Income Tax (Trading and Other Income) Act 2005, s.27 for income tax]. This provision does not apply if a cash basis election has been made for income tax purposes from 2013/14."

66 HMRC's document with the number SALF206 specifies the information which is required to be included in a self-assessment tax return. In that document, this is said:

> "**Use of judgmental figures, for example valuations, in tax returns**
>
> Valuations necessarily require the exercise of judgement, and more than one figure may be equally sustainable. Where necessary taxpayers should enter valuations in their tax return, indicating how they have been reached."

67 This is also said:

> "**Informal advice and uncertainty**
>
> Taxpayers who need guidance on completing any part of a tax return can seek help from their HMRC Enquiry Centre or local HMRC office, from the website at or, in the evenings and at weekends, from the Helpline on 0845 9000 444.
>
> However, there may still be some occasions when the taxpayer is uncertain as to the accuracy or completeness of some part of the tax return. In any such case the taxpayer should complete the tax return on the basis that appears most appropriate and should include full details of the points on which they are uncertain in the return. If they do this and the tax return is checked at a later stage, they will not be penalised if they were wrong, provided their original view was reasonable and they had disclosed all the relevant facts."

68 A little further on, this is said in the same document (SALF206):

"**Inaccuracies in the tax return**

Taxpayers must take reasonable care to complete tax returns correctly. Innocent mistakes will not be penalised. Provided the tax return is sent in on time the taxpayer has at least a year to amend it (see Corrections of errors or omissions in the tax return in SALF204).

Of course, inaccuracies brought about carelessly or deliberately are subject to penalties. In calculating the amount of any penalty HMRC take into account the extent to which the taxpayer was helpful in putting things right and volunteered information freely and fully."

69 In paragraph A4.532A of *Simon's Taxes*, this is said:

"**HMRC GUIDANCE ON WHAT CONSTITUTES TAKING REASONABLE CARE**

HMRC's guidance concedes that reasonable people do make mistakes and that HMRC does not expect perfection. The guidance also states that 'reasonable care' must be judged by reference to the capacity of the individual taxpayer [HMRC document CH81120]:

> 'For example, we do not expect the same level of knowledge or expertise from a self-employed unrepresented individual as we do from a large multinational company. We would expect a higher degree of care to be taken over large and complex matters than simple straightforward ones.'

HMRC examples

In cases specifically involving inaccuracy in a document, HMRC's guidance is that the taxpayer will have taken reasonable care if they completed the document on the basis of a reasonably arguable view of the situation that was subsequently not upheld [HMRC document CH81130]. However, if there is doubt about the entries made on the return, despite having taken care to find out about the correct treatment and/or taking advice on the matter, the taxpayer should draw HMRC's attention to the issue [HMRC document CH81120]. Then, if they are wrong, they should have a defence against HMRC contending that they had been careless. Full disclosure along these lines will also be relevant to considering the validity of a discovery assessment (see DIVISION A6.7).

HMRC has given further examples of mistakes which might not attract a penalty [HMRC document CH81130], all of which are less than clear-cut in that HMRC makes it plain that reasonable care always has to have been exercised. For instance, a transposition or arithmetical error will only be treated as a

genuine mistake if it is not so large as to produce an odd result that the taxpayer ought to have noticed, or picked up on a quality check. Of course, the individual's circumstances always have to be taken into account (for example, a taxpayer who is dyslexic might be more readily forgiven a transposition error than someone who is not [See HMRC examples at COG11372]).

HMRC gives the following examples of actions which may indicate that the inaccuracy was due to the person not taking reasonable care [HMRC document CH402704]:

'• not enough time given to maintaining the necessary records
- no check of the figures
- advice not sought where necessary
- uncritical acceptance of advice
- not giving an adviser or HMRC the full facts when seeking advice
- not checking the work done by an adviser
- not acting on the advice given
- not using the records or systems at their disposal
- relying on unreasonable estimates
- relying on uncorroborated statements from third parties'

Estimated and provisional figures

Use of estimated or provisional figures will not necessarily give rise to a penalty. HMRC has published its views on how such figures should be dealt with [See, for example, SAM121190, SAM122120].

An estimate is defined by HMRC as a figure which has been supplied because no more accurate information is available. Provided the estimate is a 'best estimate', having regard to all the circumstances, then it will be regarded as a final figure. The taxpayer will be considered to have complied with their responsibilities and the question of penalties will not arise. However, where an estimate is found to be inadequate to the point where it can be said to have been included negligently, then penalties could be charged.

Provisional figures are distinguished in HMRC's mind from estimates. These are defined as figures which have been included in the return pending receipt of more accurate details. Provisional figures should be identified as such on the return and the following information should be given:

- the reason for the delay in providing final figures, and
- the date by which it is expected that final figures will be available

As long as the above is followed, with estimates and provisional figures being carefully considered at the outset and fully disclosed (and if any adjustment to them is made as and when further information is available, therefore following

the principles of complete disclosure - see A4.567C), the taxpayer should be able to defend themselves as having taken reasonable care."

70 In paragraph 19.20 of Tolley's Tax Guide 2021/22, this is said:

> "Under self-assessment details of the business income and expenses have to be shown under specified headings in the tax return. If turnover is below £85,000 the 'short' self-employment pages designed for more straightforward businesses may be completed in most cases. Alternatively, if other circumstances permit, the short tax return (SA200) may be completed (see 9.20).
>
> This does not mean that the detailed information should not be kept. Keeping records is often not a strong point for many small businesses, but under self-assessment it is vital that adequate records relating to business expenses (and indeed other tax liabilities – see 9.35) are kept, and that, if challenged, the way in which the allowable part of mixed expenses has been calculated can be justified."

A discussion about the impact of the law relating to income tax

71 During 14 February 2022, before coming to final conclusions on the question whether the claimant had been dismissed constructively, I put to the parties the following propositions, and neither party dissented from them.

71.1 The purpose of an income tax return is to state the taxpayer's taxable remuneration.

71.2 In order to do that the taxpayer must have calculated his/her/its receipts, i.e. money received in the course of the work or business to which the tax return relates. Those receipts are plainly fully ascertainable. Receipts are concrete: you have either received income or you have not. I record here that Ms Venkata did not assert that receipts could be estimated.

71.3 It is necessary then to calculate the costs incurred in earning those receipts in order to ascertain the taxable remuneration of the taxpayer.

71.4 It is possible to justify (as far as the law of tax is concerned) using an estimate only in certain circumstances. The Taxes Management Act 1970 says nothing about those circumstances.

71.5 There is in existence no guidance give by HMRC or in a text book which is to the effect that a taxpayer can include in the calculation of his/her/its expenses an estimate of something that the taxpayer may have forgotten.

The parties' submissions on liability

72 Ms Venkata defended the claim of unfair dismissal in part on the following basis (set out in her written closing submissions on liability sent to me on 14 December 2021):

> "27. All estimates have to be approved by clients [106] guidance: para 8 and 9.
>
> 28. It was reasonable for Mr Harris to use the methodology of increasing estimates of 5%+10 [sic; i.e. £10].
>
> 29. It is the clients who have the ultimate responsibility for filing an accurate tax return.
>
> 30. In relation to the KN case:
>
> 30.1 KN queried Mr Harris's use of estimated expenses as these exceeded what she had submitted as expenditure [C ws exhibit 47].
>
> 30.2 Mr Harris explained that the additional estimates were used to "cover the bits and pieces the clients often forget to record". He expressly asked KN whether she was happy with this or wanted to revert her figures .
>
> 30.3 It is simply non-sensical to suggest that Mr Harris' clients are not aware of the use of estimated expenses when they are required to approve the accounts [C ws 11].
>
> 31. In relation to the KT case:
>
> 31.1 HMRC reduced the expenses for the 2014 return from £17,944 to £3950 [181] which resulted in an additional £4083.20 being due.
>
> 31.2 HMRC charged the minimum penalty of 15% of the additional tax due which is £612.48, to reflect the "full assistance" given during the enquiry. In light of the extensive correspondence between HMRC and Mr Harris regarding KT, the tribunal is invited to find that the low penalty is due to Mr Harris giving full assistance to HMRC [181b].
>
> 31.3 KT had receipts totally [sic; i.e. totalling] £7977.2 [173]
>
> 31.4 The reason that KT used estimated expenses was that he had broken up with his wife and all of his record[s] were with her [150]
>
> 32. HMRC did not escalate the enquiry to a formal action or make any findings of impropriety against Mr Harris.

33. This strongly suggests that Mr Harris was not acting unlawfully in his use of estimated expenses."

73 I record here that paragraphs 8 and 9 on page 106 were parts of a document entitled "Professional Conduct in Relation to Taxation (PCRT) Helpsheet A: submission of tax information and 'tax filings'". Paragraphs 8 and 9 and their heading were in these terms:

"**Responsibilities: taxpayer's responsibility**

8. The taxpayer has primary responsibility to submit correct and complete filings to the best of their knowledge and belief. The final decision as to whether to disclose any issue is that of the client, but in relation to your responsibilities see paragraph 12 below.

9. In annual self-assessment returns or returns with short filing periods, the filing may include reasonable estimates where necessary."

74 Paragraph 12 of the same document was under the heading "Responsibilities: member's responsibility". The whole of the passage under that heading was relevant. That passage was in these terms:

"10. A member who prepares a filing on behalf of a client is responsible to the client for the accuracy of the filing based on the information provided.

11. In dealing with HMRC in relation to a client's tax affairs, a member should bear in mind their duty of confidentiality to the client and that they are acting as the agent of their client. They have a duty to act in the best interests of their client.

12. A member should act in good faith in dealings with HMRC in accordance with the fundamental principle of integrity. In particular, the member should take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client.

13. Where acting as a tax agent, a member is not required to audit the figures in the books and records provided, or verify information provided by a client or by a third party. However, a member should take care not to be associated with the presentation of facts they know or believe to be incorrect or misleading, nor to assert tax positions in a tax filing which they consider to have no sustainable basis.

14. When a member is communicating with HMRC, they should consider whether they need to make it clear to what extent they are relying on information which has been supplied by the client or a third party."

75 Given Mr Harris' reliance on materiality (see paragraph 25.9 above), the following passage in the document was also relevant. It was in these terms (with emphasis by underlining added by me; the word "of" may have been inadvertently omitted before the word "profits" in the underlined words):

> "**Materiality**
>
> 15. Whether an amount is to be regarded as material depends upon the facts and circumstances of each case.
>
> 16. The profits of a trade, profession, vocation or property business should be computed in accordance with generally accepted accounting principles (GAAP), subject to any adjustment required or authorised by law in computing profits for those purposes. This permits a trade, profession, vocation or property business to disregard non-material adjustments in computing its accounting profits.
>
> 17. <u>The application of GAAP, and therefore materiality, does not extend beyond the accounting profits. Thus, the accounting concept of materiality cannot be applied when completing tax filings.</u>
>
> 18. It should be noted that for certain small businesses an election may be made to use the cash basis instead; for small property businesses the default position is the cash basis. Where the cash basis is used, materiality is not relevant."

76 I regarded the following passage of that document (from paragraphs 19-30 inclusive, on pages 107-108) also to be of particular relevance. I do not need to set that passage out here. I do, however, set out paragraph 24 of that document in paragraph 125 below, and paragraphs 29 and 30 of that document in paragraph 90 below.

77 Returning to Ms Venkata's closing submissions, I saw that she submitted the following further things.

> "45. Mr Harris did not intend to abandon altogether the contract, *Tullet* and *Eminence* [i.e. *Eminence Property Developments Ltd v Heaney* 2011 3 All ER (Comm) 223, CA].
>
> 46. Mr Harris genuinely believed that his use of estimated expenses was acceptable.
>
> ...
>
> 48. It is accepted that Mr Harris gave C a written warning on 23 June 2020, following the disciplinary hearing on 22 June 2020. It is denied that that the warning constituted a breach of the implied term of trust and confidence.

49. It was reasonable for Mr Harris to give C a warning for the charge of insubordination due to C's failure follow a reasonable management order [307], namely post estimates on tax returns. C's contract of employment states "serious insubordination" as an example of gross misconduct [44]. It follows that insubordination is an example of misconduct."

78 Ms Venkata also submitted that the claimant had not resigned in response to the respondent's conduct which she (the claimant) claimed was a breach of the implied term of trust and confidence, and that the claimant had affirmed her contract of employment by delaying in resigning. In regard to affirmation, she submitted this in her written closing submissions:

'61. The following factors are in support of a finding of affirmation:

61.1. On 1 June 2020, C discussed resigning with the ACCA.

61.2. C delayed nearly two months following the issuing of her written warning (23 June 2020) before resigning. During this period C continued to carry out work for R. C did not state that she was working under a protest.

61.3. C's appeal was dismissed on 10 July 2020 [334-337]

61.4. On 13 July 2020, C called a legal helpline and discussed "time" and bringing a "constructive dismissal" claim or negotiating a settlement. [339]. She also discussed a whistleblowing claim.

61.5. On 22 July 2020, C's grievance was dismissed.

61.6. C took a week's holiday between 5 and 10 August 2020, and then resumed work on 11 August 2020. C worked normally until 17 August 2020, when she resigned on being asked to do some work.

62. It is submitted that going back to 1 June 2020, C appears to have actively considered whether to resign but decided against doing so, in other words she waived any breach.'

79 Concerning the claimant's reason for resigning, Ms Venkata submitted this:

"59. R also submits that C resigned because the working relationship had become strained between her and Mr Harris, due to his concerns regarding her conduct at work:

59.1. C took 5 days of holiday from 3rd to 6th August 2020 and 10th August 2020 on short notice, given on 28 July 2020 [350] in breach of her

employment contract which required a minimum of 1 month's notice [38]. Had she remained employed it is likely Mr Harris would have brought disciplinary proceedings against her for the short notice [Harris ws 44].

59.2. Before Cs' resignation, Mr Harris discovered C had posted unprofessional comments in client journals [124-128] which gave the impression that C did not agree with Mr Harris' views. Had she not resigned Mr Harris would have disciplined C for this as it gave clients a poor impression [351], [Harris ws 46].

59.3. Before C's resignation, Mr Harris was in the process of requesting an apology from C for her unprofessional and rude email of 3 June 2020 [Harris ws 14 and 15], [351, 357]. Had C not apologised it is likely that he would have disciplined C for her lack of courtesy."

80 At the start of the resumed hearing, on 14 February 2022, Ms Venkata put some further written submissions before me, which included this passage:

"23. In order to lawfully include estimates in an income tax return, all that is required is that the person submitting the return must honestly believe the return contains reasonable estimates. There is no legal obligation to:

a. support the estimates with documentation; or

b. to disclose their use to HMRC.

24. It cannot be said that Mr Harris has wilfully omitted to include information or knowingly included incorrect information in the income tax return contrary to the common law offence of Cheating the Public Revenue, False Accounting under s. of the 17 Theft Act 1968 and Fraudulent Evasion of Income Tax under s. 106A TMA.

25. It is Mr Harris' case that he honestly believed that the income returns he filed contained reasonable estimates.

26. Accordingly he has acted lawfully in tax law. Any finding to the contrary would be perverse.

27. Mr Harris in asking C to perform a lawful practice, to include in income tax returns estimates which he honestly believed were reasonable, looking at all the circumstances objectively, did not clearly show an intention to abandon and refuse to perform the employment contract, *Tullett Prebon plc v BGC Brokers LP* [2011] IRLR 420.

28. It follows that Mr Harris giving C a warning for failing to follow a lawful practice does not either demonstrate a clear intention to abandon and refuse to perform the employment contract."

81 Mr Rees Phillips' submissions on liability were principally in the following passage of his written closing submissions (which were also sent to me on 14 December 2021):

"3. The conduct by R which C considers the breach which gave her cause to terminate her employment and treat herself as dismissed a) was the instruction to carry out work for clients which would lead to them understating their self-employed profit to HMRC; b) disciplining her for that refusal; c) refusing her appeal against the disciplinary sanction of a final written warning; d) dismissing her grievance raised after the appeal, and e) verbally indicating to C that he would give the same instruction again in the future. The latest date that this could have occurred was accordingly 22 July 2020 and she resigned without notice on 17 August 2020. She had a period of 5 days on holiday in the meantime.

4. The ET has heard evidence [led] by R that there were WP discussions in existence shortly before C resigned, and that she took two weeks at R's suggestion to take legal advice. In the circumstances there are no grounds to criticise C to suggest that she either affirmed R's breach(es) or that she resigned in response to something else done by R.

5. It appears inescapable on the undisputed evidence of the contemporaneous documents that C was deeply unhappy at R's management instructions, and she was prepared to stick to her principles such that she was prepared to be disciplined rather than partake in what she perceived to be a wrongful calculation of expenditure for clients. It hardly seems likely that she would then resign for some other reason.

6. There is no basis for R's suggestion that it had an honest belief in the reasonableness of its instruction. Even if this applied (and the case law is uncertain on this issue), R should have realised after its client KT was investigated by HMRC that its practices (of routinely inserting estimated figures into annual returns where there was no evidence of actual expenditure on that item, or discounting clients' actual expenditure in favour of figures based on previous years plus an unsubstantiated uplift of 5% + £10, etc.) were entirely unacceptable in respect of what HMRC would consider appropriate. It is absolutely crystal clear that the only appropriate use of estimated expenses is where the taxpayer wished an estimated figure to be taken as final because the accurate figure is impossible to ascertain, for example because the underlying receipt or invoice has been lost. It is not a way for accountants to insert wholly unsubstantiated figures into their clients' accounts, on occasion based on nothing more than a vague figure 'plucked out of the air'.

7. In the circumstances of the evidence the ET has heard over the past two days, it appears self-evident that R's instruction to C was completely outside the bounds of professionally appropriate practice, and there is no support for R's contentions as to appropriateness of its instruction in any of:

    a. The HMRC guidance (both on the SA100 form, SA150 notes, public leaflets in the bundle and the internal Self Assessment Manual guidance in the bundle), or as was clear from HMRC's position in the investigation into KT;

    b. The ACCA guidance received contemporaneously by phone and by email in the bundles;

    c. The FL Memo advice received contemporaneously;

    d. The extract from Tolleys in the bundle; and

    e. The exploration of the circumstances as to how R's clients came to generally send estimated figures to HMRC (including in respect of R's client KT who was investigated in respect of his 2014 tax return and who, despite facing penalties by HMRC, could not produce a single piece of evidence to substantiate actual expenditure on the estimated items inserted into his accounts by R).

8. Accordingly, it appears inescapable that C resigned in relation to being directed to carry out an exercise which she knew fell well outside the bounds of appropriate professional practice, could well be professionally negligent, was tantamount potentially to defrauding HMRC, and which would be unsustainable if investigated. This is foursquare with there being a repudiatory breach of the implied term of trust and confidence, which she elected to accept and treat the employment contract as at an end."

82 Reliance was placed by Ms Venkata in her first set of written closing submissions on the claimant's assertion that Mr Harris had until her (the claimant's) resignation continued to require her (the claimant) to use estimates. In paragraph 50 of those submissions, Ms Venkata said this:

> "C admitted in evidence that the last date Mr Harris requested her to post estimates was on 5 June 2020 [251-252] and that her ET1 was incorrect in this regard. The tribunal is invited to infer that C is careless in her accusations against Mr Harris and should not be believed."

83 I rejected that submission, as it flew in the face of the giving of a final written warning the appeal against which was rejected and the grievance in relation to which was dismissed. There was in my view quite plainly an ongoing instruction from Mr Harris to the claimant to use estimated figures for expenses in circumstances other than those to which I refer in paragraph 92.2 below.

A discussion about the impact of an employee being a member of a profession and being bound as a member of that profession to act in accordance with a code of conduct

The situation generally

84 Where an employee is a member of a profession and is bound by the code of conduct of that profession, special considerations may arise. They may not have been explored fully in the case law, as I was not able to find any case which was comparable to this one, and nor, despite my suggestion that Ms Venkata looked for one, did Ms Venkata.

85 It appeared to me that if an employer required a professional employee to do something which was plainly contrary to the employee's professional code of conduct, then the employer would (possibly depending on the seriousness of the required breach of that code) be in breach of the implied term of trust and confidence. However, it is sometimes difficult to tell in advance of a determination by a professional body's misconduct committee whether or not what the employer is requiring the employee to do would be professional misconduct.

86 There are, however, some fundamental principles applicable to all situations where an employee is a member of a profession and is as a result bound by a code of conduct issued by that profession's governing body. There is no need to say that an employee cannot lawfully be required by an employer to act dishonestly (using that term to mean more than the telling of what one might call a "white lie"), but in the case of an employee who is a member of a number of professions, there is a heightened emphasis on the need for honesty. Accountancy is one of those professions.

87 Sometimes, it is as dishonest to tell a half-truth as it is to tell an outright untruth. Hence the requirement for a witness to swear to tell a court or tribunal the truth, the whole truth, and nothing but the truth.

A discussion about the situation relating to income tax

88 Deliberately seeking to mislead HMRC would be dishonest. Failing to reveal a highly material factor which, if seen, would show that a tax return understates the taxpayer's taxable income would be dishonest.

89 Whether or not remuneration is taxable is determined ultimately by the First-tier Tribunal exercising its jurisdiction in regard to tax. However, that cannot mean that an employment tribunal could not lawfully come to a view on the law relating to taxation in the course of determining a claim of constructive unfair dismissal. If authority for that proposition is needed then it can be found by analogy with the decision of the Court of Appeal in *Watson v Hemingway Design Ltd* [2021] ICR 1034, where, in paragraph 40 of his judgment (with which Flaux and Males LJJ agreed), Bean LJ said this:

> "Employment tribunals regularly have to deal with difficult questions of law across a variety of topics, not confined to what would be regarded as mainstream employment law. Some of the claims with which they have to deal involve millions of pounds (contrasting with the limited jurisdiction of the County Court); others have very complex facts. I doubt whether applications for a declaration that an insurer is liable to meet a judgment in an unfair dismissal claim are even at the top end of the range of difficulty of cases with which employment judges have to grapple."

90 If a professional employee such as an accountant or a solicitor is required by his or her employer to advise a client of the employer to do something which the employee perceives will put the client at risk of (for example) a financial penalty, then the employee will in many cases at least be likely to be bound by his or her professional code of conduct and/or the law of negligence to inform the client of the employee's perception of that risk. In any event, if the employee merely says that the employer's advice is to do a certain thing, then the employer at least usually will not be able to say that the employee is in any way committing a breach of the implied term of trust and confidence in doing that, i.e. by not endorsing the employer's advice and adopting it as the employee's also. In this regard, I noted that in the document entitled "Professional Conduct in Relation to Taxation (PCRT) Helpsheet A: submission of tax information and 'tax filings'" to which I refer in paragraphs 73-76 above, this was said:

> "29. The member should advise the client to review their tax filing before it is submitted.
>
> 30. The member should draw the client's attention to the responsibility which the client is taking in approving the filing as correct and complete. Attention should be drawn to any judgemental areas or positions reflected in the filing to ensure that the client is aware of these and their implications before they approve the filing."

My conclusion and my reasons for it on the question whether the claimant was dismissed constructively

91 I now state my conclusions in the light of the above analysis. I arrived at my conclusions independently of Mr Rees Phillips' closing submissions set out in

paragraph 81 above, but in fact I agreed with those submissions and disagreed with Ms Venkata's submissions in so far as they differed from those of Mr Rees Phillips.

92 In my judgment, the practice which Mr Harris followed here as summarised in paragraph 15 above but as examined by me above in considerable detail was plainly one which had the effect of causing clients to understate their income to HMRC. That is for the following reasons.

92.1 Expenses are capable of being quantified precisely. If proper records are kept of expenses incurred then the quantification of the expenses will be capable of being precise.

92.2 An estimate of expenses can honestly be used if it is known that an expense was incurred but precise records of the expenditure are lost, such as where one buys a travel ticket with cash but one loses the ticket. Nevertheless, there will usually be some contemporaneous independent evidence to support the assertion that the expenditure was incurred, such as (in the case of an expense incurred in travelling for work purposes) a diary entry to show that the taxpayer had to travel to the place in question. If there is not, because the arrangements were made only orally, then the taxpayer puts him/her/itself at risk of a penalty being imposed (albeit that the risk may in practice be very small) on the basis that the claim to have incurred the expense is not supported by independent contemporaneous evidence.

92.3 A taxpayer cannot in my judgment lawfully claim to offset against his/her/its income an estimated expense on the basis that the taxpayer may have forgotten about the expense. If a person only may have forgotten about an expense then it is pure speculation whether or not that person has incurred the expense. It cannot be consistent with the obligations imposed by section 8 of the Taxes Management Act 1970 to offset against a taxpayer's precisely-recorded income an expense which the taxpayer only may have incurred. The taxpayer either has or has not incurred expenditure and in stating a figure for expenditure, the taxpayer is asserting that the expenditure has been incurred: not that it may have been incurred.

93 In my judgment, Mr Harris well knew that he had to keep hidden from HMRC the fact that he was following the practice which I have summarised in paragraph 15 above in order to avoid HMRC seeing that the expenses figures used by his clients on the basis of his advice were at least in some cases (and probably in most cases) not capable of being justified by objective evidence. That was evident if nothing else from Mr Harris' own words, which the respondent (probably acting through Mr Harris himself) caused to be recorded and transcribed, set out in paragraph 33 above. Those words and the practice followed as described in those words was in my view dishonest, and requiring the claimant to follow it was plainly a breach of the implied term of trust and confidence. If I had concluded that Mr Harris did not know that what he was doing and requiring the claimant to do was dishonest then I would have

concluded that he was plainly incompetent and that, albeit for a slightly different reason, requiring the claimant to follow that practice was a breach of the implied term of trust and confidence.

94 Equally, routinely adding 5% to the previous year's estimated (or even actually-incurred) expenses of a taxpayer was either dishonest or plainly incompetent. That is because inflation varies from year to year. If an estimated figure for an expense could lawfully be used and the amount of the expense could lawfully be assumed to be precisely the same as the amount of the expense incurred in the preceding year, then the increase would have to be calculated by reference to the actual amount of inflation, not 5% year on year, especially when £10 is added to it every year, irrespective of the actual rate of inflation.

95 It would not be a defence to an allegation of professional misconduct by an accountant through the accountant advising a taxpayer to act unlawfully when filing or authorising an income tax return, that the taxpayer took the advice and signed or otherwise authorised the filing of the return.

96 For the avoidance of doubt, in case it is not already clear from what I have said in the preceding paragraphs above, in my judgment requiring the claimant to follow the practice summarised in paragraph 15 above was likely seriously to damage the relationship of trust and confidence that should exist between employer and employee. There was not reasonable and proper cause for requiring the claimant to follow that practice. Requiring the claimant to follow that practice was therefore a breach of the implied term of trust and confidence. That breach was compounded by disciplining the claimant for refusing to follow that practice and then giving her a final written warning for that refusal. The claimant resigned in response to that (in my view clear) breach of the implied term of trust and confidence.

97 In my judgment the claimant did not, by appealing the written warning given to her on 23 June 2020, then stating a grievance about the matter as described in paragraph 43 above, and then not resigning until 17 August 2020, affirm the contract. I concluded that she did all that she could to persuade Mr Harris to change his mind and then entered into negotiations with a view to a mutually agreed termination of the employment on the payment by the respondent of financial compensation. When those negotiations failed, she resigned and she did so in response to the fact that she had been given a first and final written warning for refusing to following the practice summarised in paragraph 15 above. That warning was, metaphorically speaking, a sword of Damocles hanging above her head, and she cannot in my judgment sensibly be said to have affirmed the contract of employment in the circumstances and thereby lost the right to resign in response to the existence of that "sword".

Was the claimant's dismissal fair?

98 Ms Venkata valiantly attempted to persuade me by analogy with *Savoia* that the claimant's dismissal was fair because of the manner in which the claimant had in one

document objected to (in effect) the practice summarised in paragraph 15 above. That was the document at page 244a, in which the claimant wrote this to Mr Harris in an email dated 3 June 2020:

> "You have to understand that given your inconsistency in your approach to various jobs, I never know which ones you will do correctly and which ones you won't."

99 I concluded that that was in substance no more than a statement of the claimant's position in regard to the practices followed by Mr Harris and which he required her to follow, and that it was an honest and objectively correct statement of the claimant's perception, which in no way justified him in giving her a final written warning.

100 In any event, in all of the circumstances, I concluded that the claimant's dismissal was unfair.

Was the claimant guilty of contributory fault or was it just and equitable to reduce the compensation payable to the claimant for that unfair dismissal?

Introduction

101 Since the claim was only of unfair dismissal within the meaning of section 98 of the ERA 1996 and the claimant was not seeking reinstatement, there were available to her only two orders by way of remedy. One was for a basic award within the meaning of section 119 of the ERA 1996 and the other was for a compensatory award within the meaning of section 123 of that Act. The parties agreed the amount of the basic award, subject to the question of a reduction (if any) for contributory fault under section 122(2), which provides:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

102 It was claimed on behalf of the respondent that the basic award should be reduced to nil. That is for reasons to which I refer below.

103 The compensatory award was capable of being reduced under sections 123(1) and (6) of the ERA 1996. Those provide respectively:

103.1 "Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

103.2 "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

104 The question of what it is just and equitable to award must be decided in accordance with the decision of the House of Lords in *Polkey v A E Dayton Services Ltd* [1988] ICR 142 and the decision of the EAT in *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274. The principles applicable under the first of those two cases are well-known and do not need to be recited by me here. The approach required to be taken by the second of those two cases is to ask whether the respondent could fairly have dismissed the claimant if she had not resigned and, if it could have done so, what is the percentage chance that it would have done so.

The parties' submissions on remedy

105 Mr Rees Phillips on behalf of the claimant argued that there should be no reduction in the basic award or the compensation payable to the claimant for contributory fault or on the basis that it was just and equitable to reduce that compensation, and that the claimant had not been shown by the respondent to have failed to make reasonable efforts to mitigate her losses. Ms Venkata on behalf of the respondent, on the other hand, argued that the claimant should receive no compensatory award and no basic award. I turn first to Ms Venkata's submissions.

106 In paragraphs 13-15 of her written closing submissions on remedy, she said this:

"13. It is submitted that it would be just and equitable for the tribunal to reduce the basic award to nil because of C's blameworthy conduct prior to the dismissal:

a. C taking unauthorised holiday in August 2020, a peak holiday period, without giving R the appropriate notice

b. C making unauthorised entries in clients' journals

c. C's rude attitude as demonstrated by her email of 3 June 2020 [244a]

d. C accessing R's client records without a lawful basis in breach of the GDPR and R's data protection policy on the following dates.

i. 16 June 2020, [KT] [pdf 704]

ii. 22 June 202[0], [AM] [pdf 656]

iii. 13 July 202[0] PSG [pdf 672]

iv. 28 July 2020, [RC] Ltd [pdf 153]

14. Regarding the allegation of accessing client records, C admitted in evidence she accessed the information without Mr Harris' consent and that she did not do so for work purposes.

15. It is submitted that C:

    a. committed an act of gross misconduct under her contract of employment, namely unauthorised use or disclosure of confidential information [pdf 67]

    b. did not have a lawful basis under Article 6 of the GDPR for processing the personal data of R's clients. In regards to "legitimate interests":
        i. it is denied that carrying out research regarding the disciplinary proceedings was a legitimate interest.

        ii. in any event C's legitimate interests are outweighed by the client's legitimate interests in safeguarding their personal data. Notably the material was not relevant to the key issues in the tribunal. There was no need for C to access it."

107 As for Ms Venkata's submissions on the compensatory award, she said this in her written closing submissions on remedy:

"**Compensatory award**

Polkey

16. The tribunal is invited to find that R could have fairly dismissed C on 17 August 2020 for misconduct or shortly thereafter for the reasons stated at sub-paragraph 13.a to 13.c above.

17. At the latest the ET is asked to find that R would have fairly dismissed C in February 2021 when he discovered that she had accessed client's tax records without authorisation.

Just and equitable reduction

<u>Acquiescence in unlawful estimates practice</u>

18. C is an experienced accountant with a bachelor's degree in accounting.

19. She was a manager at R. C is not a work experience student.

20. For 5 years C engaged in a practice of using estimates in income tax returns, which the tribunal has found to be unlawful.

21. C's conduct is blameworthy. As a qualified accountant she is responsible for finding out proper accounting practices.

22. The tribunal should be slow to absolve C of culpable conduct through the argument that she did not know better, *DWP*.

23. C says that shortly after she joined R she discovered Mr Harris' practice of estimates.

24. C says she did not challenge this because Mr Harris has said other accountants use this practice and he had an agreement with HMRC.
25. That is not good enough. C should have made further enquiries whether it be by speaking to the ACCA or by alternative means.

26. By going along with the estimates practice for 5 years, C lulled Mr Harris into a false sense of security in strengthening his belief that the estimates practice was lawful.

27. The ET is invited to find that Mr Harris would have been more inclined to listen to C had she confronted him in November 2014 when she joined, or shortly thereafter, rather than after 5 years.

28. C could have avoided resigning in August 2020 had she not acquiesced in the estimates practice for 5 years.

29. It is submitted that the fact that Mr Harris also participated in the estimates practice does not absolve C of blame, *Slack*.

30. C's compensatory award should be reduced to nil.

<u>Other contributory conduct</u>

31. It is submitted that in light of the conduct described at sub-paragraph 13.a to 13.c above that it would be just and equitable to reduce the compensatory award to nil due to C's conduct prior to her dismissal:

    a. the conduct was blameworthy

    b. the conduct contributed to her dismissal, it augmented the difficult atmosphere between C and Mr Harris. Notably Mr Harris:

i. in his email of 22 July 2020 [pdf 414] raises the unprofessional journal entries with C

ii. on 28 July 2020 [pdf 416] and 29 Jul 2020 [pdf 417] Mr Harris requests [an] apology regarding C's email of 3 June 2020 which he describes as offensive, and asks her to respond to his criticisms of the journal entries [i.e. entries in which the claimant recorded that she had done what Mr Harris had required her to do, including that she had on his instructions taken the previous year's figure for expenses, added 5% for inflation and £10]

iii. on 4 August 2020 [pdf 422] Mr Harris informs C her holiday was unauthorised, and chases for an apology regarding the email of 3 June 2020 and the journal entries."

Relevant factual matters

108 The respondent had a "Data Protection Policy" of which there was a copy at pages 53-65 of the main hearing bundle. On pages 55-56 there was this passage under the heading "Lawful, Fair and Transparent Data Processing":

> "We are responsible as a Firm for ensuring that any personal data we hold is processed in accordance with the principles laid out above. We are permitted to process data where one of the following legal bases applies:
>
> - the data subject has given their **consent**. An example might be where a client has agreed to be contacted about a new tax advice service we are providing
> - the processing is necessary for the **performance of a contract** to which the data subject is a party, or in order to take steps at the request of the data subject prior to entering a contract with them. An example of this is where we need to retain and file personal information about our clients in order to finalise their accounts or tax affairs, or where a potential client gives us their personal data in order for us to be able to quote for advice that they need, and in order for them to decide whether to instruct us
> - the processing is necessary for **compliance with a legal obligation** to which the data controller is subject. An example of this might be where we pass personal data to the relevant money laundering authorities in a situation where we have an obligation to do so
> - the processing is necessary to protect the vital interests of the data subject or another natural person. An example of this might be where we pass on information to the next of kin of an employee who is gravely ill
> - the processing is necessary for the **performance of a task carried out in the public interest** or in the exercise of official authority vested in the data

controller. This is usually used by public authorities carrying out vital public functions such as provision of public utilities or public safety

- the processing is necessary for the purposes of **legitimate interests** pursued by the data controller or by a third party, except where those interests are overridden by the fundamental rights and freedoms of the data subject and their right to privacy in relation to their personal data. This is a difficult exception to generalise about, but it can be used by business where they have legitimate commercial aims which can override data subjects' interests. An example might be the chasing of a legitimate debt, investigating potential dishonesty of an employee, investigating a grievance about sexual or racial harassment. These legitimate aims may require some processing of personal data which may be justified in that context. Any user who wishes to use this basis would be advised to speak to the DPO to discuss it."

109 The "DPO" was the respondent's "Data Protection Officer". I was not told who that was.

110 When Mr Harris gave oral evidence on 15 February 2022, among other things he said that he had in February 2021 spoken to a representative or representatives of the ACCA. He said that that occurred after he had been informed by the ACCA that the claimant had made a complaint about his conduct to the ACCA. As a result of being so informed, he had found out that the claimant had accessed and used client data in connection with that complaint. Mr Harris said that that was the first time that he knew about the claimant's accessing of the records about which he now complained and which he now said he could have dismissed the claimant for on the basis that it (i.e. such accessing) was a breach of the Data Protection Act 2018 or the General Data Protection Regulation ("GDPR").

111 Mr Harris also gave oral evidence that he had spoken to someone in the Information Commissioner's Office ("ICO") about the matter and that that person had said that the claimant had breached the applicable principles in the GDPR. However, Mr Harris had no written record of that conversation, and there was no document containing anything by way of an exchange of information between him and the ICO, let alone the expression of a view by anyone acting on behalf of the ICO that the claimant had breached the GDPR here.

112 The respondent first became aware that the claimant had in her possession and had used the content of the documents about which complaint was made in paragraphs 13(d)(i) to (iii) of Ms Venkata's written submissions on remedy (which I have set out in paragraph 106 above) on 7 and 8 December 2021. However, Mr Harris was aware that the claimant had accessed similar documents in connection with the disciplinary proceedings that he had initiated against her, and he had not in any way criticised her during those proceedings for using those documents in the course of defending herself in those proceedings.

113 Mr Harris also accepted that the respondent was under a duty to report any breach of the GDPR to the ICO within 72 hours of becoming aware of the breach, but that he had not at any time made a report to the ICO stating that the claimant had committed a breach of the GDPR.

114 Mr Harris repeatedly said during oral evidence on 15 February 2022 that he continued to believe, and maintained, that the practice of using estimates which I have summarised in paragraph 15 above and about which I have made detailed findings of fact above was lawful and by implication that the claimant was wrong to object to it.

115 The claimant gave unchallenged oral evidence (which in any event I accepted) that she had had her own caseload when she was working for the respondent and that there was no good operational reason for her not to be on holiday at the same time as Mr Harris. That was because if there were any issues arising in regard to her clients then they would in practice await her return. Mr Harris gave oral evidence that he had, as a result of the claimant giving short notice of her holiday on 28 July 2020 (the holiday was on Monday 3 August to Thursday 6 August and Monday 10 August), cancelled his own holiday. That evidence was not stated in any way before (i.e. prior to) the hearing before me, and Mr Harris accepted that he had not indicated in any way between 28 July and 17 August 2020 when the claimant resigned that he might take any (further) disciplinary action against her. Indeed, he went further in cross-examination and accepted that he was not sure that he would have even instituted disciplinary proceedings against her either for not giving proper notice of her holiday or for including on clients' records the fact that she had done things on his instructions.

116 The claimant gave oral evidence also about her losses and her efforts to mitigate them. She had applied for a number of non-accountancy jobs, but also a number of accountancy jobs. The period when she was applying for replacement work was subject to continued measures imposed by the United Kingdom government in response to the Covid-19 pandemic. In paragraph 37 of her witness statement, the claimant said this:

> "Following my resignation, I have made strenuous efforts to find new employment. As at the date of this statement, the only employment I have secured was a receptionist in a GP's surgery. I was employment by that surgery on a temporary contract for the period 1st October 2021 to 1st December 2021. My salary was £9.50 per hour and my contracted hours were 28 ½ a week."

117 The claimant put before me a number of documents which related to her search for alternative employment, which supported her assertion that she had "made strenuous efforts to find new employment". When giving oral evidence on 15 February 2022, the claimant said that when she was applying for accountancy posts, it was difficult to match the skill sets sought by employers to her skills. For example, during the furlough period, payroll skills were in particular demand, and she had no such skills.

In addition, she said, she had difficulty in finding roles that were equal to, and required skills which were similar to those required for, the role that she had had with the respondent. She had, however, she said, searched diligently for an equivalent accountancy role. She had finally found one in January 2022. I accepted all of the evidence of the claimant to which I refer in the preceding paragraph above and this paragraph.

118 When it was put by Ms Venkata to the claimant that she was "professionally obliged" to question Mr Harris about how he used estimates, the claimant said this (and I accepted this evidence also):

> "I had trust in my employer; I believe he took advantage of my inexperience."

My conclusion on the issue of whether or not the claimant's conduct before her dismissal was such as to make it just and equitable to reduce the basic award

119 I concluded that the claimant could not be said to have committed gross misconduct by accessing client records for the purposes of (a) responding to the disciplinary proceedings against her, (b) making a complaint to the ACCA of unprofessional conduct on the part of Mr Harris, or (c) planning to make a claim to this tribunal. Indeed, I could not see how doing that could be said to be misconduct of any sort as long as she kept the data reasonably safely and used them only for proper purposes. It was in my view clear that she had a "legitimate interest" of the sort referred to in the final bullet point of the respondent's Data Protection Policy which I have set out in paragraph 108 above. Accordingly, I rejected what Ms Venkata said in paragraph 15(b)(i) of her written submissions on remedy (which I have set out in paragraph 106 above).

120 For the avoidance of doubt, I also rejected what Ms Venkata said in paragraph 15(b)(ii) of those submissions. That is because I concluded that the material in question was plainly relevant to the issues before me in that it related to the practice of the respondent which the claimant had refused to follow, for which refusal she was given a first and final written warning which, as I have found, it was a breach of the implied term of trust and confidence to give.

121 Ms Venkata's written closing submissions on remedy did not rely on the claimant's o conduct in doing what is summarised in paragraph 15 above without protest for about five years before finally realising that it was wrong as a justification for reducing the basic award on the basis that it was just and equitable to do so. I nevertheless, for the avoidance of doubt, record here that, for the reasons set out in paragraphs 127-139 below, I would not have accepted that submission.

122 In any event, I concluded that there was no justification for reducing the basic award on the basis that it was just and equitable to do so. The basic award is therefore payable in the agreed sum of £4,035.

My views on the parties' submissions about the compensatory award and the case law to which they referred me

123 As for the compensatory award, I rejected the submission of Ms Venkata in paragraph 16 of her written submissions on remedy, namely (see paragraph 107 above) that the respondent "*could have fairly dismissed C on 17 August 2020 for misconduct or shortly thereafter for the reasons stated at sub-paragraph 13.a to 13.c above*". That is because in the case of the taking of holiday at short notice (1) it was done on short notice in the circumstance that (see paragraph 43 above) the parties were in discussions about the agreed termination of the claimant's employment and were in the middle of a negotiation in that regard and (2) as I say in paragraph 115 above, I accepted the claimant's evidence that she had her own caseload and that if there were any issues arising in regard to her clients then they would await her return. Furthermore, the holiday was only of 5 working days, with one working day in the middle, i.e. Friday 7 August 2020, so that any delay in responding to a client would have been minimal. Finally here, but only incidentally given my conclusion that the claimant could not fairly have been dismissed for not giving proper notice of her holiday in the manner described in paragraph 43 above and then taking it without Mr Harris having said that she could do so, if Mr Harris with hindsight even at the hearing before me on 15 February 2022 could see that he might not even have instituted disciplinary proceedings against the claimant for doing that (see paragraph 115 above), then the proposition that there was any chance at all that he would have dismissed the claimant for that conduct (even assuming that it would have been fair to do so) was hard to accept.

124 Similarly, I could not accept that Mr Harris would in February 2021 (assuming that the claimant had remained in the respondent's employment until then) have taken disciplinary action against the claimant for accessing client records in connection with her complaint about his conduct made to the ACCA. I also concluded that if he had done so then he could not fairly have dismissed her for doing so. Indeed, I accepted Mr Rees Phillips' submission on this in paragraph 18 of his written submissions on remedy, namely that "C's use of client records solely for the purpose of reporting the matter to the ACCA and in the present proceedings is a classic protected disclosure".

125 In addition, I agreed with what Mr Rees Phillips said in paragraph 12 of his written submissions on remedy, which was that the claimed "defacing" of clients' records was not supported by "evidence as to what a 'proper' journal narrative entry might be from any objective source, such as guidance or accountancy practice generally", and that the real reason for objecting to the claimant including the relevant passages in the clients' records was "because this created a paper trail that would not withstand scrutiny by the likes of the ACCA or a different accountant looking at a client's records". In addition, I regarded what the claimant did as being consistent with paragraphs 24 and 30 of the PCRT helpsheet to which I refer in paragraphs 73-76 and 90 above, and therefore in no way wrongful. Paragraph 30 is set out in paragraph 90 above. Paragraph 24 was in these terms:

> "A member who is uncertain whether their client should disclose a particular item or of its treatment should consider taking further advice before reaching a decision. They should use their best endeavours to ensure that the client understands the issues, implications and the proposed course of action. Such a decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including timely notes of discussions with the client and/or with other advisers, copies of any second opinion obtained and the client's final decision. A failure to take reasonable care may result in HMRC imposing a penalty if an error is identified after an enquiry."

126 As for the proposition that it was just and equitable to reduce the compensatory award because of the claimant's going along with the practice to which she eventually objected, I could not accept what Ms Venkata said in paragraphs 26-29 of her written submissions on remedy. That was for the following reasons, taking those paragraphs (which I have set out in paragraph 107 above) in turn.

127 The submission in paragraph 26, namely that the claimant, "*By going along with the estimates practice for 5 years, C lulled Mr Harris into a false sense of security in strengthening his belief that the estimates practice was lawful*" with the result that it was just and equitable to reduce the compensatory award could in my judgment not be accepted, and certainly I did not accept it. Rather, in my judgment, the claimant could not be regarded as having gone along with the practice of the use of the estimates in the circumstances as I have found them to be, namely that (see the next paragraph below, which addresses paragraph 27 of Ms Venkata's closing submissions on remedy, which was in effect a repeat of paragraph 26 of those submissions) Mr Harris repeatedly and forcefully told her to go along with that practice and told her (as I have found: see paragraph 13 of her witness statement, which I have set out in paragraph 16 above and which, as I say there, I accepted) that he had agreed his practice with HMRC.

128 The submission in paragraph 27 of Ms Venkata's written submissions on remedy ("*The ET is invited to find that Mr Harris would have been more inclined to listen to C had she confronted him in November 2014 when she joined, or shortly thereafter, rather than after 5 years*.") flew in the face of, and was contradicted by, the evidence to which I refer in paragraph 114 above. Taken with the evidence of the claimant set out in paragraph 118 above (which, as I say there, I accepted), there was in my view no chance that Mr Harris would, in 2014 or at any time after then, have accepted that the practice summarised in paragraph 15 above was in any way wrong.

129 The proposition in paragraph 28 of Ms Venkata's written submissions was that *"C could have avoided resigning in August 2020 had she not acquiesced in the estimates practice for 5 years*." That proposition had to be read as being to the effect that if the claimant had at any time before June 2020 refused to follow that practice on the basis that it was improper then she would not have been constructively dismissed in August 2020 because Mr Harris would have changed his ways by not

requiring her to follow that practice. Given the factors to which I refer in the two preceding paragraphs above, I could not accept that proposition on the facts.

130 The submission in paragraph 29 of Ms Venkata's written closing submissions on remedy was this: "*It is submitted that the fact that Mr Harris also participated in the estimates practice does not absolve C of blame,* ***Slack***." That submission relied on the proposition, repeatedly put to me in oral submissions by Ms Venkata, that the employer's conduct was irrelevant when considering whether the employee was guilty of contributory fault. That submission was made in paragraphs 8 and 9 of her written closing submissions on remedy, which were in these terms:

> '8. In determining contributory fault only the conduct of the claimant is concerned, ***Parker Foundry Ltd v Slack 1992 ICR 302, CA*** ("Slack"). The Court of Appeal Slack [sic] stated that the correct approach to adopt when assessing contributory conduct under s123 ERA is the one adopted by the courts in relation to the ***Law Reform (Contributory Negligence) Act 1945*** ("LRA") which deals with contributory negligence. LJ Woolf stated at 307C [emphasis added]:
>
> > *That this is so is confirmed when attention is paid to the similar language contained in section 1 of the Law Reform (Contributory Negligence) Act 1945 which refers to "just and equitable."…* ***The court's attention is therefore focused on that matter and the extent to which the complainant's own conduct caused or contributed to his dismissal****.*'
>
> 9. The learned editors of the two leading employment law textbooks state that ***Slack*** is authority for the proposition that only the conduct of the claimant is relevant to contributory conduct, the conduct of the employer (and any other employee) is irrelevant:
>
> a. IDS Employment Handbooks (Sweet & Maxwell) at paragraph 17.144 General Principles, Vol 12 Unfair dismissal, Chapter 17 Compensatory awards: adjustments state [emphasis added]:
>
> ***Only the blameworthy conduct of the employee is relevant*** *when considering whether compensation should be reduced under S.123(6) ERA,* ***not that of the employer or other employees****.*
>
> b. Harvey's on Industrial Relations state at paragraph 2710.01 (emphasis added) (emphasis added) [sic]:
>
> *It is well-established that questions of the employee's conduct alone are relevant to the issue reduction on account of contributory conduct.*

> *As the Court of Appeal emphasised in Parker Foundry Ltd v Slack [1992] IRLR 11, in deciding whether to reduce compensation* ***it is only the employee's conduct which can be taken into account; the conduct of the employer, and the treatment of other employees, is irrelevant.*** *..'*

131 Those textbook passages are illustrative of the importance of referring to the material which is the source of a proposition of law stated in a legal textbook. *Slack* concerned only the blameworthiness of the claimant's fellow employee with whom the claimant had fought. The claimant's dismissal was unfair procedurally. The headnote to the Industrial Relations Law Reports report of the case summarises the facts in the following short (in fact the opening) passage:

> "Mr Slack was involved in a fight at work with a fellow employee. On the basis of a statement by a third person, the employers concluded that Mr Slack had been the aggressor and they therefore decided to dismiss him. The other man involved in the fight was suspended without pay for two weeks.
>
> An Industrial Tribunal found that Mr Slack had been unfairly dismissed because of certain procedural irregularities. They went on to hold, however, that he was 50% to blame for the dismissal and that his compensation should be reduced accordingly."

132 In addition, the passage which Ms Venkata quoted from the judgment of Woolf LJ in *Slack* omitted some words which in my view illuminate the statement of principle on which she relied. The full passage (it is at [1992] ICR 306H-307D) of the judgment is this (the subsections to which reference is made are now sections 123(1) and (6) of the ERA 1996):

> 'Before this Court Mr. Gasztowicz [counsel for the employee] submitted that the approach to subsection (6) should be similar to that indicated in subsection (1). In particular, he submits that it is appropriate under subsection (6) to have regard to "all the circumstances," which circumstances here include what happened to Mr. Whitmore [i.e. the employee with whom Mr Slack fought].
>
> Mr. Sale, for the employers, submits to the contrary, and says it is significant that the words "all the circumstances" do not appear in subsection (6), whereas they do in fact appear in subsection (1). He contends that on a literal interpretation of subsection (6), what a tribunal is required to do is to consider, first of all, whether a dismissal was caused or contributed to by an action of the complainant and, if so, to reduce the amount of the compensatory award by the appropriate proportion which the tribunal considers just and equitable, having regard to the finding; that is, the finding that the complainant's conduct "caused or contributed to" his own dismissal.

> It is right to say that there is no express indication in subsection (6) that is the only matter to which the tribunal is to have regard. However, speaking for myself I consider there is considerable force in Mr Sale's submission that is the correct literal interpretation of subsection (6). That this is so is confirmed when attention is paid to the similar language contained in section 1 of the Law Reform Contributory Negligence Act 1945 which refers to "just and equitable". In a situation where the court is performing the task of apportioning responsibility under the Act of 1945, the matter with which the court is primarily concerned is the extent to which a defendant, who succeeds in showing that a plaintiff has caused an accident, was himself responsible for that very accident. The court's attention is therefore focused on that matter and the extent to which the complainant's own conduct caused or contributed to his dismissal."

133 If that passage had to be read in the manner of a statute (which it does not), then the use of the word "primarily" would show that it is not *only* the conduct of the employee that can be taken into account when determining whether or not the employee is guilty of contributory fault. In any event, in my judgment it is impossible to judge the conduct of an employee in a vacuum: it has to be seen in its context, which must include the actions of others. The case of *Slack* was in addition concerned only with the conduct of a fellow employee: not that of the employer.

134 The closest that any of the three judgments of the members of the Court of Appeal in *Slack* came to a statement of the proposition for which Ms Venkata contended before me, namely that I had to ignore the respondent's conduct (in the form of requiring the claimant to do the thing for which she was now said to be at fault for doing) was the passage of Woolf LJ's judgment at [1992] ICR 310 B-C; however, that passage must be read against the background of the material preceding passage, at 309E-F. The latter passage is this:

> 'The next case to which I refer is *Warrilow v. Robert Walker Ltd* [1984] I.R.L.R. 304, again a decision of the appeal tribunal but presided over by Tudor Evans J. Mr. Gasztowicz drew the court's attention in particular to p. 306, para. 19 of the report, which reads:
>
> > "The question of what is just and equitable goes to the proportion of reduction and not to the question whether there should be any reduction at all. But, quite apart from that aspect of the argument of the appellant, it seems to the majority that the tribunal, having found as a fact that the appellant was to blame, was fully entitled and obliged to reduce the award to some extent."
>
> Mr Gasztowicz draws attention to the approach to "just and equitable" in that passage. However, I see nothing in what Tudor Evans J. said there, on behalf of the majority of the tribunal, which is inconsistent with what has been said already in the course of this judgment that, in considering the two subsections,

what the tribunal is confined to taking into account is the conduct of the complainant (here Mr. Slack) and not what happened to a fellow employee.'

135 At page 310B-C, Woolf LJ said this:

> 'Next we referred to *Allders International Ltd v. Parkins* [1981] I.R.L.R. 68, a decision of the appeal tribunal presided over by May J. It is not necessary to refer to the facts of that case, but only to refer to the final paragraph of the judgment, at p.70, reflecting the general approach adopted in this judgment:
>
> > "Questions relating to the employer's conduct as well as the employee's conduct are relevant to the question of fair or unfair dismissal. It is questions of the *employee's conduct alone* that are relevant to the question aye or nay should the loss be reduced by reason of some contributory fault." (Emphasis added.)'

136 In my view, the proposition that the employer's conduct cannot be taken into account in deciding whether the employee's compensation for being unfairly dismissed should be reduced, was not supported by either the decision or any obiter dicta (i.e. statements made in the course of arriving at that decision but which were not part of the essential reasoning) in *Slack*. The statement set out in the preceding paragraph above had to be read against the background of the allegation that the claimant employee's conduct in *Slack* had to be judged without reference to the manner in which the employer treated the fellow employee with whom the claimant had fought.

137 Mr Rees Phillips drew my attention to the decision of Langstaff P in *Frith Accountants Ltd v Law*; UKEAT/0460/13 [2014] ICR 805. The judgment of Langstaff P in that case started:

> "This is an appeal against a decision made by Employment Judge Spencer, at London (South), reasons for which were given on 5 September 2013. It raises the relationship between constructive dismissal and compensation, in particular by reference to contributory conduct. So far as I know, it may be the first case to deal with an alleged contribution by an employee where the breach of contract by the employer was a breach of the implied term of trust and confidence."

138 In paragraph 9 of that judgment, Langstaff P said this:

> "It will be unusual, though there is no test of exceptionality, for a constructive dismissal to be caused or contributed to by any conduct on behalf of an employee. The reason for that is because a constructive dismissal is determined by applying the law of contract. That was determined in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221; [1978] QB 761. It has recently been re-asserted in *Bournemouth Higher Education Corporation v Buckland* [2010] ICR 908; [2010] QB 323. What causes there to be a constructive dismissal is not conduct of the employee but conduct of the employer which

> amounts to the employer abandoning and altogether refusing to perform the contract (the modern test or expression of "fundamental breach"). That is conduct which is, centrally, that of the employer. Where the conduct said to be a fundamental breach in that sense is a breach of the implied term of trust and confidence, then not only will it be repudiatory, but by definition there will be no reasonable or proper cause for the employer's behaviour. That is because the accepted formulation of the test for that which amounts to the implied term is that an employer must not conduct itself in such a way as is calculated or likely to destroy or damage the relationship of trust and confidence between employer and employee *without reasonable or proper cause*. Those last words are important. The unchallenged finding here was not only that there was a breach of contract by the employer but that there was no reasonable or proper cause for it. It had been argued, in the course of the liability hearing, by Mr Potter [on behalf of the employer] that the tribunal should find reasonable or proper cause because of the background, the history of errors and the claimant's confusing conversations, and the fact that she was unreceptive and resistant to any form of criticism. The tribunal (paragraph 27 of the liability judgment) did not accept that that amounted to a reasonable and proper cause. However, as has been recognised in the cases, in particular *Polentarutti v Autocraft Ltd* [1991] ICR 757, and the case upon which the appeal tribunal, presided over by Knox J, drew for that view, a decision of the Northern Irish Court of Appeal, in *Morrison v Amalgamated Transport and General Workers Union* [1989] IRLR 361 at 364, para 14, the doctrine of constructive dismissal deals with whether there is a dismissal. Yet the jurisdiction of a tribunal is statutory. The question of compensation is dealt with in sections 122 and 123 of the 1996 Act on the footing that there has been a dismissal, not that there has been a dismissal which is not a constructive one, or the opposite, but any dismissal. The words therefore can apply in an appropriate case to a constructive dismissal. That is what the appeal tribunal in essence determined in *Polentarutti*. It also made it clear (see p 769) that any action of the claimant which met the statutory test could be relied upon. It did not have to amount to the direct and exclusive cause."

139 The rest of Langstaff P's judgment in that case highlights the fact that while the question of causation is relevant when applying section 123(6) of the ERA 1996, it is not relevant when applying section 122(2) of that Act, although in both cases it must be determined to be just and equitable for the compensation that would otherwise have been payable to be reduced, possibly to nil.

My conclusions on the questions whether the claimant was guilty of contributory fault within the meaning of section 123(6) of the ERA 1996, and whether it was just and equitable to reduce (under section 123(1) of that Act) the compensatory award

140 In my judgment, it could not be said that the claimant's initial following without protest of the practice which I have summarised in paragraph 15 above in any way caused or contributed to her dismissal. That is because in my view in the circumstances as I

have found them to be, if she had at any time before 2020 objected to following that practice, then Mr Harris would have taken disciplinary action against her. If she had had less than two years' continuous employment, then he would, I concluded, have dismissed her. I came to that conclusion in any event, but it was fortified in doing so by the strength of his view that he was right in following that practice and that she was wrong to refuse to follow it, which was exhibited in June 2020 and continued to be exhibited in the hearing before me, even after I had given judgment on liability.

141 If that was wrong, and it could be said that the claimant's acquiescence had in some way contributed to the continuation of the practice and a confirming in Mr Harris' mind of the correctness of the practice, then in my judgment it was not just and equitable to reduce the compensation payable under section 123. I came to that view after a careful examination of all of the circumstances.

The claimant's efforts to mitigate her losses

142 In addition, it was the respondent's case that the claimant had not made sufficient efforts to mitigate her losses. However, it was not for the claimant to satisfy me that she had made reasonable efforts to mitigate her losses: it was for the respondent to satisfy me on the balance of probabilities that the claimant had not made reasonable efforts to mitigate her losses. That much is clear from the following very helpful summary of the relevant principles of Her Honour Judge Eady QC (as she then was) in *Singh v Glass Express Midlands Limited* UKEAT/71/18 set out in paragraphs DI[2671] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"), as follows:

> "In *Singh v Glass Express Midlands Limited* UKEAT/71/18 (15 June 2018, unreported), HHJ Eady QC (sitting alone) set out a concise summary of the guidance given by Langstaff P in *Cooper* [i.e. *Cooper Contracting Limited v Lindsey* UKEAT/0184/15] on the correct approach to the question of mitigation:
>
> > (1) The burden of proof to show a failure to mitigate is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.
> > (2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
> > (3) What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.
> > (4) There is a difference between acting reasonably and not acting unreasonably. There is usually more than one reasonable course of action open to the employee. The employer needs to show that jobs were available and that it was unreasonable of the employee not to apply for them.
> > (5) What is reasonable or unreasonable is a matter of fact.

(6) That question is to be determined taking into account the views and wishes of the claimant as one of the circumstances, but it is the ET's assessment of reasonableness and not the claimant's that counts.
(7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
(8) The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.
(9) In cases in which it might be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient."

143 The following paragraph of *Harvey* is also helpful. It is number [2672]-[2680], and is in these terms:

'[2672]–[2680]

The principle at (3) is important and often misunderstood. As Langstaff J said in Cooper:

"11. The burden of proof of a failure to mitigate is on the wrongdoer. A Claimant does not have to prove that he mitigated the loss. Authority for this is at the highest level and binding. It begins with *Banco De Portugal v Waterlow & Sons Ltd* [1932] AC 452, a decision of the House of Lords. Lord Macmillan said at 506:

> "… Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. …"

12. That was referred to and adopted in a decision of the Court of Appeal in *Wilding v British Telecommunications plc* [2002] ICR 1079. At paragraph 37 in the leading Judgment, that of Potter LJ, it was observed that the various authorities were apt to establish the following principles:

> "37. …. (i) It was the duty of [the Claimant] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from … his former employer; (ii) the onus was on [his former employer] as the wrongdoer to show that [the Claimant] had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of [the former employer], the way in which [the Claimant] had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of [the Claimant]."

13. The principle that the Respondent must prove that a Claimant acted unreasonably in failing to mitigate was further emphasised in the Judgment of Sedley LJ, who drew attention to the difference between a test of acting reasonably on the one hand and not acting unreasonably on the other; they are different. At paragraph 54 he gave this example:

> "Take a not uncommon case: an employee who has been subjected to harassment at work is offered his job back with the same colleagues but with promised safeguards against repetition. He refuses it in circumstances in which the employment tribunal consider that it would have been reasonable to accept it; but they accept, too, that his decision to refuse was in all the circumstances not an unreasonable one. …"

14. His judgment is to the effect that in such a case the Respondent will fail to prove that the employee has acted unreasonably. As he said in paragraph 55:

> "… it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed."

Although there is no burden on the employee to prove mitigation, a well-advised employee will do so and keep copies of job applications made, letters in

response to applications (including letters of rejection) and a record of other efforts made to find a position. Such an employee will be well-placed to defend an employer's mitigation challenge.

On the other side of the coin, a well-advised employer will look out for jobs and opportunities that the employee may be expected to apply for. The employer (or their solicitor) may even write to the employee to draw attention to any opportunities that present themselves. An employee may then have some explaining to do if they did not apply. If they chose to apply and were successful, then the loss may have been mitigated. (Of course, if the employee applies and is unsuccessful, then the employer's argument of failure to mitigate will become more difficult to run.)'

My conclusion on the question whether the claimant had failed to make reasonable efforts to mitigate her losses

144 The respondent put before me no evidence of any job for which the claimant could have applied at any time between her resignation and the hearings before me. I concluded on the basis of the claimant's evidence to which I refer in paragraphs 116-117 above that she had made many efforts to obtain alternative employment and that she had been assiduous in doing so. In those circumstances I had to, and did, conclude that she had not failed to make reasonable efforts to mitigate her losses.

The claimant's losses

145 The claimant's losses were set out in a schedule of loss (at pages 61-63 of the bundle containing the witness statements) calculated by reference to her net pay. As I pointed out during the hearing, the award under section 123 of the ERA 1996 was going to be taxed in so far as it was for loss of earnings.

146 The claimant had not sought and been paid state benefits during the period when she was unemployed, so the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996/2349, did not apply.

147 Mr Rees Phillips had calculated the claimant's gross losses (i.e. before the deduction of income tax and national insurance contributions) in his written closing submissions on remedy, which he put before me on 16 February 2022, and I accepted his calculations. He calculated that the claimant's gross losses were £61,204.82. The maximum award under section 123 of the ERA 1996 by reason of section 124(1ZA)(b) of that Act was a year's gross earnings. That was 52 x £815.92, which was £42,427.84. I therefore awarded the claimant the latter sum under section 123.

<u>Costs</u>

The respondent's application for its costs

148 The respondent's application for costs was based on the proposition that the claimant had pursued her claim unreasonably because she had rejected offers of compensation made by the respondent. The relevant sequence of events was as follows.

The history of the respondent's offers to settle

149 The relevant correspondence was in a bundle to which the respondent referred as the "WP Bundle". I refer to pages of that bundle below by referring to them by number with the letter prefix "WP"; so for example page 10 of that bundle is WP10.

150 On 14 August 2020, so before the claimant resigned, her solicitors wrote to the respondent's solicitors (WP10-13) a letter the body of which ended with this paragraph:

> "The offer of 6 weeks salary is derisory. Your client is going to have to come up significantly from that amount to reach a settlement. Our client will consider any further offer your client has to make. However, we are yet to be persuaded that it should be on terms that are anything other than:-
>
> 1. Your client pay her a settlement sum equal to £45,000;
> 2. Your client provide our client with an agreed reference;
> 3. Our client's disciplinary record is wiped clean;
> 4. The reason for the termination of our client's employment is by mutual agreement;
> 5. You pay our costs which we estimate to be in region of £2,317.50 plus VAT (based on an hourly rate of £225 plus VAT);
> 6. Our client's employment is to terminate immediately without notice; and
> 7. Our client will not pursue any constructive dismissal claim against your client."

151 On 9 December 2021, so just before the hearing before me started, the claimant's solicitors wrote the letter at page 30, which was in these terms:

> "We tried to settle this case with you at its start but your client was only willing to offer a nominal amount and our client was prepared to accept £45,000.
>
> Our client's reaction to your client's latest offer of £5,000, was no, it at least needs an extra zero on it. Our respective clients therefore remain far apart on settlement.
>
> We have no instructions to make any offer at the moment. If your client wishes to make a further offer, please now put that offer to us and we will take our client's instructions. However, that offer will have to be a significant increase on what your client has offered to date to stand any chance of our client accepting

> it. Our respective clients are now entrenched in this case now and both incurred significant costs."

152 I was told by Ms Venkata that an offer to settle for £30,000 was made over the telephone just before the start of the resumption of the hearing on 14 December 2021 (so after the first day of the hearing). That offer was (as it must be apparent) rejected.

153 On 18 January 2022, so after I had given an indication of the way that I was seeing the case (namely that I was inclined to the view, subject to submissions, that the claimant had been dismissed constructively) but before the resumption of the hearing on 14 February 2022, the respondent's solicitors sent the letter at WP33-35. That included this passage at WP34:

> "The most your client can recover in her unfair dismissal claim, due to the statutory cap, is £42,000.
>
> From a point of view of pure commercial pragmatism, our client is prepared to pay your client in full and final settlement of her claim the sum of £45,000. This is £3000 more than she can hope to achieve if she is fully successful in her claim.
>
> If terms can be agreed then the settlement between our respective clients will have to be put in writing through ACAS.
>
> If your client refuses then we consider that she is acting in an unreasonable and vexatious manner as she will be refusing a financial offer beyond the maximum damages available to her even if she succeeds in her claim, Accordingly we formally notify you that in the event of refusal of our client's generous offer, our client will seek payment of his entire costs."

154 I pause to say that the maximum awardable was the sum that I had in fact awarded, which was £46,462.84, and not £42,000. When I put that to Ms Venkata when she was making the respondent's application for its costs, she said that the schedule of loss ended with these words, which, she said, were such as to justify the conclusion that the claimant had acted unreasonably in refusing the offer of £45,000:

> "3.16. Statutory cap: £42,427.84"

155 However, that line was written at the end of the section concerning the compensatory award. There was a separate section for the basic award, and the statutory maximum (or cap) to which I refer in paragraph 147 above plainly applies only to the compensatory award. It could not reasonably be read as including the basic award.

156 On 4 February 2022, the claimant's solicitors among other things wrote (WP40) this:

> "We are in receipt of your WP correspondence. We will again take our client's instructions on the offer. However, this case is more than just about money for our client. Our client is wanting a determination that she was constructively dismissed. Is your client willing to admit liability as part of any settlement to this case?"

157 On 7 February 2022, the respondent's solicitors wrote the letter at WP41-42, which included at WP42 this paragraph:

> "Our client has obtained a supportive report from Barrie Akin of Counsel and has no intention of conceding liability to your client. However, he is willing to:
> - provide an agreed reference
> - a statement of apology without conceding liability
> - the payment of the sum of £45,000"

158 Later on that day, at WP46, the claimant's solicitors replied:

> "We are in receipt of your letter (a copy attached). We cannot accept your assertion that the tribunal will find that our client is motivated by money and not a determination on liability because:-
>
> 1. Unlike in the case of Power, our client has not exaggerated her schedule of loss;
> 2. In the tribunal proceedings our client is seeking a determination that she has been constructively dismissed;
> 3. Our client has not made any counter offers to your client's various offers during the course of the tribunal proceedings;
> 4. You would expect her to make a counter offer during the course of the tribunal proceedings, were her motivation money;
> 5. The only offer she has made was before tribunal proceedings were issued;
> 6. She is hardly going to be criticised or deemed to have acted unreasonably in having made an offer before tribunal proceedings were issued."

159 The reference there to "Power" was to the case of *Panasonic v Power v Panasonic (UK) Limited* (unreported; judgment given on 9 March 2005; UKEAT/0439/04/RN). There, the EAT, presided over by His Honour Judge Peter Clark, gave valuable guidance on the proper approach to take when costs are sought on the basis that there has been unreasonable conduct. I did not see subsequent case law as adding anything material to that which was said in that guidance. It was given in the following passage, which is taken from the transcript (which I have improved slightly by putting the case names in italics and the heading in bold font. I have also corrected one typographical error).

> "11. ... We are concerned in this case with unreasonable conduct.

12. Certain principles in deciding whether or not to make a costs order in Employment Tribunal proceedings, under a regime which differs from that in the ordinary Civil Courts, may be discerned from the authorities. They include:

(1) Costs orders in the Employment Tribunal remain the exception not the rule. See *Gee v Shell UK Ltd* [2003] IRLR 82, paragraphs 22 per Scott Baker LJ and 34 Sedley LJ and *Lodwick v London Borough of Southwark* [2004] IRLR 554, paragraph 26 per Pill LJ.

However, that characterisation has been clearly explained by Burton P in *Salinas v Bear Stearns* (EAT/596/04. 21 October 2004, unreported). Statistically, see paragraph 22.2 of the President's judgment, the proportion of the Employment Tribunal contested cases in which costs orders are made remain low, some 5 per cent on the most recent figures, however, the question is not whether the case is exceptional, but whether the applicant for a costs orders brings himself within Rule 14(1) [i.e. the then applicable rule, which was not materially different from the current provision, which is rule 76 of the Employment Tribunals Rules of Procedure 2013]. In the majority of Employment Tribunal cases, the unsuccessfully party will not be ordered to pay the successful party's costs.
See *McPherson v BNP Paribas* [2004] IRLR 558, paragraphs 2 and 25 per Mummery LJ.

However, even if an Employment Tribunal does not use words which have the effect of showing that it appreciates that costs orders are rare, provided it has applied the correct test, no error of law on appeal to this Employment Tribunal will arise. See *Salinas* paragraph 22).

(2) Rule 14(1) imposes a 2 stage exercise, first, has the paying party acted unreasonably; if so the Employment Tribunal must ask itself whether to exercise its discretion in favour of awarding costs against that party. *Monaghan v Close Thornton* (EAT/0003/01. 22 February 2002. Unreported), paragraph 22 per Lindsay P.

(3) Costs are compensatory, not punitive.

(4) The rule in *Calderbank v Calderbank* has no place in the Employment Tribunal jurisdiction. *Monagham* paragraph 25. *Kopel v Safeway Stores Plc* [2003] IRLR 753, paragraphs 17-18, Mitting J.

(5) The discretion of an Employment Tribunal under Rule 14(1) is not limited to those costs that are caused by or are attributable to the unreasonable conduct found. See *McPherson* paragraphs 40-41.

(6) Where a party has obstinently pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked for against that party if it were persisted in, the tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably. See *Kopel* paragraphs 17-18 citing the observations of Lindsay P in *Monagham*.

(7) Where a costs order made by an Employment Tribunal is appealed the prospects of success are substantially reduced by the restriction of the right of appeal to questions of law and by the respect paid by appellate courts to the exercise of discretion by the tribunal below. Unless the discretion has been exercised contrary to principle, in disregard of relevant factors or is just plain wrong, an appeal against a tribunal's costs order will fail. See *McPherson* paragraph 26.

(8) An appeal court should read the reasoning of the tribunal as a whole and not scrutinise it for error line by line. See again *McPherson* paragraph 36.

The Appeal

13. Mr Donovan [counsel for the employee] advances 16 separate grounds of appeal in his amended grounds on which this appeal was permitted to proceed at a preliminary hearing to this full hearing.

14. The principal grounds may be summarised as follows:

(1) The Employment Tribunal failed to take into account the Claimant's right to seek a declaration as to her rights, regardless of the compensation sought or payable. He cites *Telephone Information Services Ltd v Wilkinson* [1991] IRLR 148, where the Employment Appeal Tribunal, Tucker J – see paragraphs 21 and 23 – stated that it was not appropriate to strike out an unfair dismissal claim where the Respondent had offered maximum compensation provided for by law, in the absence of an admission of unfair dismissal by the Respondent employer.

We see the force of that submission in an appropriate case. However, as Mr Oudkerk [counsel for the employer] points out, it was never a condition imposed by or on behalf of the Claimant for any settlement of her claims that the Respondent admitted liability. In these circumstances we think the Employment Tribunal was entitled to proceed on the basis that the issue was money, and nothing else.

(2) The improved offer to £25,000.00 in November 2003. Mr Donovan contends that the fact of an increased offer indicated the Claimant's rejection of the original offer of £10,000.00 nearly 12 months earlier was vindicated. That is one way in which the Employment Tribunal might have approached the matter.

However, see their costs reasons paragraph 19. The Employment Tribunal in this case considered that the Claimant's rejection of that offer out of hand merely went to confirm their view, arrived at after a hearing lasting in all 7 days, that the Claimant took an intransigent attitude towards negotiations, resonating with the observation of Mitting J in *Kopel*, paragraph 21, and Lindsay P in *Monaghan*, paragraphs 17-18. In our judgment that was a view which was open to the Employment Tribunal.

(3) It is further submitted that the Employment Tribunal misapplied the principles in *Kopel*, to which they were referred. It is said that the Employment Tribunal looked at the offer of £10,000.00 made by the Respondent in December 2002 in isolation, as if applying the *Calderbank* principle. They failed to take into account, on the other side of the scales, relevant factors including the fact that the Claimant had substantially won on liability; issues on which the Respondent had given no ground; her own attempts to initiate negotiations; her entitlement to pursue a declaration as to her rights, in the absence of concessions, to a tribunal hearing and the lack of any warning as to her costs risks from the Employment Tribunal.

We have carefully considered that submission but we reject it. The Employment Tribunal was not in a position to give any warning to the Claimant as to costs. They were unaware of the earlier offers before the costs hearing. We have already stated our view that the Employment Tribunal was entitled to conclude that the Claimant was interested in money, not a declaration of her rights. They specifically recalled – see Costs reasons, paragraph 7 – their observations at paragraph 105 of the first decision reasons. They reminded themselves that she had been successful in principle in her claims – see Costs reasons, paragraph 15. However, they took the view that she had simply failed to address the point that the loss of her licence and refusal to countenance lower paid work for the Respondent fatally undermined her claim for lost earnings, the principal part of her compensation claim. She could not envisage closing the gap with a view to meaningful negotiations.

(4) It is submitted that there was no evidence to support the finding – See Costs reasons, paragraph 20 – that meaningful negotiations would have taken place such that the need for a seven day hearing could be avoided. We disagree. There was evidence that the Respondent did increase their offer in November 2003 and there is the Employment Tribunal's overall finding that the Claimant failed to engage in realistic negotiations, given her difficulty over her loss of earnings claim, pointed out by the Respondent's solicitors in their letter of December 2002.

(5) Mr Donovan argues that the Employment Tribunal failed to connect the unreasonable conduct as found to the size of the costs award. We repeat the observations of Mummery LJ in *McPherson*, paragraphs 40-41, as to the lack of any causal requirement in the exercise of the Employment Tribunal's discretion

> under Rule 14(1). In any event, as Mr Oudkerk submits, the award of £10,000.00 costs was plainly proportionate to the overall Respondent's costs of £55,000.00 incurred since their letter of December 2002.
>
> 15. We do [not] propose to further burden this judgment by reference to each of the remaining grounds of appeal advanced Mr Donovan. Suffice it to say that they do not cause us to alter our conclusion in this appeal which is that we are quite satisfied that the Employment Tribunal correctly applied the 2 stage test, reached a permissible finding that the Claimant was guilty of unreasonable conduct within the meaning of Rule 14(1) and then went on to exercise their discretion within proper limits, taking into account all relevant factors, in making the order for costs which they did. In short, no error of law is made out. Consequently the appeal fails and is dismissed."

My conclusion on the respondent's application for its costs

160 I concluded that certainly by the time that the respondent had made a realistic offer to settle the case (£45,000), the claimant wanted vindication by a judgment in her favour, and was not interested only in money. The refusal to admit liability in my view meant that she could not be said to have acted unreasonably in continuing with the claim and in rejecting the offer of £45,000. The respondent's reliance on the last line of the schedule of loss (which I have set out at the end of paragraph 154 above) was insupportable given that it could reasonably have been read only as applying to the claimant's compensatory award. But in any event, the refusal by the respondent to admit liability was the factor which meant that it was plainly reasonable for the claimant to continue with the claim, i.e. to judgment. If I had come to a different conclusion on the issue of whether the claimant had acted unreasonably by continuing to press her claim then I would have come to the conclusion that it was not appropriate in the circumstances to make an award of costs against the claimant in the circumstances stated above and in paragraphs 162 and 163 below.

The claimant's application for her costs

161 The claimant applied for her costs on the basis that the respondent's defence of the claim had no reasonable prospect of success and/or that the respondent had conducted the proceedings unreasonably.

162 The latter assertion was based on the manner in which contentions had been advanced in the course of the without prejudice correspondence, and the fact that the respondent had made a complaint to the ACCA about the claimant's conduct and offered in the course of that correspondence to withdraw that complaint if the claimant settled her claims (always, of course, with no admission by the respondent of liability). By way of illustration, Mr Rees Phillips pointed out that on 14 December 2020, the respondent's solicitors offered this by way of compromise (at WP26-27, which was the end of the letter at WP24-27):

"In order to settle the matter, our client would want the following;

1. A full of apology covering the matters set out above in paragraph 13.
2. Payment of compensation of £1000 for her offensive comments and the inference in her correspondence that our client, as a professional accountant, has been behaving in an unlawful manner. Our client would give this compensation to charity.

In consideration of this, our client will consider re employing her or providing a mutually agreed but truthful reference. Our client will also withdraw the formal complaint to the ACCA."

163 Paragraph 13 of that letter was in these terms:

"13. For the apology to be a full apology it would need to cover:-

a. your client's comments concerning [GF] implying that jobs were not done correctly;
b. the inference that your client has been asked to do something illegal or unlawful;
c. the unprofessional and insubordinate journals posted in our client's Iris system; and
d. the unprofessional comments or journals posted in clients' bookkeeping records."

164 When I first considered the claim, that is to say on the first day of the hearing, I had difficulty understanding the basis on which the claim could reasonably be resisted. After the first two days of the hearing, when it adjourned, I spent much time researching the law and thinking the case through. I then sent the detailed case management summary to the parties to which I refer in paragraphs 3 and 4 above. In it, I said that I was "struggling to see how I could lawfully come to any conclusion other than that the respondent was in breach of the implied term of trust and confidence in requiring the claimant to use estimates in the circumstances discussed above". I explained that view as being based on (among others) this proposition:

"If an estimate of expenses is used then it must be disclosed to HMRC at that time. In my view that is an escapable conclusion from the statutory framework, requiring a statement of earnings and the expenses incurred in obtaining those earnings, but it is also (see paragraph 45 above) required by HMRC and it is (see paragraph 47 above) the view expressed in Simon's Taxes."

165 The respondent then produced the opinion of Mr Akin which showed that as a matter of law, it was not necessary to state that an estimate had been used. I accepted that I was wrong in that regard, but in my view that did not alter the result of the application of the implied term of trust and confidence, and in my view also it should have been clear to the respondent that the reason why it was in some circumstances acceptable not to state that an estimate had been used was because in those circumstances the

estimate was objectively justifiable, for example where the taxpayer had lost one or more railway tickets for which cash had been paid.

166 Where, however, an estimate was the result of the application of a practice such as that which I have summarised in paragraph 15 above, then in my view the reason for not stating that an estimate had been used was likely to be that if it had been said that an estimate had been used then HMRC might have investigated the situation. Thus, the question whether or not the fact that estimates had been used needed to be stated on the income tax return was not determinative. Rather, the matter was subject to basic principles, and the applicable basic principle here was that a taxpayer is under an obligation to state honestly and to the best of his or her information his/her income and expenses. And in my view expenses either are or are not incurred. It is not a matter of guesswork: it is a matter of fact. If one knows that one has spent money on something, but one has lost the records or other documentation which evidence that expenditure, then one can properly (i.e. honestly and therefore lawfully) use an estimate. That estimate, however, has to be based on some objective phenomena such as the fact that the taxpayer went to a particular destination in the course of doing the work for which the taxable remuneration which is the subject of the income tax return was paid.

167 If only because of Mr Harris' own words set out in paragraph 33 above, I could not escape the conclusion that he knew all along that what he was doing was wrong. However, in my judgment, if he did not know that, then he plainly should have done.

168 In those circumstances, I came to the view (before hearing Mr Rees Phillips' application for the payment of the claimant's costs and the basis for it) that the response to the claim did not have a reasonable prospect of success. That meant that I was obliged by rule 76(1) of the Employment Tribunals Rules of Procedure to consider whether to make an order for the payment by the respondent of the claimant's costs.

169 I referred myself to paragraphs PI[1083] and [1084]of *Harvey on Industrial Relations and Employment Law*, which are in these terms:

> "[1083]
> When considering whether to award costs in respect of a party's conduct in bringing or pursuing a case that is subsequently held to have lacked merit, the type of conduct that will be considered unreasonable by a tribunal will obviously depend on the facts of the individual case, and there can be no hard-and-fast principle applicable to every situation. In general, however, it would seem that the party must at least know or be taken to have known that his case is unmeritorious. In *Cartiers Superfoods Ltd v Laws* (which was decided under the 1974 rules, when the only grounds for awarding costs were whether the claimant or respondent to any proceedings had acted frivolously or vexatiously), Phillips J considered that, in order to determine whether a party had acted frivolously, it was necessary '*to look and see what that party knew or ought to*

have known if he had gone about the matter sensibly'. On the facts of that case, the EAT held that if the employers had taken the trouble to inquire into the facts surrounding the alleged misconduct for which the employee had been dismissed, instead of reacting in a hostile manner with threats and false statements that the employee was guilty of dishonesty, they would have realised that they had no possible defence at all to the claim, except as to the amount of compensation.

[1084]
But such an approach needs to be applied with caution, otherwise parties could end up being penalised for not assessing the case at the outset in the same way as a tribunal may do following a hearing and evidence. As Sir Hugh Griffiths stated in *E T Marler v Robertson* [1974] ICR 72, NIRC: 'Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms'. In that case costs against the claimant were refused notwithstanding that, at the end of a nine-day hearing, he had admitted under cross-examination that the respondents had acted reasonably in dismissing him. Similarly, in *Lothian Health Board v Johnstone* [1981] IRLR 321 the EAT (overruling an employment tribunal) held that it was a wrong exercise of discretion to award costs against the respondents on the basis that they 'should have thrown in the towel' after the second day of a four-day hearing, as it had then become obvious that they were not going to establish their stated reason for the dismissal. Lord McDonald commented that the *Cartiers Superfoods* approach did not 'lay down a general proposition governing the conduct of solicitors who represent parties before tribunals and who may be thought to insist in their pleas beyond the stage which a tribunal deems appropriate'."

My conclusion on the claimant's application for her costs

170 I was not persuaded that the manner in which the respondent had conducted the proceedings was unreasonable as a result of the manner in which it had conducted the without prejudice correspondence. I was, however, of the clear view that the response to the claim had had no reasonable prospect of success within the meaning of rule 76(1)(b) of the Employment Tribunals Rules of Procedure 2013, and that the respondent should have known that all along, i.e. when first responding to the claim. I was also of the view that the making of a costs award in favour of the claimant was appropriate. I arrived at that view after a careful consideration of all of the circumstances.

171 The costs claimed on behalf of the claimant were £33,354, which was, I noted, rather less than the respondent's total claimed costs. However, given that (as I had concluded) the response had had no reasonable prospect of success, the claimant could have approached the tribunal in the knowledge that her claim was almost bound to succeed at least on liability. She therefore could have come to the tribunal without representation, or at least with rather less by way of the involvement of

lawyers. Given those factors, I concluded that the respondent should pay the claimant only a contribution towards her costs, which I judged should be £10,000.

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Employment Judge Hyams

Date: 10 March 2022

Sent to the parties on:

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For Secretary of the Tribunals