# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | | **Respondent** |
|---|---|---|
| Miss Isabel Owen | AND | The National Trust for Places of Historic Interest And Natural Beauty |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD REMOTELY** ON 14, 15 and 16 March 2022
**By Cloud Video Platform**

**EMPLOYMENT JUDGE** N J Roper **MEMBERS** Ms E Smillie
Mr J Evans

**Representation**

**For the Claimant: In Person**
**For the Respondent: Miss G Nicholls of Counsel**

## JUDGMENT

**The unanimous judgment of the tribunal is that the claimant's claims are all dismissed.**

## RESERVED REASONS

1. In this case the claimant Miss Isabel Owen claims that she has been unfairly constructively dismissed, and suffered detriment and/or automatically unfair dismissal, on the grounds that she had made a protected disclosure. She also brings a claim for victimisation. The respondent contends that the reason for the dismissal was redundancy, and it denies the claims.
2. We have heard from the claimant, and the respondent did not challenge the short statement adduced by her partner Mr Phillip Bennett on her behalf. For the respondent we have heard from Ms Michaela Hall and Mr Karl Prentice.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence,

both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The Facts:
5. The respondent is the well-known national charity the National Trust. The claimant Miss Isabel Owen was born in 1967. She commenced employment with the respondent in 2017, and in July 2018 transferred to work at Uppark House and Garden in West Sussex. The claimant is Jewish. The claimant was employed on a fixed term flexible contract, but it was a zero hours contract and no hours were guaranteed. In the event she normally worked about two days per week. Her role was Membership and Visitor Welcome Assistant with responsibilities for welcoming visitors onto the property, selling admissions, and promoting membership of the respondent.
6. The claimant's supervisor was Mr Harry Felss. Her Line Manager was Mr Malcolm MacDonald, and his Line Manager in turn was Miss Michaela Hall, the respondent's Visitor Operations and Experiences Manager, from whom we have heard.
7. The respondent has a detailed written Grievance Procedure which provides that employees must always seek to resolve issues informally in the first place, and that help in dealing with workplace conflict would be available from line management and the Employee Assistance Programme (EAP). The procedure provides that the respondent would offer mediation to resolve personal differences. If these informal approaches are not successful, then a formal grievance can be submitted using the appropriate form, which the procedure suggests the respondent would seek to resolve within 28 days. There is a right of appeal against any grievance decision, and a provision that all information must be kept confidential during any grievance process.
8. On 29 September 2019 the claimant emailed Miss Hall to request a meeting. The claimant wished to raise a complaint against Mr Felss and had prepared a handwritten note which she had passed to Mr McDonald. In turn Mr MacDonald had passed that note to Miss Hall. In that note the claimant reported that Mr Felss had made "Racist remarks about Jewish people, Indian people and Auschwitz - having considered his remarks to be a great joke - Harry makes personal remarks about the appearance of visitors … He allows VR staff to cope with difficult situations which he does not have any interest in – ie disabled people, coach parties …".
9. The claimant and Miss Hall then met on 2 October 2019, and the claimant repeated these allegations. Miss Hall confirmed that the alleged behaviour was not acceptable and that she would discuss the matter with Mr Felss directly. Miss Hall commented that they had no other reports of inappropriate comments from Mr Felss and that she would probably treat the matter as a warning to the effect that if there were any repeat of such behaviour it would be grounds for dismissal. Miss Hall also suggested to the claimant that if a member of staff makes offensive comments then she should make it clear that she been offended, or alternatively report the matter to her line manager. The meeting ended amicably with the claimant thankful for Miss Hall's attention.
10. Miss Hall then met with Mr Felss on 7 October 2019. She informed him that there been a complaint against him of racist and inappropriate comments which were entirely unacceptable, and any re-occurrence would be grounds for dismissal. Mr Felss was shocked by the claims and adamant that he had not said anything which could cause offence. He apologised if he had caused any offence to anyone but said that it was not intentional.
11. Shortly thereafter Mr Felss challenged the claimant about reporting him. The claimant complained to Miss Hall to the effect that Mr Felss had accused her of spreading lies, and she asked Miss Hall to support her. Miss Hall discussed with the claimant whether she would be in a position to move forward and continue working with Mr Felss and the claimant confirmed she would do so if she received an apology. They agreed that Miss Hall would therefore speak again with Mr Felss and bring them together to discuss the matter.
12. The claimant then met with Mr Felss in the presence of Miss Hall, and Mr Felss apologised to the claimant. He made a comment to the effect that it would have been better if the claimant had told him that she had felt offended by his comments, rather than reporting it directly to Miss Hall (who was their Line Manager Mr MacDonald's Line Manager). The

claimant then replied with words to the effect “I know, I’m sorry, I shouldn’t have gone to Kaela (Miss Hall)”. Miss Hall then took the time to check with both the claimant and Mr Felss later that day. They both confirmed that all was well between them. Someone seems to have made the comment that they had “hugged it out”, although the claimant denies that she would have wanted to hug Mr Felss to resolve the matter. In any event Miss Hall was firmly of the belief that her informal intervention had been successful in resolving their differences.

13. The claimant has raised concerns at this hearing as to whether she was believed that Mr Felss had made the comments which he had. For the record, the claimant has been consistent in her allegations in this respect which are supported by the contemporaneous documents, and we accept the claimant’s evidence that Mr Felss made comments to her which related to Jewish people, Indian people, and disabled people, which the claimant found to be inappropriate and highly offensive. However, we do not accept the claimant’s assertion that she was “made to apologise” to Mr Felss by Miss Hall. Miss Hall was trying to reach an informal resolution of the disagreement between the claimant and Mr Felss in accordance with the Grievance Procedure. She may well have suggested to the claimant that she might apologise for having escalated the matter to senior management rather than raising it directly with Mr Felss and/or their line manager Mr MacDonald in the first instance, but we do not accept the claimant’s allegation that Miss Hall somehow tried to force the claimant to apologise to Mr Felss. We also accept Miss Hall’s evidence to the effect that she thought the matter had been informally resolved as at that stage.
14. At about this time the claimant suffered a reduction in her available hours because of budgetary constraints on the part of the respondent, and Miss Hall was able to arrange the claimant to carry out additional work in a café. The Café Team Leader then reported to Miss Hall that the claimant had been openly telling other members of staff that Mr Felss was a racist and that he been bragging about stealing sandwiches from the café. The claimant gave a slightly different version which was to the effect she had only raised it with the Café Team Leader in her office. In any event, Miss Hall challenged Mr Felss about these allegations which he denied.
15. Miss Hall then met with the claimant on 17 October 2019, in particular to ask why the claimant was making these allegations when Miss Hall was under the impression that the matter had been informally resolved. The claimant complained that she should not have been asked to apologise to Mr Felss, and Miss Hall explained that there was no suggestion that the claimant should have apologised for raising a complaint in principle, it was just the way she had gone about it by not challenging Mr Felss and/or raising it with her line manager Mr MacDonald, and the claimant agreed again that she had probably not handled the situation properly in that respect.
16. Miss Hall also informed the claimant that she should have treated the matter confidentiality and should not be sharing this information with members of staff and other teams. The claimant now asserts that Miss Hall accused her of slandering Mr Felss. We accept Miss Hall’s evidence to the effect that she was advocating caution and warning the claimant that Mr Felss might have potential recourse to what he perceived to be unfounded allegations of being a racist and a thief, including the possibility of his bringing accusations of slander against the claimant. We reject the assertion that Ms Hall accused the claimant of slandering Mr Felss in these circumstances.
17. At the end of that meeting Miss Hall made it clear to the claimant that effectively she had two options. If she wished she could pursue a formal complaint under the Grievance Policy, or alternatively she could draw a line under matters and move forward. The claimant confirmed that she was happy to draw a line under these events and move on without a formal complaint. She also questioned again the reduction in her hours, which Miss Hall explained was applicable to all hourly paid staff because the respondent was over budget in that department. Miss Hall then sent a copy of her contemporaneous note of that meeting to the claimant for agreement. The claimant responded that she was broadly satisfied that it was accurate but wished to change a few small entries and would email Miss Hall to do so, but in the event did not send that email. For these reasons we find that Miss Hall’s contemporaneous note was an accurate record of events.

18. We have seen in the agreed bundle of documents the claimant's version of the notes of those minutes which Miss Hall had not seen before these proceedings and with which she does not agree. In particular there is an allegation to the effect that she had told the claimant that if she did not work with Mr Felss then her "job would be at risk". Miss Hall denies making any comment to that effect. We prefer Miss Hall's version of events for these reasons. In the first place her minutes of the meeting are contemporaneous, whereas the claimant's notes are a late introduction which have never been agreed by Miss Hall. In the second place, when it became clear that the claimant and Mr Felss could no longer work together in any event, the respondent did not dismiss the claimant, but was rather was able to arrange the rotas so that (with a combination of annual leave and other absence) the claimant could continue working but not with Mr Felss present. We reject the claimant's assertion that she was told by Miss Hall that she would be dismissed if she did not work with Mr Felss.
19. In any event the claimant remained dissatisfied and on 23 October 2019 the claimant telephoned the respondent's People Services Team (its HR department) to discuss the matter. She complained about the way her complaint had been handled, and Miss Amin of HR advised the claimant that she could raise a formal grievance if she wished to do so. The claimant's reply was to the effect that she did not wish to make the situation worse and would consider the matter, but that she would call back if she decided to raise a formal grievance.
20. The matter did then progress to a formal grievance but from both the claimant and separately from Mr Felss. Mr Felss raised a formal grievance against the claimant whom he accused of being homophobic towards him (he is homosexual), and repeatedly bringing the same matters up in the hope of trying to get him fired. The claimant also now raised a formal grievance which gave a different version of the conversation which she had had with Mr Felss concerning his inappropriate and racist comments, and also alleging that Miss Hall had been dismissive of her complaints and had told the claimant that she had to work with Mr Felss and that she had to apologise to him.
21. The matter was passed to Mr MacDonald their line manager and he held pre-grievance investigation meetings with both the claimant and Mr Felss on 6 December 2019. Mr MacDonald then prepared a grievance investigation case file which given the Christmas holiday period took some time to complete. Mr Karl Prentice, from whom we have heard, is the respondent's Senior Food and Beverage Manager and he was appointed to determine the two grievances. The relevant case file was passed to Mr Prentice. Mr Prentice ensured that he had all the relevant information to hand, and exchanged emails with both the claimant and Mr Felss to arrange meetings to discuss their grievances.
22. Mr Prentice met with Mr Felss on 3 March 2020. The gist of his complaint was that he had made comments which had been taken "the wrong way" and that there had been a "misunderstanding" between him and the claimant, but nonetheless she continued to accuse him of being racist. He thought the matter been sorted out at the time and they had apologised to each other. He complained that the claimant was blaming him for a reduction in her shifts which had been caused by seasonal variations. Mr Felss also complained that he felt the claimant's attitude towards him was because of his sexual orientation. He had therefore rearranged the rotas so that he did not have to work with the claimant. As a result of these difficulties Mr Felss was now looking for alternative employment. Mr Prentice concluded the meeting by suggesting that he would not be issuing Mr Felss with a disciplinary warning and he agreed that the matter should have been resolved sooner. Mr Prentice suggested that if Mr Felss remained in the respondent's employment then he would be required to undertake a Great People Management Course. He was advised of his right of appeal and Mr Felss said that he did not wish to appeal that decision.
23. Mr Prentice then met with the claimant on 6 March 2020 to discuss and determine her grievance. The claimant explained her Jewish heritage and the offensive comments and jokes which she said Mr Felss had made to her. After she had complained Mr Felss became very confrontational and the claimant perceived that Miss Hall had "turned it around" to make it seem that she was the problem and had asked her to apologise to Mr Felss. The claimant denied it was anything to do with Mr Felss's sexual orientation. Mr Prentice

suggested that following the joint apology between them at the outset the matter appeared to have been amicably resolved, but the claimant denied this, which was why she said she had taken advice from the respondent's head office and subsequently raised her grievance. When asked to about the desired outcome the claimant confirmed that she did not wish to work with Mr Felss anymore, and that Mr MacDonald had not been supportive as her Line Manager. The claimant also suggested that she had not been having normal one-to-one meetings with Mr MacDonald and he had not been supporting after she complained about Mr Felss.

24. By this stage it was clear that Mr Felss had decided to leave the respondent's employment. Mr Prentice explained to the claimant the outcome of the grievance raised by Mr Felss, and he explained to the claimant that he felt that she needed more support, and more regular one-to-one meetings with Mr MacDonald. Mr Prentice's view was that the claimant had been "pushed" into the grievance process and had not received as much support as she should have done from Mr MacDonald. He suggested that he reported this back to Mr MacDonald and insisted on regular one-to-one meetings, as well as setting clear objectives. He confirmed Mr Felss was leaving the respondent's employment. The claimant responded to Mr Prentice that this was the "perfect solution" and that she was happy with that grievance outcome. Mr Prentice confirmed the position to her in an email dated 6 March 2020 which reminded the claimant of her right of appeal. The claimant did not appeal that decision.
25. During the course of these proceedings the claimant has alleged that the respondent failed promptly to investigate her complaints, and also failed competently to handle her complaints. We accept that the respondent did not resolve the grievance within 28 days which is expressed to be desirable under the Grievance Procedure. However, given that the claimant had earlier indicated that her complaint had been informally resolved, and that there was a counter-grievance from Mr Felss, with the result that both grievances needed to be investigated and decided upon, we do not accept that there was any unreasonable or prejudicial delay in investigating and resolving the claimant's grievance. In addition, we reject the claimant's assertion that the grievance was handled incompetently by the respondent. It was entirely appropriate for the respondent to seek to resolve the matter informally in the first place, as recommended by the Grievance Procedure, and the claimant confirmed initially that she was content with that resolution. The claimant was informed throughout that she could draw a line under the matter and move on, or alternatively exercise her right to pursue a formal grievance if she chose. Once the claimant chose to do so that formal grievance was investigated fully and responsibly. The claimant confirmed that she was happy with the outcome, and indeed called it a "perfect solution". She did not appeal. For these reasons we reject the assertions that the claimant's complaints were not investigated promptly or competently.
26. The claimant has also raised the allegation that her line manager (Mr MacDonald) and the Locations Manager (Miss Hall) "ignored her". In her detailed eight page statement for these proceedings the claimant only makes a passing reference to this allegation and states: "After the meeting I had with Michaela on 17 October 2019 she would ignore me, refusing to acknowledge me while greeting the people around me". In December 2019 during a telephone call to Ms Broad of Head Office the claimant also suggested that Miss Hall had "blanked her". She also asserts that Mr MacDonald left her name off the list of authorised first aiders and had "only reluctantly" confirmed her fundraising achievements at a staff dinner when reminded to do so.
27. Miss Hall denies these allegations against her, which she says relates to a Christmas preview event with staff and volunteers. She saw the claimant and smiled at her at this event, but she says that was she busy speaking to a number of volunteers and they did not get the chance to speak. She denies "blanking" the claimant. We have not heard sufficient evidence to conclude that Miss Hall deliberately blanked or ignored the claimant, which she denies, and on the balance of probabilities we reject this assertion.
28. Similarly, the claimant also asserts that Mr MacDonald ignored her, but again we have not heard any evidence on this matter, and we are unable to conclude that he deliberately blanked or ignored the claimant, and on the balance of probabilities we reject this assertion.

29. Subsequently in early 2020 the Covid-19 pandemic took hold, and there was a national lockdown. The respondent closed its various properties and visitors' attractions on about 21 March 2020 and almost its entire workforce was put on furlough leave. This included the claimant, and as it happened, she never returned from furlough leave for the following reasons.
30. The respondent suffered a significant loss in revenue, which amounted to more than £200 million in 2020 alone. This necessitated redundancies and on 29 July 2020 the respondent launched a redundancy consultation which it called the Reset programme. Under this programme there was a 45-day collective consultation on proposals for redundancy, with the intention to follow this up with individual consultation meetings for any employees whose roles were potentially affected by the restructuring. During this time it was open to employees to apply for voluntary redundancy if they wished.
31. Miss Hall was appointed as the consultation manager under the Reset programme for the relevant region, and she emailed all staff on 30 July 2020 to seek to arrange individual consultation meetings. This included the claimant who asked to rearrange the meeting. This individual consultation meeting with the claimant then took place over the telephone on 12 August 2020.
32. In the meantime, the claimant was concerned that Miss Hall was her individual consultation manager and she made a request to head office that this should be changed because of Miss Hall's involvement in the earlier grievance. Ms Emberson in People Services responded to the claimant by email on 7 August 2020 to the effect that they were unable to accommodate individual preferences for consultation managers because of the scale of the process. She pointed out other support which was available to the respondent, and confirmed that the grievance process was entirely separate and had been dealt with and previously closed, and that it had no impact on the current process.
33. At the telephone consultation meeting between the claimant and Miss Hall on 12 August 2020 Miss Hall explained that the claimant's role of Membership and Welcome Assistant was to be replaced with a Visitor Welcome Assistant role. The proposed new role was sufficiently different to suggest the risk of redundancy because there was a shift away from attracting new memberships to more service-related goals. The claimant seemed interested in the new prospect of the different roles and explained that she would wish to stay with the respondent. Miss Hall confirmed that they were still within the collective consultation period and that she was encouraged to give her feedback in connection with the Reset programme.
34. Rather than give feedback on the Reset programme, the claimant then started to resurrect matters arising from the events between September 2019 and March 2020 and in particular her grievance concerning Mr Felss. She asked Miss Hall if she would do things differently and whether she had learned from the experience. Miss Hall's response to the claimant was to the effect that she had "done everything by the book" in the sense that she had taken advice from HR throughout the process and had initially attempted to resolve things informally, as recommended by the Grievance Procedure. To that extent she told the claimant that she would not have done things any differently. She suggested to the claimant that if she was not able to draw a line under the matter now, given that many months had expired and Mr Felss was no longer working with the respondent, then perhaps Uppark was not necessarily the right place for her. It was at this stage of the claimant informed Miss Hall that she had changed in mind and wished to pursue the offer of voluntary redundancy.
35. The claimant submitted a form applying for voluntary redundancy on 12 August 2020, and Miss Hall supported that application. She informed the claimant that she was entitled to withdraw her application for voluntary redundancy at any time. The respondent made a formal offer of voluntary redundancy on 1 September 2020, and on 5 September 2020 Miss Hall checked with the claimant whether she needed any further support or assistance. The claimant then accepted voluntary redundancy in writing on 9 September 2020 and her last day of employment was 14 October 2020 following the expiry of her notice period. She was paid her statutory redundancy entitlement and pay in lieu of accrued holiday.

36. The claimant had already commenced the Early Conciliation process with ACAS on 7 August 2020 and the Early Conciliation Certificate was issued on 14 August 2020. The claimant then presented these proceedings on 8 September 2020.
37. Having established the above facts, we now consider the claims and apply the law.
38. The Claims:
39. The claims which fell to be determined by this Tribunal were agreed and set out in a Case Management Order of Employment Judge Smail dated 4 May 2021. We deal with each of these claims in turn.
40. Constructive Unfair Dismissal:
41. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
42. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
43. We have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT.
44. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
45. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these 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 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."
46. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… 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."

47. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
48. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
49. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
50. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
51. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.
52. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to

destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

53. In this case the claimant asserts that the respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The claimant asserts that these breaches followed her actions of: (i) reporting to the claimant's Line Manager (Mr MacDonald) and the Locations Manager (Miss Hall) that her supervisor Mr Felss had made offensive racist comments to her about Jews; and (ii) reporting to Head Office that the Locations Manager (Miss Hall) had failed to investigate her report that Mr Felss her supervisor had made racist comments and disparaging comments about disabled people in front of her. The alleged breaches of contract are these:
54. (1) Attempting to make the claimant apologise to Mr Felss;
55. (2) Accusing the claimant of slandering Mr Felss;
56. (3) Threatening to dismiss the claimant if she did not work with Mr Felss;
57. (4) Failing properly to investigate the claimant's complaints;
58. (5) Failing competently to handle her complaints;
59. (6) Both her Line Manager and the Locations Manager ignoring the claimant;
60. (7) The Locations Manager confirming that she would not have changed the way in which he had responded to the claimant's complaint.
61. For the reasons explained above in our findings of fact, we do not accept that any of the seven allegations are substantiated by the claimant, and they have already been rejected. We reject the assertion that the respondent has acted in fundamental breach of contract, in respect of the implied term of trust and confidence, or otherwise. For these reasons we do not accept that the claimant's resignation can be construed to be her constructive dismissal, and we find that she has not been constructively dismissed. Accordingly, we dismiss her claim for unfair constructive dismissal claim under sections 95(1)(c) and 98(4) of the Act.
62. Redundancy Dismissal:
63. The claimant has not brought a specific claim for unfair dismissal arising from her redundancy, but we have considered the matter because it is the reason relied upon by the respondent for the termination of the claimant's employment.
64. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"
65. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
66. We have considered the cases of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT, and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.
67. In this case we have no hesitation in finding that there was a genuine redundancy situation following the respondent's requirement to reduce the number of employees carry out work of a particular kind for which the claimant was employed. The respondent had encountered significant financial losses as a result of the Covid-19 pandemic, along with many other employers at that time, and had embarked on a wholesale redundancy process. There was both collective consultation and individual consultation during which the circumstances were explained in detail to the claimant, and she had the opportunity to apply for voluntary redundancy. She chose to do so and was offered advice and assistance throughout that process.

68. An application for voluntary redundancy still amounts to a dismissal of the claimant by the respondent by reason of redundancy, but we find that the claimant's dismissal was attributable to that redundancy. Given the detailed consultation process and the advice and support available to the claimant during the process, and the fact that the claimant clearly volunteered to be dismissed by reason of redundancy, we find that the respondent's decision to dismiss the claimant in these circumstances by reason of redundancy was fair and reasonable in all the circumstances of the case. To the extent that there is any claim for unfair dismissal by reason of redundancy, any such claim is also dismissed.
69. Public Interest Disclosure Claims:
70. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
71. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
72. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
73. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
74. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
75. We have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ. Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018 Ibrahim v HCA International Ltd [2019] EWCA Civ 2007.
76. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.

77. [24] “As for the words “in the public interest”, inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker’s own self-interest; see Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).
78. In whistleblowing claims the test of whether a disclosure was made “in the public interest” is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.
79. The statutory framework and case law concerning protected disclosures was also summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: “it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.”
80. In this case the respondent does not concede that the claimant has made protected public interest disclosures. The claimant relies on two disclosures. The first disclosure was to Mr MacDonald and Miss Hall to the effect that Mr Fells had made offensive and racist comments about Jews. The second disclosure was to Head Office to the effect that Miss Hall had not investigated this matter to the claimant’s satisfaction.
81. With regard to the first disclosure, we accept that the claimant provided information rather than just allegations because she was sufficiently detailed in the information which she provided as to the offensive nature of the comments made by Mr Felss. The claimant has told us that she believed that it was in the public interest to make this disclosure, not least because the respondent is a national organisation with published standards relating to equality and diversity, and Mr Felss was both a staff supervisor and in a customer facing role. We accept that the claimant believed that it was in the public interest, and we also accept that it was reasonable for the claimant to hold that belief. We also accept that the claimant believed that the disclosure showed that Mr Felss was in breach of his legal obligations under the Equality Act with regard to equality and diversity issues for both staff and public alike. We also agree that any such belief was reasonably held.
82. We are not similarly convinced with regard to the second disclosure, which we find to be a more personal complaint to head office about Miss Hall and how she had dealt with the claimant’s grievance. There was no clear information with regard to a specific breach of any legal obligation, and we do not accept that it is reasonable to believe that a complaint of this specific nature is in the public interest. We do not accept that the second disclosure was a protected public interest disclosure.
83. Nonetheless we find that the first disclosure was a protected public disclosure by reason of sections 43B(1)(b) and 43C(1)(a) of the Act because the claimant made a disclosure of information which, in her reasonable belief, was made in the public interest and tended to show that a person had failed to comply with a legal obligation to which he was subject. In addition, the claimant made that disclosure to her employer. The claimant therefore has the potential protection against detriment and dismissal afforded by sections 47B and 103A of the Act
84. Public Interest Disclosure - Automatically Unfair Dismissal:
85. For the reasons set out above we do not accept that the claimant’s resignation can be construed to be her constructive dismissal, and we have found that the claimant was dismissed by reason of redundancy. Accordingly, we reject the assertion that she has been dismissed for the principal reason of having made protected public interest disclosures.

The disclosure made by the claimant were made almost a year before she volunteered for redundancy, which is the only reason why the respondent then dismissed her. There was simply no causative link between any disclosure made and the claimant's dismissal almost a year later. We therefore dismiss the automatically unfair dismissal claim under section 103A of the Act.

86. Public Interest Disclosure - Detriment Claims
87. The claimant relies on eight specific detriments, which as for the first seven replicate the allegations of fundamental breach of contract. The alleged detriments are these:
88. (1) Attempting to make the claimant apologise to Mr Felss;
89. (2) Accusing the claimant of slandering Mr Felss;
90. (3) Threatening to dismiss the claimant if she did not work with Mr Felss;
91. (4) Failing properly to investigate the claimant's complaints;
92. (5) Failing competently to handle her complaints;
93. (6) Both her Line Manager and the Locations Manager ignoring the claimant;
94. (7) The Locations Manager confirming that she would not have changed the way in which he had responded to the claimant's complaint; and
95. (8) Constructively dismissing the claimant.
96. For the reasons explained above in our findings of fact, we do not accept that any of the first seven allegations are substantiated by the claimant, and they have already been rejected. In addition, with regard to the eighth allegation, we have found that the claimant was not constructively dismissed. In any event the Act draws a distinction between detriment and dismissal, and section 47B(2)(b) provides that that section does not apply where the alleged detriment in question amounts to dismissal.
97. We therefore cannot find that the claimant suffered any detriment on the grounds that she had made a protected public interest disclosure, and accordingly this claim is also dismissed.
98. Victimisation Claim:
99. This is also a claim alleging victimisation under the provisions of the Equality Act 2010 ("the EqA").
100. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
101. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
102. The claimant relies on two protected acts as follows which replicate her alleged protected public interest disclosures: The first protected act is said to be the disclosure to Mr MacDonald and Miss Hall to the effect that Mr Felss had made offensive and racist comments about Jews. The second protected act is said to be the disclosure to Head Office to the effect that Miss Hall had not investigated this matter to the claimant's satisfaction.
103. In the first place we accept that the complaint to Mr MacDonald and Miss Hall to the effect that Mr Felss had made offensive and racist comments about Jews was a protected act for the purposes of section 27 EqA because an allegation was made to the effect that Mr Felss had effectively contravened the provisions of the EqA. In addition, to the extent that this complaint was repeated when the claimant explained the circumstances to Head Office, there was another protected act. The claimant therefore has the potential protection against victimisation by way of detrimental treatment under section 27 EqA.

104. The claimant relies upon the following detrimental treatment which is said to be victimisation under section 27 EqA, which replicates the list of detriments for the protected public interest disclosure claim under section 47B of the Act. The alleged detriments are these:

105. (1) Attempting to make the claimant apologise to Mr Felss;

106. (2) Accusing the claimant of slandering Mr Felss;

107. (3) Threatening to dismiss the claimant if she did not work with Mr Felss;

108. (4) Failing properly to investigate the claimant's complaints;

109. (5) Failing competently to handle her complaints;

110. (6) Both her Line Manager and the Locations Manager ignoring the claimant;

111. (7) The Locations Manager confirming that she would not have changed the way in which he had responded to the claimant's complaint; and

112. (8) Constructively dismissing the claimant.

113. For the reasons explained above in our findings of fact, we do not accept that any of the first seven allegations are substantiated by the claimant, and they have already been rejected. In addition, with regard to the eighth allegation, we have found that the claimant was not constructively dismissed.

114. We therefore also dismiss the claimant's claim of victimisation.

115. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 36; a concise identification of the relevant law is at paragraphs 40 to 52, 53 to 61, 70 to 79 and 99 to 101; and how that law has been applied to those findings in order to decide the issues is at paragraphs 64 to 66, 67 and 68, 80 to 97, and 102 to 114.

Employment Judge N J Roper
Dated: 16 March 2022

Judgment & reasons sent to parties: 30 March 2022

FOR THE TRIBUNAL OFFICE