



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss D Ireland-Cooper

AND

Respondent

Bradleys Estate Agents Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 16, 17 and 18 January 2023

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Hewitt-Gray
Mr I Ley

Representation

For the Claimant: Miss T Jones of Counsel

For the Respondent: Miss G Nicholls of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's claim of harassment related to disability is dismissed on withdrawal by the claimant; and

2. The claimant was unfairly dismissed.

RESERVED REASONS

1. In this case the claimant Miss Donna Ireland-Cooper claims that she has been unfairly constructively dismissed, and that she was discriminated against because of a protected characteristic, namely her disability. The discrimination claim was limited to one of harassment, and this claim was later withdrawn at the end of this hearing. The respondent denies the remaining constructive unfair dismissal claim.
2. We have heard from the claimant. For the respondent we have heard from Ms Suzette Richardson, Mr Kris Peters, Miss Sally Smitheran, Mr Andrew Hawkins and Mr Chris Baxter.

3. There was a degree of conflict on the evidence. 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 company is a large chain of estate agents which provides letting and property sales services with over 30 branches throughout Devon and Cornwall. It has over 200 employees and its head office is based in Exmouth in East Devon. The events relevant to this claim took place in West Cornwall, and in particular the respondent's office in Hayle. The manager of this office was Mr Kris Peters, from whom we have heard. We have also heard from Miss Sally Smitheran who worked in that office as the Office Administrator. We have also heard from three of the respondent's senior managers, namely Ms Suzette Richardson who then was Group Operations Director; Mr Andrew Hawkins the Personnel and Premises Manager; and Mr Chris Baxter the Managing Director.
6. The claimant Miss Donna Ireland-Cooper was employed by the respondent as a Sales Negotiator from 20 February 2017 to 4 March 2021. She worked in the Hayle office which was managed by Mr Peters and alongside Miss Smitheram, and another Sales Negotiator namely Ms Karley Evans. The claimant suffers from ill-health which includes diagnoses of dyslexia, dyspraxia, depression and fibromyalgia. During July and August 2018, she was also diagnosed with skin cancer and breast cancer.
7. As is to be expected with a large employer the respondent has a number of written policies and procedures, and its grievance procedure is relevant in this case. This grievance procedure requires an employee to set out the detail of the grievance in writing to the relevant Line Manager, with a copy to the Personnel Manager. The grievance will normally be dealt with by the Line Manager, unless it relates to that Line Manager in which case the grievance would then be dealt with by the next level of management, or the Personnel Manager if preferred by the employee. There is no specific requirement for a grievance meeting to be heard at the first stage, but the procedure does state: "Every opportunity will be given for the grievance to be stated and thoroughly discussed." The grievance affords the right of appeal, and the procedure provides: "Once an appeal has been received, a consultation hearing will be held within 10 days working days. You have the right of a colleague or union representative present at any grievance hearing". The procedure therefore appears to presume (but not specifically require) that a grievance hearing will take place in the first instance, and during the appeal process it requires a consultation hearing to be arranged.
8. The claimant has made a number of allegations relating to Mr Peters' sometimes aggressive and intimidating management style, and lack of support from the respondent generally. We have seen a number of text message exchanges between the claimant and Miss Smitheram, and subsequently between the claimant and Ms Evans, to the effect that the claimant felt that Mr Peters was "not her sort of person" and that there was a personality clash between them. Mr Peters denies that there was any personality clash but accepts that there was occasionally friction between them when he had to address work-related issues. These included a number of occasions in which the claimant made simple errors, such as misplacing keys to various properties with which the respondent had been entrusted by clients, including when the claimant lost keys in the street which were then returned by a member of the public. Equally there are a number of other occasions on which the claimant expressed gratitude for the help and support provided to her by Mr Peters.
9. We find that the general allegations relating to Mr Peters' alleged aggressive and intimidating management style are inconsistent with both the evidence given by the respondent's witnesses at this hearing, and also the contemporaneous documents. These include repeated review and appraisal meetings at which the claimant made positive comments about the working environment, including the management and her colleagues. It is also clear from these contemporaneous documents that there were

repeated examples of the claimant expressing her gratitude to both Mr Peters and other colleagues for their support and encouragement, particularly during the distressing time during and after the claimant's diagnosis of cancer, and her treatment for that condition.

10. The claimant has also raised a number of more specific allegations which we deal with as follows.
11. In January 2018 Miss Richardson was shadowing Mr Parker in readiness to take over his role, and this included conducting monthly Branch Manager appraisals. On 22 January 2018 this involved a meeting at the Hayle branch when they conducted Mr Peters' appraisal. The claimant asserts that she told Ms Richardson that she was suffering from depression as a result of the working environment under Mr Peters, and that the claimant requested a transfer, but that Ms Richardson refused. The claimant also asserts that Mr Peters was failing to give her credit for sales which she had achieved which had a negative impact on the commission to which she was entitled.
12. Ms Richardson denies that this conversation took place as alleged. She stated that if the claimant had raised serious issues about Mr Peters or an oppressive atmosphere in the office, she would have discussed this further with the claimant with a view to the matter being raised if necessary through the formal grievance process, which did not happen. In fact, the first occasion on which Ms Richardson was informed of these allegations was when the claimant did raise a formal grievance nearly three years later in November 2020. In addition, the position concerning transfers was that the respondent publicised vacancies throughout its branch offices, and if an employee wished to transfer that employee could discuss the request with the manager and make an application to transfer to that vacancy. As is to be expected the various vacancies in the various offices change from time to time. Ms Richardson would never have refused to allow a transfer as a matter of principle, and the claimant was entitled then, and remained entitled, to apply for any transfer if she wished. The claimant did not pursue any such request.
13. We prefer Ms Richardson's evidence as to her recollection of this meeting. We reject the claimant's assertion that Ms Richardson refused to assist the claimant and/or refused to take appropriate steps to protect her health and safety, and that the claimant raised a grievance about commission. We also reject the assertion that Ms Richardson refused to allow the claimant to transfer offices. With regard to the payment of commission on sales, we accept Mr Peters' evidence to this tribunal that he had to sign off details of all completed sales in a monthly form to Head Office, and that commission was paid equally to all members of an office based on the monthly sales which that office had made. In other words, sales were not recorded against individual employees. Neither salary increases, nor commission were based on the number of sales made by an individual. In addition, the claimant did not at that stage raise any grievance, either formally or informally, in connection with this matter.
14. With regard to the facilities in the office, the claimant raises a complaint that the respondent failed to provide an appropriate sanitary disposal bin in the ladies' washroom prior to the summer of 2019. She asserts that the respondent was in breach of the workplace requirements to provide a suitable means for the disposal of sanitary dressings in ladies' washrooms, and that Miss Smitheram refused to request appropriate facilities from the respondent's Head Office. The claimant asserts that on her return from holiday in June 2018 Mr Peters and Miss Smitheram had decided to throw away the existing bin because of the smell, with the implication that the claimant was responsible. The claimant asserts that she suffered this humiliating accusation which was motivated by Mr Peters' inclination to treat her less favourably, which she says was because of her dyslexia. The claimant asserts that she felt degraded and intimidated because it was clear that Miss Smitheram had acted with Mr Peters, and that only after Karley Evans joined in the summer of 2019 and the claimant again asked Mr Peters for a bin, he then relented and purchased one from Home Bargains.
15. This version of events is denied by both Miss Smitheram and Mr Peters. In particular Miss Smitheram gave evidence to the effect that there was no difficulty and no

discussion to that effect until after Ms Evans joined in 2019. At that stage the claimant suggested that the respondent should engage a company to provide and clear the sanitary waste bin. Miss Smitheram decided not to refer the matter to head office because it could be dealt with locally and an appropriate bin was purchased out of petty cash. Mr Peters' evidence is that he was vaguely aware of a conversation to that effect in 2009, but he was not involved, not least because he saw it as a personal matter for the female employees. He denies ever having discussed with the claimant, and certainly denies refusing to allow the purchase of the bin.

16. Again, the weight of evidence is against the claimant in this respect, and we prefer the respondent's version of events. We reject the assertion that Mr Peters and/or Ms Smitheram were in any way disrespectful or intimidating to the claimant in this respect. In addition, the claimant did not at that stage raise any grievance, either formally or informally, in connection with this matter.
17. It was during July and August 2018 that the claimant was diagnosed with skin cancer and then with breast cancer. This was clearly a very distressing time for the claimant.
18. The claimant asserts that shortly after this diagnosis it became clear that a local solicitor who had a good working relationship with the Hayle office had also been diagnosed with breast cancer, and that Mr Peters approached the claimant on receiving this news, and stated to the claimant "you wouldn't wish that on your worst enemy would you?" The claimant asserts that this made her extremely upset and vulnerable because Mr Peters either deliberately or thoughtlessly made such a hurtful remark which was intended to hurt the claimant's feelings.
19. Miss Smitheram and Mr Peters deny this version of events. They both accept that they discussed the diagnosis for the local solicitor, and in an open office conversation Mr Peters did say "you wouldn't wish that on your own worst enemy" or words to that effect, but that he was expressing his shock and sadness at the news. This is more likely to have been in May or June 2018, which importantly was before they knew of any similar diagnosis for the claimant. In any event the comment was not aimed at the claimant in an aggressive or hurtful way.
20. We prefer the respondent's version of events in this respect, and we do not accept that this comment was in any way expressed in a hurtful or upsetting manner to the claimant. In any event it seemed clear from the contemporaneous documents that the respondent was very supportive of the claimant who continued working through her subsequent treatment. For instance, the respondent supported the claimant by way of alterations to the claimant's working practices, and the claimant was grateful for that support. In addition, the claimant did not at that stage raise any grievance, either formally or informally, in connection with this matter.
21. The claimant also complains about an incident in which she says she was required to work until the end of an afternoon following surgery which was related to her cancer treatment. She says that on an occasion in August 2018 after she had undergone surgery in connection with her breast tumour, which was extremely painful, instead of going home to rest the claimant had to return to work to cover the office until close of business because the respondent had failed to make reasonable adjustments and to arrange cover for her.
22. The respondent accepts that the claimant did return to work on that occasion, but both Miss Smitheram and Mr Peters deny that the claimant was forced to do so, or that she was treated in an unsupported manner in this respect. In general terms the claimant decided to carry on working throughout her cancer treatment which Miss Smitheram thought was for financial reasons. Nonetheless the claimant was allowed appropriate flexibility in her diary to attend various appointments and other members of staff took on the work which the claimant was unable to attend to, and they were happy to do so given the circumstances. Miss Smitheram in particular was pleased to see how flexible and supportive the respondent was as their employer. Mr Peters denies that the claimant was forced to work that afternoon because of the absence of cover, and he confirmed that if the claimant was too unwell to work then she only needed to have said so, and she could of course have stayed at home given her difficult circumstances.

23. Again, we prefer the respondent's version of events, particularly because at that time it is clear from contemporaneous documents that the claimant was grateful for the support that she was receiving. In addition, the claimant did not at that stage raise any grievance, either formally or informally, in connection with this matter.
24. There was then an incident on 14 September 2018 during which an angry customer behaved in an aggressive and unreasonable manner towards the claimant, during which he shouted at and intimidated her. The claimant complains that Mr Peters failed to report the matter to Head Office in order to review the available CCTV footage. Mr Peters had witnessed part of the verbal assault and was responsible for the safety and security of the staff in the office and the claimant asserts that he showed a lack of concern for the safety of the claimant and her ongoing welfare.
25. We prefer Mr Peters' version of events (which is supported by Miss Smitheram) to this effect. When he heard shouting, Mr Peters came out of his office and approached the customer, and he intervened. He tried to engage with the angry client to get him to move away from the claimant. He resolved the situation by agreeing with the client how to proceed and the client left the office. He was then able to check that the claimant was all right after such an upsetting confrontation. The claimant agreed that she felt well enough to report the matter to the respondent's then Personnel Manager, which she did. The matter was certainly taken seriously by the respondent, because after the personnel department reviewed the camera footage, they banned the client from attending any of the respondent's offices in the future.
26. For these reasons we reject the claimant's assertion that Mr Peters or anyone else at the respondent failed to support the claimant during or after this incident, or in any way trivialised the matter, or failed to take due regard for the claimant's health and safety.
27. The claimant changed her working hours with effect from January 2019 so that she could take alternate Mondays off. She now asserts that Mr Peters effectively forced a reduction in her hours because he disapproved of the amount of time off which she was taking. We reject that assertion. It is clear from the contemporaneous documents, including a letter of 21 January 2019 from the Group Personal Manager, that it was the claimant who had requested a reduction in her hours, which the respondent had accommodated in order to support her.
28. With effect from 15 May 2019 the claimant was absent on certified sick leave for approximately eight weeks following her operation.
29. The Covid-19 pandemic then struck the nation, and with effect from 23 March 2020 during the first national lockdown, the respondent placed the majority of its employees, including the claimant, on furlough leave. She remained on furlough leave, and to accommodate her concerns about returning to work and her vulnerability, the claimant was the last of the respondent's employees to be called back to work, which took place on 1 August 2020. The claimant agreed to cover a temporary vacancy in the nearby Camborne office, but found her return to work too upsetting, and left the office abruptly on 7 August 2020. She then commenced a period of further sickness absence. Mr Hawkins, from whom we have heard, had by this stage taken over as Personnel Manager, and he and the claimant had discussions concerning a return to work during October 2020. The claimant returned to work on 18 November 2020 and had a return-to-work meeting Mr Peters to include information about procedural updates, which was important because the claimant had been absent from the office almost entirely since March 2020.
30. One of the earlier themes arising from the claimant's work was that she often made mistakes and that on occasions this had given rise to tension between her and her manager Mr Peters. Within two days of her return to work a similar event occurred. The claimant had failed to notify a client vendor of an agreed viewing by a prospective purchaser on the morning of 20 November 2020. The claimant and then Mr Peters were unable to make the necessary alternative arrangements, which cause a professional embarrassment.
31. The claimant asserts that Mr Peters confronted the claimant in front of her two colleagues in the office and said to her aggressively "That just makes us look shit

- Donna". She says that these comments were addressed directly to her, and that these insensitive comments made her feel humiliated and threatened. She felt threatened and anxious and had to leave the office, and she felt sufficiently unwell thereafter to call her GP.
32. Mr Peters' version of events is slightly different. He accepts that he was frustrated and annoyed that the simple mistake which the claimant had made and in trying to resolve the position was discussing it with the claimant and Miss Smitheram he admits he said: "This makes us look shit". He accepts that was an unprofessional comment in the heat of the moment, and he has apologised for having made that comment. However, it was not the case that he approached the claimant to say it, nor did he address the comment angrily at the claimant. That version of events is supported by Miss Smitheram, and also by Mr Hawkins who reviewed the footage of the event as noted further below.
 33. The claimant was sufficiently upset to take her coat and leave the office. This was easier said than done because the front door was locked because of Covid restrictions. Miss Smitheram tried to persuade the claimant not to leave. The claimant asserts that Miss Smitheram grabbed her and physically tried to prevent her from leaving, which Mr Peters and Miss Smitheram deny, not least because the claimant and Miss Smitheram were still friends and Miss Smitheram was trying to support the claimant.
 34. We find that Mr Peters made an unprofessional comment in the heat of the moment, and that the claimant was upset, and that she left the office. Otherwise, the weight of evidence is against the claimant, and we prefer the respondent's version to the effect that the comment in question from Mr Peters was not necessarily aggressively directed at the claimant, and she was not manhandled by Miss Smitheram in trying to restrain her.
 35. Mr Peters then contacted Mr Hawkins the Personnel Manager to tell him what had happened. Mr Hawkins then made contact with the claimant to offer her support and she complained about what had happened. Mr Hawkins then decided to review the camera footage for the office. Mr Hawkins formed view that this supported the version of events put forward by Mr Peters, which was subsequently corroborated by Miss Smitheram and Ms Evans. Mr Hawkins saw and heard what had happened through the footage and he did not consider it serious enough that it would give rise to any formal complaint, and he did not think to save or extract the relevant camera footage.
 36. The recorded camera footage of the events in question is through a system which the respondent has, which is not full CCTV, but rather each office has one small WiFi camera trained at the office which uses its own memory card. If an incoming telephone call remains unanswered by an office and defaults back to the respondent's head office, they can check on this camera system why the office in question is not answering calls. The memory card automatically records over itself every two weeks unless it is retrieved. This system recorded one view of this conversation, and it also recorded the audio content.
 37. The claimant then commenced a further period of sickness absence with effect from 23 November 2020, from which she did not return to work.
 38. By letter dated 25 November 2022 to Mr Hawkins, apparently received the following day, the claimant raised a formal grievance. That letter related to the management of Mr Peters in which the claimant stated: "His behaviour towards me has included open criticism in front of my colleagues, ignoring me when I speak to him, ignoring my achievements at work, and a lack of support and hurtful comments done prior and throughout my illness and treatment with cancer." The claimant followed this up with a second letter, also dated 25 November 2020, which runs to six pages giving further information about the claimant's complaints.
 39. Mr Hawkins acknowledged the grievance in an email dated 30 November 2020 and agreed to investigate the grievance and stated: "As you are currently signed off work I will respond to your grievance in writing once I have carried out my investigations". He also attached a copy of the respondent's grievance procedure.
 40. There was then an email exchange on 2 December 2020 in which the claimant clarified a confusion about her documents. She confirmed that her original letter was to stand

as her formal grievance, and that the second letter was a statement in support. The claimant also stated: "I understand I am currently away from work sick but please know that I'm happy for you to contact me to discuss any questions you may have." The claimant's grievance had specifically included a complaint about the events on 20 November 2020 when Mr Peterson said: "This makes us look shit". Mr Hawkins then made investigations of Ms Smitheram and Ms Evans by asking them about how Mr Peters treats colleagues in the office and how he had treated the claimant, and also seeking further information about the events on 20 November 2020. They both provided a detailed reply. In addition, he made enquiries of Mr Peters about the events of 20 November 2020 and he gave a detailed reply.

41. Mr Hawkins was concerned that the claimant had made a number of generalised allegations, without specific examples to support them. By email dated 11 December 2020 he informed the claimant that it appeared difficult to substantiate the number of the events relied upon and he asked the claimant to provide more specific detail such as dates times and specific examples in connection with a number of paragraphs in the claimant's complaint. The claimant replied with a detailed handwritten letter, and later some screenshots and text messages, but Mr Hawkins did not feel that this had taken the matter very much further. By email dated 22 December 2020 he stated to the claimant: "Unfortunately these do not answer my request for more specific details such as dates and times ... I look forward to providing me with the details I require in order to complete my investigations." Nothing further of substance was provided by the claimant despite this request.
42. Mr Hawkins did not offer the claimant a meeting to discuss her grievance because he felt that it would be more appropriate to deal with the matter in writing given the claimant's absence through ill-health, and the Covid-19 restrictions on movement and attendance in person which still prevailed at that time. In addition, he had not preserved the camera footage of the events on 20 November 2019 and the machine had automatically wiped this clean in recording over it.
43. Having investigated and reviewed the matter, by detailed letter dated 4 January 2021 Mr Hawkins rejected the claimant's grievance. He addressed each of the points raised by the claimant in detail, but he was unable to substantiate any of the complaints which she had raised. He concluded by saying: "I feel that in order to resolve these issues on or before your return to work with your agreement we will arrange a meeting with you and Kris to discuss the issues you have raised which I will attend as mediator. A mutual agreement can then be met as to how both parties are going to resolve the issues and achieve a better working relationship moving forward." He also reminded the claimant that she had the right of appeal within 10 days to Mr Baxter the Managing Director.
44. By letter dated 15 January 2021 the claimant appealed against that decision. She gave further background information to support her previous allegations, and she objected to the fact that they had not been upheld. The claimant at that stage did not complain about the absence of a meeting in person to discuss grievance. She did suggest that her version of events on 20 November 2019 would be supported by the camera evidence.
45. Mr Baxter then dealt with the claimant's appeal by way of a detailed review. He reviewed all of the claimant's grievance documents, the statements from the fellow employees, and Mr Hawkins' outcome letter. He reviewed the claimant's personnel file, and also spoke with each of Ms Richardson, Mr Hawkins, Mr Peters and Miss Smitheram. He concluded that the claimant's complaints were inconsistent with the contemporaneous documents, and that they were also inconsistent with her colleagues' recollection of the various events. He noted that the claimant had not raised any of these issues during or following her reviews or appraisals, during which she had consistently rated the morale in the Hayle office as being very strong. He concluded that Mr Hawkins had thoroughly investigated the claimant's complaints and had reached a fair and reasonable decision based on his investigation. Given that the claimant remained off sick, and Covid 19 restrictions were still in place, Mr Baxter did

- not consider it necessary to hold a meeting with the claimant only decided to reject her appeal. He confirmed this by letter dated 22 January 2021.
46. Mr Baxter also reiterated that the respondent was prepared to provide mediation in order to seek to facilitate the claimant's return to work and to resolve any outstanding issues. The claimant had not yet responded to an original offer to that effect from Mr Hawkins and he requested any further thoughts which he might have on seeking to resolve the situation. The claimant did not respond to this request.
 47. The claimant accepted during her cross-examination that both Mr Hawkins and Mr Baxter had considered each of the points which she had raised during the grievance process. She also accepted that despite the fact that she was not offered a grievance meeting, at which she could have articulated her grievances personally, there were no points which she failed to raise (and which were considered), which she would otherwise have done if a meeting had been provided.
 48. The claimant remained on certified sickness absence. As at that stage the claim had been absent on agreed furlough leave from 23 March 2020 until 1 August 2020, but she had only returned for a few days before commencing further sickness absence between 8 August 2020 and 18 November 2020. She then returned for two days only before taking further sickness absence with effect from 20 November 2020. She was still therefore absent on sickness absence as at the end of January 2021.
 49. By letter dated 27 January 2021 to the claimant Mr Hawkins acknowledged her latest statement of fitness for work and given that the grievance and appeal process had been concluded he reminded the claimant of the respondent's sick pay procedures and the payment of SSP. He informed the claimant that he would like to arrange a video meeting in the week commencing 8 February 2021 "to decide what steps we can take in order to facilitate a return to the workplace." He asked the claimant to give consent for the respondent to obtain a medical report and advised the claimant that if the respondent was unable to facilitate a return to work in the near future then the respondent would investigate her absence from work under the capability procedures.
 50. The claimant then resigned her employment by letter dated 4 February 2021. She gave one month's notice to 4 March 2021. She explained the reason for leaving was "workplace bullying" and referred to behaviour which had taken place over the last two and half years and had escalated after her cancer diagnosis. She complained that the investigation into her grievance was neither fair nor thorough, with particular reference to the CCTV footage which was destroyed. She asserted that the respondent had failed to follow the ACAS Code and that they were in breach of contract.
 51. By letter dated 8 February 2021 Mr Hawkins acknowledged her resignation letter and invited the claimant to withdraw her resignation. He explained that her grievance had been investigated fully and that by the time the claimant had mentioned the camera footage in her appeal it already been destroyed. Mr Hawkins repeated the respondent's offer to seek to facilitate a return to work, and he invited her again to reconsider her resignation. In the event that she chose not to do so he confirmed that she would be paid in accordance with her contract of employment together with accrued holiday entitlement on the termination of her employment. By email dated 12 February 2021 the claimant acknowledged that letter, but she confirmed that she intended to proceed with her resignation.
 52. The claimant subsequently consulted with ACAS and commenced the Early Conciliation process on 6 May 2021, and ACAS issued the Early Conciliation Certificate on 17 June 2021. The claimant then presented these proceedings on 13 July 2021.
 53. Finally, we make the following points with regard to the claimant's evidence and credibility. The claimant has made a number of assertions against the respondent, and in particular against Mr Peters, and in connection with his alleged aggressive and intimidating behaviour, and the nature of the oppressive atmosphere in the office. These assertions are roundly rejected by Mr Peters and the other female employees from whom we have heard. In addition, in many respects the claimant's assertions are entirely inconsistent with the contemporaneous documents during this time, which

show repeatedly that the respondent's employees were caring and considerate to the claimant during her illness and generally seemed to be supportive to the claimant throughout. There are a number of contemporaneous documents which show that the claimant acknowledged this and was grateful for it. The weight of evidence is clearly against the claimant in a number of respects, and where there was a conflict of evidence between the parties, we generally preferred the respondent's version for these reasons.

54. Having established the above facts, we now apply the law.
55. The Law:
56. 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.
57. 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".
58. 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; and Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN.
59. 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 (2015) ("the ACAS Code").
60. We have also considered the ACAS Code itself. We note in the Foreword it confirms that: "It provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace ... A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases". In paragraph 3 the Code provides: "Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code." In paragraph 4 the Code provides that if a grievance process is being followed it is important to deal with issues fairly and there are a number of elements to this, including: dealing with issues promptly; carrying out any necessary investigations to establish the facts of the case; giving employees an opportunity to put their case before any decisions are made; allowing employees to be accompanied at any formal meeting; and allowing an appeal against any formal decision made. In paragraph 33 it provides that upon receipt of a grievance:

- “Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.”
61. A guide was issued by ACAS to supplement this statutory Code in February 2019 (Discipline and Grievances at Work - the ACAS Guide). The guidance relating to paragraph 33 of the Code and grievance meetings provides: “In general terms a grievance meeting deals with any grievance raised by an employee ... Managers should arrange a meeting, ideally within five working days, in private where there will not be interruptions”.
 62. Decision
 63. The claimant's claims to be determined by this Tribunal were agreed at a case management preliminary hearing and were set out in the Case Management Order dated 27 April 2022 (“the Case Management Order”). The claimant brought two claims, namely constructive unfair dismissal, and for disability discrimination, which was limited to a claim for harassment related to cancer. The harassment claim is now withdrawn. That leaves one remaining claim to be determined by this Tribunal, namely constructive unfair dismissal, as follows.
 64. Constructive Unfair Dismissal:
 65. 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.”
 66. 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.”
 67. 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. It need not be the predominant, principal, major or main cause for the resignation.
 68. 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”.
69. 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.”
70. 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).
71. 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.
72. 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 it 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.
73. In this case the fundamental breaches of contract relied upon by the claimant were agreed and set out in the Case Management Order. There were five of these, which we now deal with in turn.
74. The First Alleged Breach:
75. This is described as: “not providing a sanitary disposal bin in the ladies’ washroom prior to the summer of 2019 (as detailed in paragraph 8 of the particulars of claim).” This reference to paragraph 8 further explains that the respondent was in breach of the workplace requirements to provide a suitable means for the disposal of sanitary dressings in ladies’ washrooms, that the then current arrangements were unsatisfactory, that Miss Smitheram refused to request appropriate facilities from the respondent’s Head Office, and that on the claimant’s return from holiday in June 2018 Mr Peters and Miss Smitheram had decided to throw away the existing bin because of the smell. The claimant asserts: “This was another humiliating act which the claimant believes was motivated by Mr Peters’ motivation to treat her less favourably because of her dyslexia. The claimant felt degraded and intimidated as it was clear that Miss Smitheram had now acted with Mr Peters.” Only after Karley Evans joined in the

- summer of 2019 and the claimant again asked Mr Peters for a bin he then relented and purchased one from Home Bargains.
76. For the reasons explained in findings of fact above, we reject the claimant's allegations in this respect, and we prefer the respondent's version of events. We reject the assertion that Mr Peters and/or Ms Smitheram were in any way disrespectful or intimidating to the claimant over this matter, and we reject the claimant's assertion that there was any breach of contract, repudiatory or otherwise, in this respect.
77. The Second Alleged Breach:
78. This is described as: "By informing the claimant that there was no opportunity to transfer, and by not investigating any further nor exploring how the respondent could protect the claimant's health and safety in accordance with its duties (as detailed in paragraph 11 of the Particulars of Claim)." This reference to paragraph 11 further explains that in January 2018 the claimant spoke to regional managers Ms Richardson and Mr Parker that she was not happy at the Hayle branch and requested a transfer to another branch. She complained that sales were only recorded as having been made by a particular employee at the discretion of the manager, and that unhappiness at that office was giving rise to depression. The claimant alleges that Ms Richardson informed the claimant there was no opportunity to transfer and failed to investigate or explore how the respondent could protect the claimant's health and safety.
79. For the reasons explained in our findings of fact above, we have rejected the claimant's assertion that Ms Richardson refused to assist the claimant and/or refused to take appropriate steps to protect her health and safety, and that the claimant raised a grievance about commission, and in any event that any such complaint about commission would be justified. We reject the claimant's assertion that there was any breach of contract, repudiatory or otherwise, in this respect.
80. The Third Alleged Breach:
81. This is described as: "by requiring the claimant to work until close of business following surgery related to her cancer treatment (as detailed in paragraph 14 of the Particulars of Claim)". This reference to paragraph 14 further explains that in August 2018 the claimant had undergone surgery in connection with her breast tumour which was extremely painful. Instead of going home to rest the claimant had to return to work to cover the office until close of business because the respondent had failed to make reasonable adjustments and to arrange cover for her.
82. For the reasons explained in our findings of fact, we reject this assertion. Although the claimant did return to work on that occasion, she was not forced to do so, and if the claimant had been too unwell to work then she could have stayed at home given her difficult circumstances. This was during a time when the claimant expressed gratitude for the support which the respondent was providing. We reject the claimant's assertion that there was any breach of contract, repudiatory or otherwise, in this respect.
83. The Fourth Alleged Breach:
84. This is described as: "The respondent's alleged handling of the incident on 14 September 2018 (as detailed in paragraph 17 of the Particulars of Claim)". This reference to paragraph 17 further explains that this was the incident on 14 September 2018 with the angry customer. She asserts that Mr Peters had been a witness to this verbal assault and that his failure to report the incident "evidenced the lack of concern for the safety of the claimant and also her ongoing welfare."
85. For the reasons explained in findings of fact above, we reject the claimant's assertion that Mr Peters or anyone else at the respondent failed to support the claimant during or after this incident, or in any way trivialised the matter, or failed to take due regard for the claimant's health and safety. We reject the claimant's assertion that there was any breach of contract, repudiatory or otherwise, in this respect.
86. Before addressing the fifth and final alleged breach, we also wish to record that these first four alleged breaches of contract all took place between two and three years before the claimant resigned her employment. She did not raise any formal or informal grievance at the time of any of these events. Even if there had been any breach of contract as alleged, which we do not accept, it is clear that the claimant continued in

the respondent's employment and affirmed her contract of employment despite these alleged breaches.

87. The Fifth and Final Alleged Breach:

88. This is described as: "The respondent's alleged failure to preserve camera footage of the events which took place on 20 November 2020, and its handling of the grievance submitted by the claimant on 26 November 2020 (as detailed in paragraphs 35 to 38 of the particulars of claim)". It is clear from these paragraphs 35 to 38 that there are three constituent elements of this complaint. The first relates to the comment that Mr Peters said to the claimant on 20 November 2020: "That just makes us look shit Donna" which the claimant asserts was in a manner which was addressed directly to her and that these insensitive comments made her feel humiliated and threatened, with the result that she left the office and called her GP. She asserts that she telephoned Mr Hawkins in the HR department to make the respondent aware of the incident and asked to review the camera footage to see what had happened. The second element relates to the claimant's subsequent grievance on 25 November 2020, which was not upheld, and that the respondent failed to follow its own Grievance Procedure in reaching this conclusion. The claimant specifically asserted in her resignation letter that the respondent had failed to follow the ACAS Code, and that it was in breach of the contract. The third element relates to the failure by the respondent to retain the camera footage which the claimant asserts was either deliberate or incompetent and in breach of its duty of care to the claimant, and which she says would have been the strongest evidence to support her allegations of bullying which had been rejected.
89. Dealing first with the events of 20 November 2020, for the reasons explained in our findings of fact above, we find that Mr Peters made an unprofessional comment with the result that the claimant felt undermined and threatened, she became upset and then left the office, she then raised a complaint, and subsequently raised a formal grievance. We reject the assertion that Mr Peters singled out the claimant and stated aggressively and directly to her (in front of others) that "this makes us look shit Donna". However, after much consideration on balance we find that the comment made by Mr Peters was conduct which, without reasonable and proper cause, was likely to seriously damage the relationship of confidence and trust between employer and employee. The background context was that the claimant had been ill for some time and had only very recently returned to work; the mistake in the arrangements was clearly hers; Mr Peters accepts that the comment he made was "unprofessional"; this comment was made in front of the claimant, and in public in front of her work colleagues, when it clearly related to her mistake; with result that the claimant felt humiliated and undermined, and she was sufficiently upset to leave in tears, raise a complaint, and then raise a formal grievance. It was effectively a public dressing down after which the claimant felt upset and humiliated.
90. We have applied the "unvarnished Malik test" and on balance we find that this conduct impinged on the relationship in the sense that, looked at objectively, it was likely to seriously damage the degree of trust and confidence which the claimant was reasonably entitled to have in her employer. We therefore find that this incident on 20 November 2020 was a fundamental or repudiatory breach of the claimant's contract of employment.
91. We next deal with the third element, slightly out of turn, which relates to the respondent's failure to retain the camera footage of the events on 20 November 2020. We accept Mr Hawkins' evidence that following the claimant's initial complaint he reviewed the footage and did not expect it to result in a formal grievance. He did not think to retain the footage but accepted that with the benefit of hindsight it would have been preferable to have done so in this case. We reject the claimant's assertion that this was deliberate or incompetent. It was unfortunate, because by the time the claimant requested the respondent to produce the footage it had already been erased. Mr Hawkins was able to investigate the allegation by interviewing all those who were present and decided to proceed on that basis. To the extent that the claimant makes the assertion that there was a fundamental or repudiatory breach of contract by the

- respondent by way of Mr Hawkins failing to retain the camera footage, we reject that assertion.
92. The final point we deal with therefore is the second element of this fifth alleged breach, namely the respondent's handling of the claimant's grievance and appeal, which includes her specific complaint that there was no grievance hearing at any stage.
93. The following aspects support the claimant's argument that the absence of a grievance meeting was a fundamental and repudiatory breach of contract: (i) the respondent's own grievance procedure at the very least envisages a grievance hearing at the first stage, and it requires a grievance consultation hearing on appeal; (ii) there is the clear recommendation in the ACAS Code that a grievance meeting should be arranged upon receipt of a formal grievance; (iii) she was never told that the grievance process would necessarily proceed without any hearing, and did not agree to that; and (iv) the claimant gave evidence to the effect that she would have been in a better position to have articulated her grievance at a meeting for that purpose.
94. The following aspects support the respondent's contention that the absence of a grievance meeting does not of itself amount to a fundamental and repudiatory breach of contract: (i) the ACAS Code is not a contractual requirement, and although it may be best practice, the Code itself recognises that "Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code."; (ii) this should be seen against the background of the Covid-19 restrictions in place at the time which at the very least were strongly discouraging personal contact; (iii) the claimant was away on certified sickness absence; (iv) the claimant acknowledged in her evidence that the respondent considered each of the points which she had raised, and she was not precluded by the absence of any meeting in person from raising, or having considered, any point which she wished to pursue as part of her grievance; and (v) the respondent clearly complied with all other recommendations for a fair grievance procedure set out in the Code, namely it dealt with the issues promptly; it carried out any necessary investigations to establish the facts of the case; it gave the claimant an opportunity to put her case before any decisions were made; and it allowed a detailed appeal against any formal decision made.
95. On balance, and if it were to be seen in isolation, we would not have found that the failure in this case to hold a grievance meeting was of itself a fundamental or repudiatory breach of contract. Despite the respondent's procedures and the recommendations in the Code it cannot be said that the claimant was prejudiced by the absence of a grievance hearing given her concession that the respondent was able to consider, and did consider, each of the points which she had raised in writing.
96. Nonetheless this aspect did appear to have a cumulative effect when seen together with the other circumstances, namely that the respondent had rejected the claimant's complaint about the events on 20 November 2020, and it had deleted the camera footage which the claimant wished to review and rely upon to support her claim. It was entirely appropriate of the claimant to raise a formal grievance if she wished to complain about the events of 20 November 2020, and she could have been criticised for resigning at that stage without taking advantage of the grievance procedure. Even if the respondent's handling of the grievance process cannot itself be said to be a fundamental breach of contract, nonetheless this process did bring to an unsatisfactory end the claimant's complaint about Mr Peters' conduct, and she was entitled to accept that repudiatory breach of contract and to resign at that stage.
97. It seems to us to be clear (applying Meikle, Abbey Cars and Wright) that this repudiatory breach (that is to say Mr Peters' conduct on 20 November 2020) "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause.
98. We have found this to be a difficult case to determine because we had no hesitation in rejecting the majority of the claimant's claims which we consider to be wholly

- unsubstantiated. In addition, we find that there was a considerable amount of evidence to demonstrate that the respondent had been a responsible and supportive employer when the claimant presented with significant health difficulties. This includes Mr Peters who was entitled to challenge the claimant about repeated mistakes at work, but who was nonetheless in general terms constructive and supportive. In addition, the grievance process carried out by Mr Hawkins and Mr Baxter was careful and thorough, and they ensured that they fully understood the complaints which the claimant wished to pursue, and had investigated them responsibly, before reaching any decision.
99. Despite all of this we find that there was a fundamental breach of the implied term of trust and confidence on 20 November 2020, and that the claimant was entitled to accept that breach and to resign her employment following notification of the rejection of her appeal. We find that the claimant's resignation can therefore be construed to be a dismissal, and that the claimant was dismissed within the meaning of section 95(1)(c) of the Act.
100. The respondent suggests that there was a potentially fair reason for this dismissal, namely some other substantial reason such as to justify dismissal, following a breakdown in the relationship between the parties, as evidenced by the claimant's failure to engage in mediation or otherwise to explore a return to work. In circumstances where the final breakdown can be said to have been occasioned by the events on 20 November 2020, we reject that assertion.
101. In conclusion therefore we find that the claimant's resignation can be construed to be her dismissal, and that (bearing in mind the size and administrative resources of the respondent) this dismissal was not fair and reasonable in all the circumstances of the case. We therefore find that the claimant was unfairly dismissed with effect from 4 March 2021.
102. Separate directions have now been made with regard to the appropriate remedy.
103. 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 4 to 53; a concise identification of the relevant law is at paragraphs 55 to 61; how that law has been applied to those findings in order to decide the issues is at paragraphs 62 to 101.

Employment Judge N J Roper
Date: 19 January 2023

Judgment sent to Parties: 07 February 2023

FOR THE TRIBUNAL OFFICE