



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4101775/2023**

**Held at Aberdeen on 12, 14, 15 & 16 & 27 June 2023**

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**Employment Judge J M Hendry  
Members Dr. N Richardson  
Ms V Lockhart**

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**Mrs K Anderson (or Farquharson)**

**Claimant  
Represented by  
Mr E Obi,  
HR Consultant**

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**Thistle Marine (Peterhead) Ltd**

**1<sup>st</sup> Respondent  
Represented by  
Mr A Mackey,  
Solicitor**

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**James Duncan Clark**

**2<sup>nd</sup> Respondent  
Represented by  
Mr A Mackey,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The unanimous decision of the Tribunal is as follows:**

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- 1. The claim for unfair dismissal being well founded the respondent company shall pay the claimant a monetary award of Eighteen Thousand Eight hundred and Twenty Six pounds and Fifty Six pence (£18826.56) consisting of a basic award of £13418.50, loss of statutory**

**E.T. Z4 (WR)**

rights £500, Loss of wages of £3198, loss of pension contributions £1800 and expenses seeking work £10.

- 5 2. The claim for harassment in terms of Section 26 of the Equality Act being well founded the Tribunal awards the claimant the sum of Ten Thousand Pounds (£10,000) for injury to feelings together with the sum of Two Hundred and Twenty Eight pounds (£228) as interest.
- 10 3. The claim for accrued but unpaid wages being well founded the respondent company shall pay the claimant the sum of Eight Thousand Three Hundred and Twenty five pounds (£8325).

### REASONS

- 15 1. The claimant in her ET1 sought findings that she had been unfairly “constructively” dismissed from her post as Office Manager with the respondent company, that she had been discriminated against on the grounds of her sex (harassment) and she was due unpaid wages.
- 20 2. The respondent’s position was that the claimant had resigned on 15 December 2022 following an altercation with two of the respondent’s Directors following which she had announced that she was not coming back. They denied that the claimant had been subjected to any discriminatory conduct and disputed the claimant’s version of events. They had lodged a counterclaim for alleged overpayment of wages on the basis that the claimant  
25 had paid these to herself without authority which had been discovered after she had left.
- 30 3. The Tribunal had the benefit of two separate bundles of documents lodged by the parties. The claimant and the respondent, at later points added, of consent, additional documents to their bundles. On the first day the respondent’s agent added some contractual documentation that had been

found (p117-124) which was added to the claimant's Bundle. The claimant added a Fit Note she had obtained from her GP dated 19 December and copies of two WhatsApp conversations (p125-126). Mr Mackey added the Tribunal's Note of 19 April 2023, his draft List of Issues and the respondents' response to the claimant's Schedule of Loss (documents 10,11 and 12).

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4. Prior to the hearing the claimant's representative had asked for a copy of his client's contract of employment. The respondent's initial position was that there was no such document. However, the claimant indicated that it was kept in the office at the respondent's premises. As a result of a further search the respondent's lodged a copy of a rudimentary note of terms and conditions relating to the claimant. It showed her employment began on 6 June 1995 and in different iterations various changes in her hours. She explained in evidence that these reflected periods when she had worked reduced hours because of child care commitments. Nothing particularly turned on these documents. The most recent indicated an hourly rate of £15 (it was undated). They also gave the respondent company a right to require the claimant to work additional hours by way of overtime that were "necessary in the interest of the operational requirements of the Company".

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### Issues

5. Unfortunately, parties had been unable to agree a list of issues. The Tribunal had two separate lists of issues. However, the principal issues were relatively straightforward. The first factual issue revolved around the claimant's resignation and whether she had resigned on 15 December 2022 or whether she had resigned at a later date namely through the submission of a letter of resignation dated 21 December (C5/6) The first legal issue was whether the claimant had cause to resign and whether the respondent had committed a breach of the implied duty of trust and confidence. We had to consider whether, even if proven, whether the claimant had effectively waived her right to rely on previous incidents and whether there was a final straw.

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6. The Tribunal also had to determine what the claimant's correct contractual hours were and whether or not she had overpaid herself the sum of £23,379 as sought by the respondent.
- 5 7. The core incident centred around the events of the 15 December 2022 and whether or not the actions of one of the respondent's Directors Jim Clark amounted to harassment on the grounds of the claimant's sex (Section 26 of the Equality Act).
- 10 8. The claimant sought payment/repayment of wages which had been kept aside by the respondent in an account called the "Tiddly" account. This was in effect an in-house savings account for employees. They would allow wages to be held in the account and allow an employee to draw on the sums accrued when requested. The respondent had retained the balance due to the claimant to offset against any liability found under the counterclaim.
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9. At the outset, of the hearing the claimant had conceded that, after she had examined the wage slips produced, she had noted she had made an error. She had paid herself slightly higher monthly wages than the wages she was entitled to for some months prior to her resignation. The parties agreed that any liability on the part of the claimant could be deducted from the sums due to her in the "Tiddly" account. The respondent's solicitor indicated that he was content for the Tribunal to deal with the matter and there was no argument advanced that the sums in this account shouldn't be treated as accrued wages and appropriate set offs made. Mr Obi agreed that if the Tribunal came to issue a Judgment in favour of the claimant in relation to payment of this balance, or the respondent in relation to the counter claim, he was content for the agreed overpayments or any sums found due under the counterclaim to be deducted. In short parties took no issue with treating the sums in the account as accrued wages and allowing the Tribunal to make a set off if required.
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## Evidence

10. The Tribunal had the benefit of Witness Statements. The Tribunal heard oral evidence from the following witnesses:

- The claimant;
- 5 • Jason Clark, (respondents' Technical Director)
- Brenda Coutts, former Clerical Assistant
- James (Jim) Clark, (a Director and founder of the business);
- Mrs Gillian Reekie, (Office Administrator);

## 10 Facts

11. The claimant started work with the respondent company as Office Manager on 6 June 1995. She had numerous administrative duties including being responsible for sales and purchases, invoicing, inputting information into the accounts system, accounts, payroll and banking. She was hardworking and well thought of by the owners and Directors of the business.

12. The claimant has a strong and forceful character. She felt responsible for the good running of the Office. She was "hands on" and kept an eye on all aspects of what happened. She had a good working relationship with the two Directors. In particular she worked closely and liaised daily with Jason Clark. The two Directors took no interest in the day to day running of the Office and left the claimant essentially to her own devices.

13. The use of swearing and other "industrial language" was common in the workplace and not uncommonly used by the claimant and the two Directors.

14. The respondent company provide engineering and marine services to the fishing and oil industry and have their main premises in Peterhead. The claimant worked there. They have approximately 20 employees including the 2 Directors, Jim Clark and Jason Clark. Mr Jason Clark is the Technical Director and in effect the Managing Director of the company. His father Jim

Clark founded the company and is a shareholder. The company has a turnover of several million pounds a year. It has access to both legal advice and HR advice the latter through a “helpline” system.

- 5 15. In early 2022 Mrs Gillian Reekie, the daughter of Jim Clark moved to Peterhead to work. She had previously been involved in sales and was now to train in accounts and administration to assist the claimant.

### Background history

- 10 16. From around February 2015 Jim Clark asked the claimant to transfer currency from a local branch of Ramsdens to two Thai women, living in Thailand. He would leave her cash to do this. The claimant became concerned and embarrassed at the questions being asked about the transactions by staff at Ramsdens and persuaded Jim Clark that an account should be opened to  
15 allow the payments to be made online. Accordingly, the claimant opened an account in her own name and used this to transfer money using “Remitly” an online remittance service. Mr Clark continued to give the claimant cash and the agreed cash payments were then made. The arrangement was to be kept secret from Jason Clark and Mrs Reekie.

- 20 17. On various occasions the claimant was asked by the Directors to process invoices through the company to cover personal expenses not associated with the business for themselves and Mrs Reekie. The claimant was concerned that this was avoiding tax. On occasions she challenged the  
25 Directors whether or not she should be doing this through the company’s ‘books’ but nevertheless complied.

18. On occasions the company sold scrap metal. The claimant was asked to process the money received from these sales through her own personal bank  
30 account and the money was then divided between Jim Clark, Jason Clark and the claimant. This was seen as a “perk”. It also avoided income tax. Various

payments were made between 2019 and April 2022 totalling several thousand pounds to the Directors and the claimant.

19. The claimant was concerned at Jim Clark's attitude towards staff and to his  
5 commitment to adherence with Covid guidelines. He expressed the view that the claimant should work in the office rather than from home.
20. In March 2020 the claimant noticed that Jim Clark had authorised a payment  
10 to a Pension Plan he had arranged for Mrs Reekie. She was upset at this because as Office Manager she did not get a pension despite her years of service. She complained about this. As a result Jason Clark agreed to pay £600 per month to a private pension for the claimant. This decision followed an exchange of WhatsApp messages (C53). Mr Clark asked the claimant what her hourly rate and hours were. She responded: "£18.50, 35-37  
15 hours.....". Jason Clark did not query or challenge this.
21. In August 2021 the claimant informed the respondent that she had the  
20 menopause and that she was experiencing a number of serious symptoms which caused her difficulties. She did not ask for any particular adjustments to her work. The claimant agreed with Jason Clark that because of long delays in having her condition fully assessed through the NHS that the company would reimburse her for getting an assessment done through BUPA. This was quickly carried out and following the assessment the claimant was given a treatment plan. The sum of money involved was in lieu  
25 of money set aside for the claimant's long service award.
22. In April 2022 Gillian Reekie joined from the Aberdeen office. The claimant  
30 was tasked to train her in the accounts system which she did. The claimant kept a notebook on her desk with the passwords for the system.
23. Mrs Reekie would, often when quiet, do work for her own husband's business.
24. Around May 2022 the respondent company had a visit from Health and Safety  
35 Inspectors who pointed out various deficiencies in record keeping. The claimant liaised with them. Mr Jim Clark was on holiday. She was involved in

compiling various new safety checklists for vans and forklifts that the Inspectors had indicated that the company needed. She found that Jim Clark and Jason Clark did not put much weight on these requirements which were to ensure the vans and forklifts were checked daily as being safe. She found it difficult to get them to agree the necessary steps that the Health and Safety Executive required to satisfy their concerns and put a proper system in place. She was concerned at the Directors attitude towards health and safety that it was neither urgent nor important. She noted Mr Jim Clark's suggestion in a message that their involvement was just "job creation for them" (R130).

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25. In June/July 2022 the claimant tested positive for Covid. This was following both Jim Clark and Jason Clark having tested positive for Covid. They both continued to attend the office and did not self-isolate. The claimant mentioned coming into the office with Covid was putting everyone at risk. The Directors asked the claimant to keep quiet about the matter and not to tell anyone.

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26. On 25 July 2022 the claimant had breast surgery. The respondent's Directors were aware of this. The claimant kept in contact with Gillian Reekie by WhatsApp (JB118). Mrs Reekie was not able to process the wages on the 26 July without the claimant's assistance which she provided. In the course of this Mrs Reekie had access to a file which she opened showing the wages being paid that month including those of the claimant. The claimant felt obliged to go into work later in the week although she was still signed off and not supposed to drive.

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27. Over the years working with the company the claimant had observed that Jim Clark had an issue with employees taking holidays or being off ill. In particular in relation to one employee who was off ill for a period with "sore legs" Mr Clark was very dismissive about his absences. It transpired that the employee had developed diabetes and the pains in his legs were connected to this condition. Mr Clark would often refer to employees who were off sick as "snowflakes".

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28. Mr Jim Clark was blunt by nature. He would speak his mind.

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29. In October/November 2022 the claimant was asked to prepare an invoice which was falsely labelled as a purchase of winches for the company. The sums involved actually related to the decoration of a property owned by Jim Clark.
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30. On occasions the claimant was asked to put through the Thistle Marine's account Invoices which were not for the business but that related to a letting property owned by the two Directors.
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31. When preparing the wages in June the claimant had worked £111 in overtime. Her regular monthly gross wage was £3174.60. Her gross wage for that month was £3285.60 (£3174.60 plus £111). The claimant wrongly used this gross monthly figure in the ages paid in July, August, September, October and November. This amounted to an over payment of £555 (5 x £111).
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### **The claimant's health**

32. The menopause badly impacted on the claimant. In mid October 2022 she had to undergo blood tests to check her hormone levels. In mid November 2022 she underwent a scan to investigate menopausal bleeding. She suffered from anxiety and was prescribed anti-depressant by her G.P. She would often suffer from a loss of concentration, brain fog and anxiety.
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### **Crane Incident**

- 25 33. On 27 November 2022 the company received £30,000 from a customer who ordered a crane. Jim Clark did not believe that the customer was serious and that it might be some sort of scam. The claimant left work in the late afternoon but was in WhatsApp contact with Jim Clark throughout that evening trying to allay his suspicions. She had to contact the duty manager at their bank to discuss if there was any way the money could be withdrawn and whether it could be a scam The claimant had been due to have dinner with her daughter that evening but felt she was expected to respond to the messages that
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continued into the early evening. The two Directors expected the claimant to be available after hours if some matter arose.

### December incident

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34. On Monday 12 December 2023 the claimant attended work. The following day there was heavy snow and the claimant was snowed in. Her driveway was a quarter of a mile long. She texted a photograph of the snow to Jason Clark. He agreed that she should work at home. The following day the claimant told Jason Clark that she was unwell due to heavy menopausal bleeding and feeling unwell as she had taken strong pain killers and would work from home. She indicated that she would attend work the following day. The claimant would regularly carry out work remotely from home.

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35. The claimant arrived at work on the 15 December at about 2 o'clock. She entered the premises and went to her office. She passed Jim Clark in the corridor. He spoke to her in a sarcastic tone: "Oh I see you've made it in!". The claimant began to explain why she hadn't been in the office earlier that week. She mentioned the snow and also that the day before she had heavy menopausal bleeding. Mr Clark gave her a disgusted look and then walked away towards the workshop.

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36. The claimant was very upset and angry at his behaviour and the implication that she did not have good reason to have not been at work earlier in the week. She went to a nearby door to the workshop door and shouted for Jason. Jason Clark appeared from the workshop and there was a discussion involving the claimant, Jim Clark and Jason Clark. The claimant was angry and said that Jim Clark should not treat her the way he did because of her menopause bleeding condition. Jim Clark interrupted and accused the claimant of "strolling" in and out of work whenever it pleased her and doing what she pleased. He also questioned the number of days off she'd taken that year including holidays. He then said "menopause, menopause a'biddy fucking get's it, just get on wi' it, that's your excuse for everything". The

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claimant was shocked. She told him that he had no understanding of what she was going through and she emphasised that he didn't understand the discomfort and challenges that she faced particularly when experiencing heavy bleeding. He once more dismissively mentioned the menopause saying "a'bidy has aches and pains".

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37. At this the claimant became even more upset and felt hysterical. She was emotional, angry and crying. She said to the Directors what had happened amounted to discrimination and that she was going to take legal advice. Mr Jason Clark asked her to calm down. She said words to the effect that she "had to get out of here" and was going to "get legal advice". She left the premises.

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38. The claimant heard nothing from the company on Friday 16 December. She was still upset and too unwell to work. She expected them to contact her and apologise for Jim Clark's behaviour but as she heard nothing she composed a grievance letter (C2/4). She attended her G.P. at the first available opportunity and was signed off work on 19 December (C117) for 28 days. The GP did not increase her anti-depressant medication but indicated that she would keep this under review.

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39. The claimant wrote in her grievance:

*"Thistle Marine (Peterhead) Ltd has been aware of my menopause condition since August 2020. Thistle Marine (Peterhead) Ltd is also aware that I am on the following medication Oestrogen 100 patches and Progesterone tablets every night. I started HRT medication since January 2021 since you are both aware. I love my job. The cumulative effects of the actions of Thistle Marine (Peterhead) Ltd through Jim Clark having adversely affected my "abilities and capabilities" to undertake my "day-to-day activities" considering that I am juggling my workload in conjunction with my health Thistle Marine (Peterhead) Ltd has provided no help, reasonable adjustment, assistance or support. Instead I am being treated with disdain and disgust due to no fault of my own."*

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The claimant also wrote:

*"It's my hope that invoking the grievance procedure, I will not be made a workplace pariah, and or subjected to any detriment" or "detrimental treatment" which would amount to a contravention of the Acts or Regulations.*

5 *I trust that my career can continue to flourish under positive circumstances."*

40. The grievance asked the respondent to investigate the matter.

41. On the morning of 19 December the claimant discovered that the respondent  
10 had cut off her remote access to the accounts system she used from home.  
This meant that she could no longer work from home. She was disappointed  
that she had no acknowledgment of her grievance. She decided to resign.

42. The claimant wrote to the respondents on 21 December (JB5/6):

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*"I am writing to inform you that I am resigning from my position as Office  
Manager with immediate effect from today's date 22.12.22. Please accept this  
as my formal letter of resignation and a termination of our contract. I now  
20 consider that my position at Thistle Marine (Peterhead) Ltd is untenable and  
my working conditions intolerable, leaving me no option but to resign in  
response to the following breaches:*

a) *A fundamental breach of contract: Thistle Marine (Peterhead) Ltd has  
25 breach of an express term by subjecting me to undue disproportionate harsh  
treatment. I sent you my grievance on 19 December 2022 and up till 22  
December 2022 you did not acknowledge it. You have also discriminated  
against me due to my age, sex and disability which was clearly stated in my  
grievance.....*

b) *Breach of trust and confidence: You have acted in a manner that  
30 damages my reputation and future career prospects.....*

c) *The last straw doctrine: You have subjected me to abusive treatment  
and acted in breach of contract on numerous occasions in the past, thus  
35 resulting in your breach of contract and although I may have waived your  
breaches in the past I am no longer willing to do so. The last straw from you  
was.....instead of acknowledging my e-mail communication you  
proceeded on the same day upon receipt of my grievance to remove my mail,  
Xero account software and Share Point access, you performed this action  
40 because of my raising of a formal grievance."*

43. The claimant subsequently lodged a subject access request with the respondent company (C8) to which they did not respond.

44. The claimant raised Employment Tribunal proceedings.

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45. Following her resignation the claimant looked at various websites for suitable work. She obtained new employment on the 6 February 2023. It took three months for her new employers to enrol her in a pension scheme and she received no payment towards a pension in this period.

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### **Wages history**

46. The claimant was given a style contract in the format used later in a further iteration (C p120). During the duration of her employment the claimant who was initially full time (35 hours per week) reduced her hours when she had children but then latterly these hours were increased. She had an hourly rate that was agreed with Jason Clark. This rate increased steadily throughout her employment.

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47. For many years the claimant had the assistance of a clerical assistant in the office called Brenda Coutts. Mrs Coutts carried out a mixture of administrative work such as processing invoices. She latterly worked four days per week. She had access to the company's banking and had prepared the wages on occasion. Mrs Coutts did not find the claimant easy to work with but did not raise any grievances or informally complain about her.

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48. Mrs Coutts was furloughed for about one and half years. Although the business remained open during lockdown the work had decreased. A new accounts system was installed during her absence. On her return at the beginning of October 2021 she was told that because of the decrease in work her hours were to be cut to one day per week. She was surprised and shocked at this turn of events. She had only been back at work one day and had no consultation or discussion about the change. Mrs Coutts blamed Mrs

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Anderson the claimant for these events. Mrs Coutts left the company's employment on agreed terms.

5 49. The claimant could work remotely from home which she regularly did. Up until lockdown in March 2020 she was working 35 hours per week. She continued to work 35 hours per week following Mrs Reekie starting work in the office at Peterhead. In early 2021 the claimant was expected to train Mrs Reekie in office administration, banking and on the accounts package used. She increased her hours to 37 in September 2021 by agreement with Jason Clark. 10 He was aware that she would work flexibly but be available when needed. She would often work from home and become involved in business discussions through a WhatsApp involving the company's Directors and Mrs Reekie.

15 50. The claimant's pattern of work was to work core hours from about 8 or 9 in the morning until around three in the afternoon. She would log on later in the day and keep in touch with the Directors as to issues or events that had arisen. She was given discretion about the time she spent in the office and was never challenged about how long she spent at the office or what work 20 she had actually undertaken. Mr Jason Clark and Mrs Reekie were generally aware day to day when the claimant was in the office. Mr Jim Clark had often left the yard by the time she started work. The claimant processed her own and others wages and recorded the wages paid. On occasions she would put through overtime she had to work. It was never queried.

25 51. In the 15 January 2022 the claimant was contacted through WhatsApp by Jason Clark (Cp53). This was in relation to setting up a pension. He wrote: "what's your hourly rate and hrs again? Canna mine" She responded: "£18.50. 35-37 hours.." Mr Clark did not query or challenge this. 30

52. The claimant worked some overtime in April and May 2022. She processed her wages for the 28 June (Rp5) with overtime added to her usual weekly wage (£3174.50 and £111). When processing the monthly wages for the 26 July, 22 August, 27 September, 25 October and 25 November she mistakenly took across in the accounts system her wages as being the higher wage paid in June. She was overpaid £555 (5 x £111). Mr Clark authorised the payment of her final wages in December based on this higher monthly figure despite being aware that it was wrong.
53. At the termination of employment she had accrued wages of £8800 in her Tiddly Account.
54. The claimant began looking for work following her resignation. She secured work as an office manager on a higher salary 6 February 2023.

#### 15 **Witnesses**

55. The background is that the main witnesses (the claimant, the two Directors Jim and Jason Clark and Mrs Reekie) had previously been on very friendly terms but now there was mutual ill feeling and antagonism which came across in their evidence.
56. The claimant was generally a credible and reliable witness although there were some aspects of her evidence we felt were exaggerated principally the concerns she now professed to have over various untoward transactions she was asked to make through the company account. We accept that she may have had such concerns but took no steps to raise them and in relation to the division of the scrap money a willing participant and beneficiary.
57. Mr Mackey criticised her for claiming in her ET1 more money than she actually had in the Tiddly account. The claimant provided an estimate of what she thought had been saved and as soon as the respondents lodged details of the account (Rp119) accepted that it was accurate. Given that the claimant

had no access to the accounts system and had to estimate the figure from memory we do not think she can be criticised for this.

58. A more weighty criticism was the fact that she had paid herself too much for  
5 some months. The claimant was clearly embarrassed about this. She put it  
down to a single error she had made. Her wage was generally regular but on  
occasion she put through as overtime occasions when she had to work much  
longer hours for some particular purpose. The claimant had then mistakenly  
10 taken the gross monthly figure (inflated by overtime) to the next month and  
so on without stripping out the overtime element. As soon as she realised this  
is what she had done she conceded the point and did not argue that there  
had been any continuing extra work or any basis for the overpayments. She  
was content to pay the money back. We understood from her that because of  
15 her condition had been anxious about difficulties she had in concentrating  
which she believed was associated with the symptoms she had been  
suffering.

59. We also considered whether she had a clear recollection of the events that  
20 took place on the 15 December especially in the light of her own evidence  
which was that she was at points hysterical. Nevertheless, weighing the  
evidence from the respondent's witnesses, we concluded that in relation to  
the central incident her evidence was to be preferred to that of the other  
witnesses and that it was highly likely that Mr Jim Clark had behaved as she  
alleged.

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60. Jim Clark can best be described a blunt, self-made man and successful  
businessman. He no doubt has many admirable qualities but empathy for  
others is not among them. It became clear to us in his evidence that the  
claimant had correctly assessed that he has little time or respect for those,  
30 unlike himself, who are not able to work as hard or without illness as he has.  
In his evidence he alleged that he had concluded that the claimant was  
always going to leave as he had found a CV prepared by her (he could not

say when and the document was not lodged) and that the claim was engineered to get her compensation. He expressed no sympathy for the claimant's health problems. His evidence dispelled any doubts we had about the claimant's evidence as to his attitude and behaviour.

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61. The day-to-day operations of the business had been dealt with by Jason Clark for some years. He had worked closely with the claimant and she accepted that she had a good relationship with him. He left the claimant very much to her own devices. He candidly admitted that if he had been asked before the claimant's resignation what her approximate annual salary was he would not have been able to say. Her actual salary did not seem an issue as long as the work was done and the office ran smoothly. We suspect that familial loyalty led to him to downplay his father's role in the incident on the 15 December. We did not find him a persuasive witness nor one that was a reliable or particularly credible witness in relation to these crucial events.

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62. Mrs Reekie accepted that she might not have heard the full exchange that took place between her brother, father and the claimant as she had been in her office a short distance away. In hindsight she had various complaints about the way in which the claimant had run the office keeping tasks and passwords for herself for example which she now found highly suspicious. We noted that she had previously had a good relationship with the claimant and had raised no complaints about her even informally to her brother and father. We found her evidence of limited assistance to us and overall not particularly credible or reliable.

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63. Mrs Coutts was unhappy at what she believed was the claimant's role in making her redundant. This occurred a few months before Mrs Reekie joined the office effectively replacing her. We concluded that her jaundiced opinion of the claimant impacted on her objectivity and although an honest witness not one we could rely on.

## Submissions

64. Mr Obi stressed that the claimant's evidence had been consistent and she had acknowledged she had made an error compiling her last few months' salary through a simple mistake. He pointed out that the error was admitted. He pointed to the crucial exchange that had occurred between the claimant and Jason Clark. It was no secret what the claimant's salary/hours were. She would work for as long as it took to carry out the work and this had never been challenged. She had been expected to work when needed after normal working hours. In response to a question Mr Jason Clark acknowledged that he had no idea what the claimant's salary/wages were. He submitted that the counter claim had been put together after the claimant had left to try and bolster the company's position.
65. Mr Obi took the Tribunal though the events of the 15 December and her resignation. In his submission the final straw was the respondent's failure to deal with the grievance and the claimant discovering that she had been cut off from the system. The respondent company had argued that the claimant kept what she was paying herself secret and that Mrs Reekie had no access to the system. This he suggested was disproved by the claimant's evidence and the fact that Mrs Reekie had been sent a digital file showing all the wage payments for the month when the claimant was in hospital. She admitted opening it. It was also evidence that the claimant wasn't hiding her wages as her wages were recorded there. He made reference to the incident in December and to the workings of the 'Tiddly' account. He asked the Tribunal to recall that Jim Clark had laughed when he had been shown the Fit Note prepared by the claimant's GP on the 19 December. She had been signed off for 28 days which shows the GP's view that she was very unwell and that the incident had made a big impact on her. He asked the Tribunal to accept the claimant's evidence on these events.
66. In response Mr Mackey referred the Tribunal to the list of issues he had lodged. He suggested that the evidence of the claimant could not be relied on. Her evidence was contradictory and unsatisfactory particularly when it

related to how she had agreed additional hours and hourly rate. The respondents' witnesses should be preferred if there was any dispute. The respondent's Directors were inexperienced in HR matters and should not be criticised for the short delay in responding to the grievance. Different employers would act in different ways and the respondent's actions following the incident were reasonable. They thought that the claimant had resigned.

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67. The solicitor took the Tribunal to the evidence it had heard. The claimant was highly experienced. She kept close control over what happened in the office excluding others. The respondent's Directors now believe that this was to allow her to pay herself additional wages. There was no basis prior to the incident in December to justify resignation. The claimant was a willing participant in paying the money abroad, taking scrap money and so forth. The respondent's position was threefold the first was that they disagreed with the words attributed to Jim Clark by the claimant (he did not swear), she had raised the menopause first and there was no intention on his behalf to harass the claimant.

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68. If the Tribunal were to make any award in relation to harassment it should be at the lower end of the scale. Her own behaviour needed to be taken into account and the way she had threatened the company with legal action. This was contributory conduct. There was no evidence that the incident had anything other than a minor effect of her. When it was pointed out to him that she had been described by his own witnesses as hysterical and had been signed off for a month from work he responded that the Tribunal would have to apportion the upset between the effects of her existing anxiety condition and the impact of the incident she relied upon. An award should be no higher than £1000.

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69. It might be that the Tribunal would be critical of the way in which Mr Clark senior approached the claimant on the 15 December but he was blunt and

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old fashioned in his approach but calling someone a 'snowflake' was not discrimination and had to be seen in context.

70. Mr Mackey then turned to look at the wages position and the evidence from  
 5 the accountant. All the respondent's witnesses said that the claimant worked  
 no later than about three and there could be no justification for the longer  
 hours claimed. The txt to Jason Clark related to the claimants wish to have a  
 pension. It was understandable that Mr Clark did not pay too any attention to  
 it in relation to hours. Mr Obi had mentioned Mrs Reekie helping with the  
 10 wages and opening up a file with all the wages to be paid on it. This was not  
 enough to prove that the respondent's Directors were aware of what the  
 claimant was paying herself. The claimant had acknowledged that she had  
 overpaid herself for some months and this should count against her credibility  
 as a witness. If she had not resigned this would never have come to light. In  
 15 relation to the Tiddly account it could be accepted that this was accrued  
 wages and should be set off against aby liability for repayment of wages.

### Discussion and Decision

71. We will deal first with the central incident on the 15 December as it formed  
 20 the core reason for the claimant's resignation. The claimant's position was  
 that it amounted to harassment in terms of Section 26 of the Equality Act  
 2010. That section is in the following terms:

#### **"26 Harassment**

(1) A person (A) harasses another (B) if—

25 (a) A engages in unwanted conduct related to a relevant protected  
 characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

30 (ii) creating an intimidating, hostile, degrading, humiliating or offensive  
 environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
- 5 (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
- 10 (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.”

72. The Equality Act contains provisions as to the burden of proof. In the case of **Hewage v Grampian Health Board** [2012] ICR 1054 the Supreme Court held (at para 32) that the burden of proof provisions require careful attention where

15 there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other and that is the situation here.

73. The protected characteristic here was the claimant's sex, which is female. It

20 was accepted by the respondent that references to the menopause, if they had been made in the manner the claimant claimed, could amount to harassment on the grounds of sex as this condition is one that affects only women.

25 74. We firstly had to examine the conduct complained of and whether and it had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals have to examine the whole context and if necessary draw inferences as to intention. In this case we had no difficulty in accepting that the conduct of Jim Clark had

30 the purpose of violating the claimant's dignity. That was clear from the context which was to upbraid the claimant for not being at work and for coming in late that day. We found that Mr Clark had been unaware of the reasons why the claimant had not been into work or was likely to be late (having been snowed

in). He thought that she had not been into work on the Monday of that week. We suspect that he may not have seen her at work that day if he had been in early as was his custom and then out of the yard on business.

5 75. We also formed the view that he was probably unaware of the background or  
at least the full background. He had not seen the photograph she had sent  
about the snow or was aware of the discussion she had with Jason Clark  
about being unwell the day before. From his evidence we detected that there  
seemed to be resentment at the number of days she had off work either  
10 through holidays or sickness or indeed working from home. None of these  
frustrations had been made and the respondent's Directors had no  
complaints about the quality of her work. His intention was not to make some  
innocent remark, as he suggested, but to make his feelings clear about what  
he regarded as excessive time spent away from the workplace. This was a  
15 pet hate of his and she knew that. She was aware of his dismissive attitude  
to people he called 'snowflakes' who did not turn up to work for whatever  
reason. When he asked her if she had managed in the claimant immediately  
realised what he was implying.

20 76. Mr Clark too must have realised that the later remarks he made about strolling  
in, blaming everything on the menopause and trivialising it as only amounting  
to an ache or pain would have been deeply insulting to her. He was aware  
that she had encountered difficulties with symptoms of the menopause and  
was also aware that the company had reimbursed her for a medical  
25 assessment. We would add the claimant was not challenged when she said  
that the amount involved was £250.

77. In practice proving that the effect of any unwelcome conduct has engaged the  
section is often easier. The Tribunal has to consider the perception of a  
30 claimant, the other circumstances of the case and whether it is reasonable  
for the conduct to have had the effect complained of (Section 26(4)). We  
concluded here that the claimant would have succeeded on this basis alone  
even if we had accepted that the remarks made were not intended to cause

the offence which they did. Even if we had accepted that Mr Clark had not sworn, that his tone was neutral or friendly and that he had simply responded to the claimant raising the menopause as a reason for her absence the comments made would still, given the context we have described, have amounted to harassment in our view.

### Unfair Dismissal

78. An employee can, in certain circumstances terminate, the employment contract and claim what is referred to as 'constructive' dismissal. The statutory basis for this is set out in Section 95 of the Employment Rights Act 1996 9 (ERA) as follows:

***"95 Circumstances in which an employee is dismissed.***

***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—***

***(a...***

***(b) ...***

***(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."***

79. In cases concerning constructive dismissal it is clear that the focus should be on the employer's actions and the reasons for those actions rather than the employee's response to what has happened. A finding of constructive dismissal is not inconsistent with a finding that the employee has by their own conduct, contributed to that dismissal.

80. In the case of ***Garner v Grange Furnishing Ltd*** [1977] IRLR 206, the EAT observed:

*'... the conduct of both parties has to be looked at when assessing whether or not the employer's conduct was such that the employee is entitled to ... say that he was forced to go... In our judgment, in which, once the [employment] tribunal reasonably and properly concludes that the relative conduct of both, and particularly of course the conduct of the employer, is such that there was a constructive dismissal, the choice of time, or the choice of incident, may be*

5            *either completely or largely irrelevant when it comes to the degree of compensation. Put another way, once the very difficult assessment is arrived at in favour of the employee arising out of some trivial incident, or the last straw, it seems to us logical that one is forced back then, so far as the contribution is concerned, to look at the conduct of the employee, not with reference to the triviality of the final incident, but over the whole period. Just as the employer may be found liable in a constructive dismissal situation as a result of conduct over a period of time, so it seems to us that the more normal and perhaps more sensible way of assessing contribution should be to pay very little attention to the finality of the situation, but to look at it much more broadly, over the whole period of time.'*

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81.        A constructive dismissal case is determined by applying the law of contract. That was determined in the well-known case of ***Western Excavating (ECC) Ltd v Sharp*** [1978] IRLR 27. It has recently been re-asserted in ***Bournemouth University Higher Education Corporation v Buckland*** [2010] IRLR 445. What causes there to be a constructive dismissal is not conduct of the employee but conduct of the employer which amounts to the employer abandoning the contract (the modern test or expression of 'fundamental breach'). That is conduct which is, centrally, that of the employer. Where the conduct said to be a fundamental breach in that sense is a breach of the implied term of trust and confidence, then not only will it be repudiatory, but by definition there will be no reasonable or proper cause for the employer's behaviour. That is because the accepted formulation of the test for that which amounts to the implied term is that an employer must not conduct itself in such a way as is calculated or likely to destroy or damage the relationship of trust and confidence between employer and employee without reasonable or proper cause (applying the test in ***Mahmud v BCCI*** 1998 AC 20).

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82.        In this case the Tribunal had to consider what had happened during the incident in December. As Mr Mackey submitted that there could be no last straw without a bale of hay meaning some substantial reason for resignation. His metaphor is descriptive and apt. We placed no weight on the earlier incidents raised by the claimant. They were background which gave the Tribunal an insight into the way in which the business operated but the

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claimant was really a willing participant and had raised no real concerns in our view. To this extent Mr Mackey's submission was well founded however, crucially, as we have noted earlier we did not accept his client's evidence about the incident on the 15 December.

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83. As we have noted earlier we considered the whole exchange that had taken place. The language Mr Clark used was insulting and demeaning to the claimant who was in a senior position in the company. It was made in a corridor that others had access to. Indeed, Mrs Reekie heard some of the exchange.

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84. We accepted that the respondent's senior Director acted in the way we have found and was guilty of statutory harassment. We were left with the strong impression he was spoiling for an opportunity to have a 'go' at the claimant. It was telling that during his evidence he told us that the claimant had taken two foreign holidays that year and went on to say how many days they had both lasted. He suggested that she had engineered the resignation to get money perhaps because she was getting married. This argument did not sit well with the submission that the claimant had been keeping close control of the payroll to prevent anyone realising she was being overpaid. If as the respondent company alleged she had been overpaying herself for years then she would have been very foolish to have "engineered" her resignation which would inevitably lead to someone new looking at the books.

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85. We have no doubt that his actions were sufficiently serious to have allowed the claimant to resign immediately. She did not do so. She sought to try and repair the relationship through lodging a grievance. This was not only not acknowledged but the claimant's computer access was cut without any warning or explanation. They had no cause to do so. The claimant we have found did not resign she had gone home. It must have been readily apparent to the respondent that whatever their understanding was she had not resigned. In the circumstances here the claimant is entitled to take these

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actions as amounting to a 'last straw'. It showed that the respondent company regarded the relationship as severed.

### Remedy

5 86. The respondent's solicitor had lodged a counter schedule which we considered. The claimant had not applied for benefits and accordingly the recoupment rules do not apply. Parties were not in dispute as to the calculations used in the claimant's Schedule of Loss. An issue of mitigation of loss was raised by the respondent's solicitor namely whether the claimant had taken time off to go on honeymoon during the period before she started  
10 her new job. She explained, and, we accept this, that she got married over a weekend and took no honeymoon holiday. Accordingly, she would have been in a position to work if offered work. The claimant did in fact get suitable alternative work quickly in our view and we accepted that she had taken appropriate reasonable steps to mitigate her loss.

### 15 Harassment

87. The claimant had joined the respondent company from school. She felt a deep senses of betrayal and upset at the way in which she had been treated by Jim Clark and the comments he had made. We bore in mind that the  
20 claimant was signed off work on the 19 December as quickly as she could see her GP. The GP did not increase the dosage of her medication and this is a factor which we bear in mind. However, there is no doubt as to how upsetting the incident was for her. It would be fair to say that her sensitivity had been heightened because of her condition. Even the respondent's  
25 witnesses described her as hysterical. Although this was one incident we could not properly describe it as being a less serious matter as the **Vento** guidance suggests. We decided that it should be in the lower end of the second band (which at the time started at £9900) and that an appropriate measure of injury to feelings caused should be reflected in an award of  
30 £10,000. The claimant is entitled to interest on that sum. It is calculated as follows: days from incident (15/12/22) to the calculation date (11/6/2023) 208 divided by  $2 \times 0.08 \times 1/365 \times £10,000 = £228$ .

## Unfair Dismissal

- 5 88. The claimant was 48 years old at the date of her dismissal. The effective date of termination was the 22 December 2022. The claimant is entitled to a basic award based on her service, age and capped weekly wage. This amounts to £13,418.50 (13 years' service at £571 of £7423 and 7 at 1.5 weeks at £571 of £5995.50). She is entitled to the sum of £400 for loss of statutory rights.
- 10 89. The claimant was paid until the end of December. She lost wages following her dismissal amounting to six weeks' pay. The last three months' payslips show a weekly wage of £533 (£2291.09 + £2071.50 + £2041.88 /12). This means a net loss of wages amounting to £3198 (6 x £533.) It took some time for the claimant to be enrolled in a new pension and for her new employer to begin making contributions. We therefore accept that she lost £1800 in  
15 pension payments. The claimant sought £50 for driving to two interviews for her new post. We will award her £10 which we think is reasonable in the circumstances given the relatively short distances involved.
- 20 90. We considered whether the claimant was entitled to an uplift for the respondent not dealing with her grievance. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, a Tribunal has the power to increase an award of compensation, by no more than 25%, if it considers that an employer has unreasonably failed to comply with the Code, and it is just and equitable to increase the award. While we accept they should  
25 have acknowledged it the claimant lodged the grievance three days before her resignation which was insufficient time for the respondent company to deal with it. In these circumstances we do not accept that the respondents have acted unreasonably or that it is just and equitable to make an uplift.

91. The sums due to the claimant from the Tiddly account were agreed as being £8880 (R119) and from this bears to be deducted the overpaid wages amounting to £555 leaving £8325.

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<b>Employment Judge:</b>	<b>J Hendry</b>
<b>Date of Judgment:</b>	<b>12 July 2023</b>
<b>Date Sent to Parties:</b>	<b>12 July 2023</b>