



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102609/2022

**Held at Aberdeen on 15, 16 and 17 August 2022; 16, 17, 18, 23, 24 and 25
November 2022 and 6 January 2023**

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Employment Judge N M Hosie

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Miss S Annand

**Claimant
Represented by
Mr K Gibson
Counsel
Instructed by
Mr N Fraser,
Solicitor**

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Samphire Subsea Ltd

**Respondent
Represented by
Mr M O'Carroll,
Counsel
Instructed by
Mrs N Gray,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that:-

1. the unfair dismissal complaint is dismissed; and

E.T. Z4 (WR)

2. the respondent shall pay to the claimant the sum of Seven Hundred and Fifty Pounds (£750) as damages for breach of contract.

REASONS

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1. The claimant, Miss Sharon Annand, brought complaints of constructive unfair dismissal and for breach of contract. The claim was denied in its entirety by the respondent.

10 **The evidence**

Anonymisation

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2. As the claimant alleged in evidence that she had been sexually assaulted at work and there was also evidence about her medical conditions, I advised the parties that I was prepared to consider issuing an Order, under Rule 50(3)(b) of the Tribunal Rules of Procedure, anonymising the parties and the witnesses. The respondent was amenable to my suggestion but the claimant was not. I decided, in light of the claimant's objection and having regard to the ECHR and the principle of open justice, not to issue an Order.

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3. I first heard evidence from the claimant. Sharon Annand. I then heard evidence, on behalf of the respondent Company, from:-

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- Paul Soutar, the respondent's Managing Director.
- Karen Soutar, a Director and joint owner of the respondent Company and Mr Soutar's wife.
- Sarah Whitman, an external HR Consultant who dealt with the claimant's Grievance.

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A Joint Inventory of documentary productions, comprising some 720 pages, was also submitted ("P"), along with a Supplementary Bundle ("P2") and a Chronology of Events.

4. I heard 9 days of evidence which was completed on 25 November 2022. The hearing was then adjourned to enable the parties' Counsel to make written submissions which I was able to consider and reach a decision on 6 January 2023.

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Observations on the evidence

5. There were a number of areas of factual dispute and many issues of credibility arose. In general, my observations on the evidence of each of the witnesses are as follows:-

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The claimant

5.1 Miss Annand gave her evidence over a period of some 4 days. This length of time was not surprising in light of the numerous and varied issues, extending over many years, which she had raised, in some considerable detail, in support of her claim, including evidence about matters which had arisen in 2013, and the vast number of documentary productions. She became distressed on a number of occasions when giving evidence which necessitated short adjournments. It was clear that she is an articulate, intelligent, sensitive, person and had been a valued employee. However, when cross-examined she was reluctant to concede even the most obvious point, lest, I believe, it would be considered, in some way, unfavourable to her claim; her answers were sometimes guarded and evasive and required Counsel to repeat his question and persist until he got a direct answer. I found certain parts of her evidence to be neither credible nor reliable and, significantly, at odds with some of the contemporaneous documents. These aspects of her evidence are dealt with more fully in my reasons, below.

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Paul Soutar

5.2 There were certain aspects of Mr Soutar's evidence which were inconsistent with the documents. However, by and large, he gave his evidence in a measured, consistent and convincing manner. His evidence was consistent, for the most part, with the documentary productions and corroborative, in some respects, of Mrs Soutar's evidence. He presented, in general, as credible and reliable.

Karen Soutar

5.3 Mrs Soutar's manner when she gave evidence was defensive and on occasions she appeared resentful of Counsel's cross-examination questions. However, by and large, her evidence was consistent with the documentary productions, corroborative in some regards of Mr Soutar's evidence and she also presented, in general, as credible and reliable.

5.4 In arriving at this view about the credibility of Mr and Mrs Soutar's evidence, I was mindful that their interests in defending the claim were the same, that they are husband and wife and Co-Directors of the respondent Company and that there was a risk of collusion.

Sarah Whitman

5.5 Ms Whitman, a very experienced and well qualified, HR professional, also presented as credible and reliable. Her evidence was consistent and measured throughout.

The facts

6. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact.

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7. The respondent Company is a supplier of services to the oil and gas sector. The Directors and shareholders are husband and wife, Paul and Karen Soutar. The Company started trading in 2012. The claimant was employed from 12 March 2012 to 21 February 2022. She was employed as the respondent's Services Support Lead. Her role was not client facing. She had a wide range of responsibilities. She was held in high regard by her employer, as evidenced by the significant annual bonus payments she received. Her Contract of Employment was produced (P.53-61). Her hours of work (Section 6) were varied by agreement so that she undertook 9 hours of work Monday to Thursday (8am to 6pm) and 4 hours on Friday (8am to 12noon). She was required, on occasions, to provide support to the respondent's business outwith these working hours, and she did so willingly. She was entitled to claim expenses and/or overtime but never did.

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8. The respondent's "Staff Handbook" was also produced (P.62-168).

9. The claimant's duties included supporting the two Directors with administration and office management, invoicing, payroll support and HR administration and client contract management.

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Mrs Karen Soutar

10. Mrs Soutar also worked in the respondent's offices from shortly after the business started around February 2012. She provided administrative support. In the course of her Grievance investigation in 2022, the claimant referred to Mrs Soutar as her "subordinate"; she also referred to her as her "assistant", but that was not the case. The claimant's Line Manager was Mr Soutar. Mrs

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Soutar is a Director of the respondent Company and does not have a Line Manager. When she started to work for the respondent she had not worked in an office for many years. At the start, the claimant provided her with guidance. However, that became less over the years as she gained experience in the business.

11. Mrs Soutar decided on her own hours of work. She normally started at 11am and finished at 5.30 to 6pm, Monday to Friday.

10 **Alleged assault in 2013**

12. The claimant alleged that in 2013 she was sexually assaulted in the respondent's offices by AL, one of the respondent's Contractors. The allegation was a very serious one indeed. She said that when she was on her own in her office AL came in, *"walked aggressively towards her, pinned her against the wall"*, said, *"I know you want it"* and *"went for his belt"*. She said she feared she was going to be raped. He only desisted and left, she claimed, when she told him there was someone else in the office. He said he would *"be back"*. He returned to her office *"a few days later"* but did nothing more when she told him that there was, *"someone in the office and she would call the police"*. She said she was, *"terrified and scared to leave the office"* as she *"lived alone"*.

13. This allegation was a significant factor in the case. It had ramifications over many years thereafter. However, for the purposes of addressing the issues with which I was concerned, it was not necessary for me to make a finding in fact that she had been assaulted, as she alleged. In any event, I only had the claimant's account and there was insufficient evidence to enable me to do so in relation to a matter which had occurred over 9 years ago. The claimant did make a formal complaint to the Police in 2022 but they took no action against AL because, I understand, there was insufficient evidence.

14. The issue for me was the state of knowledge of the matter of Mr and Mrs Soutar, the Directors of the respondent Company. I was faced with a direct conflict in the evidence I heard in this regard.
- 5 15. The claimant accepted that she had not told either of them about the assault at the time and nor did she report the matter to the Police. She claimed that she did not do so as they were having "*personal difficulties*"; it was a new business; they were "*away at the time in South Africa*"; she didn't want to give the respondent Company a "*bad reputation*".
- 10 16. She claimed that she first told Mrs Soutar about the assault at a "*Christmas night out*" in a local restaurant on 13 December 2013. She claimed she told her in the premises' toilets.
- 15 17. She claimed that Mrs Soutar told her "*the following Monday*" that, because of the seriousness of the allegation, she had told Mr Soutar, her husband and fellow Director. The claimant also alleged that Mrs Soutar told her she wouldn't be left alone in the offices with AL in future and if Mr Soutar wasn't going to be in the office, she would come in earlier than her normal 11am start time.
- 20 18. These allegations about the extent of their knowledge were strongly denied by both Mr and Mrs Soutar. Their evidence was that they were not aware of the claimant's allegation that she had been seriously assaulted by AL until
- 25 July 2021. This was when Mr Soutar asked the claimant to assist in securing an offshore position for AL with the oil and gas services Company, TAQA; and also when they were made aware of the terms of the claimant's Grievance which she raised on 27 September 2021. I have detailed what happened then, below.
- 30 19. I decided that the evidence of Paul Soutar and Karen Soutar was to be preferred. In my view, there was a substantial body of evidence, both oral and documentary, to support my view. I find, in fact, therefore, that neither

Paul Soutar nor Karen Soutar were aware of the claimant's detailed allegations about being assaulted by AL and the seriousness of the allegations until, at the earliest, July 2021, over 8 years later.

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20. There were a number of reasons for this. As I recorded above, Mr and Mrs Soutar both presented as credible and reliable; significantly, their evidence was not only corroborative, to an extent, but also consistent with the contemporaneous documents; and the claimant's conduct at the time and for some time after was inconsistent with her having been seriously assaulted by AL.

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21. Mrs Soutar did have a "*vague recollection*" of the claimant telling her something about AL but she could not remember when and it was not anything like the seriousness or in the detail she now alleges. Mr Soutar also only had a vague recollection of an issue but he also had no knowledge of the detail or the seriousness until July 2021.

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22. When Mr Soutar was interviewed, in December 2021, in connection with the claimant's Grievance and asked, "*I believe it came to your attention, because she shared with Karen at a Christmas event*" he replied, "*that's probably right, but what I'm struggling with a little bit is the issue with AL*" (P.268). However, his evidence at the Tribunal Hearing was quite clear and unequivocal, particularly in cross examination, that he had not been told about the "*assault*" by Mrs Soutar between 13 December 2013 and 15 December 2013, as the claimant alleged. He said in evidence, "*I have a vague recollection that there was an issue but certainly not that detail*".

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23. Another factor which supported my view that neither Mr nor Mrs Soutar had knowledge of the alleged assault until July 2021, was the unequivocal and convincing evidence of Mr Soutar that if he had known the details of the alleged assault at the time and of an allegation of attempted rape in his offices, he would have treated that very seriously indeed. The matter would

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have been documented; AL would have been suspended immediately and not allowed into the offices; and he would have encouraged the claimant to report the matter to the Police.

5 **AL's work in the respondent's offices in 2015/2016**

24. As it transpired, AL returned to work in the respondent's offices in 2015 and 2016. This was another factor to which I had regard in relation to the state of Mr and Mrs Soutar's knowledge. The claimant tried to play down her contact with AL at that time. I did not find her evidence about this credible. It was inevitable, given the configuration of the relatively small offices, that she would encounter him (P.2/3/4).

25. Further, there was produced a "Summary of AL's engagements" with the respondent (P.482). This revealed that in a period of some 15 months, from 5 August 2015 to 26 August 2016, AL worked in the respondent's offices for a total of around 192.5 hours. Although this was challenged by the claimant (she alleged he only worked for about 40 hours (P.17)), I was satisfied that the Summary was reasonably accurate. Both Mr and Mrs Soutar spoke to its preparation and that it had been compiled from AL's timesheets.

26. Notwithstanding the claimant working in the same offices for AL for all that time and inevitably having contact with him, she raised no concerns.

25 **Change in the claimant's evidence**

27. Another factor to which I had regard, so far as the credibility and reliability of the claimant's evidence was concerned, was that she had changed her position in relation to the date of the alleged assault. In the claim form she averred that it was, "*in March 2013*" (P.17), a position she had maintained throughout her Grievance which started with her e-mail of 27 September 2021 (P.214).

28. However, when the respondent included in a supplementary bundle of documents (P2) a photograph of the claimant smiling and having a drink in the company of AL at the respondent's first anniversary party on 9 May 2013 (P.2/30), she changed her position. When the claimant saw this, only shortly
5 before the start of the Tribunal Hearing in August 2022, she changed her position markedly and claimed instead, in evidence, that the assault had occurred in the Summer/Autumn of 2013. Although she said in evidence that the incident was "*seared in her memory*", she claimed she had made a mistake about the date and only realised this when she saw the photograph.
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29. There was also included in the Joint Inventory an e-mail from the claimant to AL on 31 May 2013 arranging for him to have a set of keys for the office and explaining how to gain access (P.488) which was somewhat at odds with her contention that she had no desire to engage with AL.
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30. The claimant had also alleged that the assault occurred when Mr and Mrs Soutar were "*away on holiday in South Africa*" and in the course of her Grievance interview she had referred to an e-mail which she said she received from Mr Soutar on 17 March 2013 with handover information prior
20 to his departure to South Africa (P.475).
31. I also had unequivocal, corroborative, evidence from Mr and Mrs Soutar, which I accepted, that the only holiday they had abroad in 2013, before they went abroad at Christmas time, was their holiday in South Africa which was
25 in March 2013.
32. I did not consider the claimant's evidence that the date of the alleged assault was "*Summer/Autumn of 2013*" to be either credible or reliable. This was another factor to which I had regard in deciding that neither Mr Soutar nor
30 Mrs Soutar had knowledge of the alleged assault until July 2021. It also called into question the credibility and reliability of the claimant's evidence in general.

Anniversary party in May 2013

33. Another part of the claimant's evidence which I did not consider to be either credible or reliable was her claim that there were some 100 people at the anniversary party in May 2013 when she was photographed in the company of AL (P.2/30). There was produced an e-mail from Mrs Soutar on 30 April 2013, copied to the claimant, making arrangements for the party in which she advised that there would only be 25 people attending (P.719); this was confirmed in evidence by Mr and Mrs Soutar.

34. When cross-examined, the claimant said "*it was before the sexual assault*" as by then she had changed her position on the date. However, there was no explanation as to why she had grossly exaggerated the number in attendance, although of course AL was one of the 25 attendees.

Possible assignment for AL in 2021

35. For the sake of completeness, so far as the issue of Mr and Mrs Soutar's knowledge of the alleged assault was concerned, I record what occurred in July 2021.

36. On 8 July 2021, Mr Soutar sent an e-mail to AL, copied to the claimant, in connection with a work opportunity for him at "TAQA". His request for the claimant to assist was a normal one, part of her duties (P.321).

37. Mr Soutar's e-mail did not suggest that he was aware of any issues between the claimant and AL. However, the claimant responded later than day by e-mail as follows (P.321):- "*I am unable to support this. I did not officially report AL for what he did to me in the office as I was concerned for Samphire's reputation. The assault triggered a past trauma and it has taken considerable time to recover from both. Only in recent times while dealing with this have I accepted that my safety and health should have been my priority. I would*

appreciate if you would note my concerns as I would not wish for similar to happen to another female.”

- 5 38. This was the first time that Mr Soutar was made aware of the allegation that AL had assaulted the claimant and her e-mail came as a complete surprise to him. He responded by e-mail shortly thereafter as follows (P.321):-

“Feedback noted and accepted.

10 *Can you please summarise the options we have for first thing tomorrow morning for my review and decision. I will then likely expect you to issue a mail with options to TAQA ideally before you depart for the day, or I can cover later if necessary. Can you complete this CV as requested.*

15 *Should this progress, I will deal with the resource directly which shall be all remote.”*

- 20 39. Mr Soutar was on holiday at the time and did not consider it appropriate to get involved in e-mail correspondence about such a sensitive matter. He said in evidence, *“It needed a face-to-face in the office.”* However, that did not happen. The claimant was absent from work on 12 July due to an adverse reaction to the Covid vaccine; she returned to work for the morning only on 13 July; and on 14 July she started sick leave due to “stress at work” (P.342). She did not return to work before her resignation on 21 February 2022 (P.433).

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Incident involving the claimant and Mrs Soutar on 18 February 2020/ “Breach of confidence” allegation

5 40. This was another aspect of the case where there was a conflict in the evidence and issues of credibility to be resolved.

10 41. The claimant maintained that Mrs Soutar’s behaviour had become “*increasingly challenging*”. She claimed that when Mrs Soutar came into the office mid-morning on 18 February 2020 she, “*had a go at her*” about the respondent’s website. Updating the Company’s website had been an issue for some time but it was not a priority and there was no budget for doing so. Later that morning, the claimant sent Mrs Soutar copies of previous e-mails to remind her of what had been agreed (P.273).

15 42. The claimant then maintained that the situation between her and Mrs Soutar that day “*became worse*”. She alleged that Mrs Soutar, “*came storming into her office*”, complaining that she couldn’t access ‘Bank Line’ and refused to process payment of an Invoice, which had to be paid. She claimed that Mrs Soutar was “*very hostile*” and that when she felt a panic attack coming on she left the office. She thought about going home but decided to return, although she was upset. The claimant said that she went back into her office without speaking to Mrs Soutar at reception and closed the door. She denied that she slammed the door, as Mrs Soutar claimed. She said that Mrs Soutar then 20 “*barged*” into her office and asked why she had left the offices. She said that she told Mrs Soutar, “*just leave it*” and tried to diffuse the situation as she didn’t want to tell her that it was her behaviour that was, “*the problem*”.

25 43. She said that it was “*tricky*” for her. Although Mrs Soutar was her 30 “*administrative assistant*”, she was also a Director of the respondent Company and her Line Manager’s wife.

44. Later that evening, the claimant received an e-mail from Mr Soutar in which he referred to her having *“a challenging day today”* and made reference to a *“robust discussion”*. He suggested meeting *“first thing tomorrow”*. The claimant advised him she was happy to do so (P.272).

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45. The claimant met Mr Soutar the following morning in his office. It was clear he was aware that there had been an incident the previous day between the claimant and his wife. She told him that she found Mrs Soutar’s behaviour *“challenging”*. She claimed that she also told him that she was *“at a loss to know how to deal with Mrs Soutar’s behaviour”*. However, Mr Soutar said he *“couldn’t take sides”* as she was his wife. The claimant said she was *“trembling and crying”* and she left as she *“feared a panic attack”*. She said she regretted being *“so open”* but as it was *“sort of an informal Grievance”* what she said should have been treated in confidence. However, she claimed that Mr Soutar told Mrs Soutar about their conversation in breach of that confidence. She claimed that that could be inferred from a private meeting she had with Mrs Soutar on 24 February 2020, which Mrs Soutar had requested.

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46. At that meeting Mrs Soutar told her she was going to work from home in future. The claimant said she apologised for being *“short”* with Mrs Soutar although her behaviour had not warranted this and she expected Mrs Soutar to also apologise but she did not do so. When Mrs Soutar told her that she had decided to work from home, the claimant said that she felt, *“undermined by this as there had been no prior discussion”*. She also said that she was concerned about who would cover Reception if Mrs Soutar worked from home, as that was part of her duties.

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47. However, Mrs Soutar’s account was quite different. She recounted in evidence what she had said to Sarah Whitman on 14 February 2022 in connection with the claimant’s Grievance (P.590-592). She confirmed that what she said then remained her position. The following are extracts from Ms Whitman’s report:-

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Sarah

So if we fast forward, you'd worked with her for quite a long time then I understand there was an incident in February 2020, just before where everybody went into lockdown.

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Karen

That's correct.

Sarah

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Can you give me your recollection of that incident?

Karen

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It was a pretty normal day. I think if I recall, I was trying to make a new bank payment to a Company to pay them. I logged into RBS Bank Line which is for bigger payments, and it looked different. Obviously, the bank had done a bit of a revamp of their website and it was different to how it had been previously and I was having difficulty setting up this new Company to pay. I tried a few times. So I entered Sharon's office and asked her if she could give me some guidance. She wasn't happy and started shouting at me, telling me she didn't have access to Bank Line.

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I was quite surprised and shocked by her tone and how loudly she spoke to me. It was a normal question and I wouldn't have thought that she would have responded to me in that way. I was quite concerned. I asked her if there was anything wrong? And she said to me she was finding the work challenging. I responded I was sorry to hear that and asked if she had told Paul about it. I think she replied that she hadn't. I just went back to my desk and not long after that she left her office, got her coat from the stand and left the office for 5 to 10 minutes. She then came back to her office and slammed the door.

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Sarah

She slammed the door as she said she just closed it normally.

Karen

It was definitely a slam. Why would she say she closed the door normally? That seems a bit odd. Not long after that she e-mailed me because she had arranged a meeting with the cleaning Company to go round and identify what needed cleaned. She asked me if I could cover it and I replied that I would and I showed the cleaning Company around that afternoon and that was that.

Sarah

So you would say that it was quite an unusual reaction from her?

Karen

Unusual? Yeah, that's why I was concerned, and I asked what was wrong and she said she found the work challenging.

Sarah

In response to a raised voice, you didn't raise your voice?

Karen

No, not at all.

Sarah

And I understand the next day she came in and apologised or sent you an e-mail to apologise?

Karen

I actually didn't come into the office for a few days after that, because I was quite taken aback by her behaviour. She WhatsApped me, apologising for being short with me and I replied that I was reviewing my situation at Samphire. She replied that she was sorry to hear that after 8 years and she asked me to come in and have a meeting with her and I just said yes, that would be fine. It was on the 24th February I came in that afternoon and we had a meeting which didn't last very long. I basically said to her that I had decided to work from home and I could tell by her reaction, that she didn't like

what she was hearing. She asked me why this had been decided without her. I confirmed that it had, I explained that I'll be doing my work, it's just I preferred to work from home and Paul and I had discussed this and this was what we had decided.

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I also remember the question I asked her just before the meeting finished was "Would you have spoken to anyone else in the office the way you spoke to me and she replied "No". I said well, clearly you have got an issue. After that she never commented on my reply and did not raise anything else. The meeting concluded.

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Sarah

It was your decision to work from home. I know a few weeks later everybody was home working but at this point I presume that this was a decision you made as a Director to change your work location to home?

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Karen

Yes, I think that meeting showed me she had no respect for me. I thought we were friends but who on earth shouts at someone for no reason at all? She admitted she wouldn't have spoken to anyone else in the Company that way so why am I any different? Now I know it's because she regarded me as a subordinate and I never ever thought she would have regarded me in that way. Subordinate is not a term that I would choose to use to describe anyone. This also reflects on her "above her station" status. This is becoming much clearer now."

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48. It was by no means easy to resolve this conflict in the evidence as I only heard direct evidence about the incident on 18 February from the claimant and Mrs Soutar. I looked, therefore, for any other evidence which might support either version of events. I decided that Mrs Soutar's account was to be preferred. The reasons for this were primarily that Mrs Soutar presented as a credible and reliable witness; and the claimant's evidence was inconsistent with the contemporaneous documents and, in particular, WhatsApp messages she

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sent to Mrs Soutar following the incident which were also more consistent with Mrs Soutar's account (P.468-469):-

"19 Feb 2020

5 *Hi Karen, I hope that you are ok today. Sorry for being short with you yesterday. I don't want there to be any awkwardness between us so let me know if you'd like to chat about it.*

Hi Sharon, just letting you know that I won't be coming into the office.

10 *Hi Karen. Ok, sorry if yesterday has influenced that.*

21 Feb 2020

15 *Hi Karen. I can only guess that you have not been in work because of what happened on Tuesday. Please let me know if there is anything I can do to make it easier for you to be in the office. I hope you have a good weekend.*

Hi Sharon. Yes you are correct. I haven't felt much like coming into the office. I'm really disappointed. I'm reviewing my situation in Samphire. Have a good weekend too.

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Hi Karen. I'm sorry to hear that you feel that way, especially after 8 years. If you would like to chat through, inside or outside of the office, then I would be happy to do so. I hope that you can relax over the next few days."

25 49. Mrs Soutar's evidence was also consistent with WhatsApp messages she sent to her husband at the time (P.2/31/32):-

"18 Feb 2020, at 16:22

30 *Hiya. I need to have a chat in private with you regarding Sharon. She had a go at me today & she is finding the work challenging. Her words. I wouldn't mind heading off earlier today. x*

Am packing up. x

24 Feb 2020, 15:31

Hiya. I have told her. Went as well as expected. I got the impression she isn't all that pleased with my decision. Said that she doesn't have a say in it & she would not have spoken to anyone else here that way. I did ask her that but kept it neutral & I didn't go over last week about the bank thing & website. Didn't mention that & I said I accepted her apology. x"

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- 10 50. While I was mindful that the claimant found herself in a difficult situation as Mrs Soutar was a Director of the respondent Company and wife of the Managing Director, Paul Soutar, who was the claimant's Line Manager, I was not persuaded by the claimant's assertion that she didn't really have to apologise and that by doing so, she was trying to be conciliatory. Her
- 15 apologies and the tenor of her messages does not suggest that Mrs Soutar was at fault in any way and the claimant did not ask Mrs Soutar to apologise.
51. Mrs Soutar worked from home from 19 February 2020 and after that only went into the respondent's offices occasionally, for no more than 15 minutes
- 20 at a time, to do photocopying.

Lockdown

- 25 52. On 23 March 2020, the respondent's offices closed due to the Covid Pandemic lockdown.

March/April 2021**Further alleged breach of confidence**

5 53. During the lockdown the claimant had limited contact with Mrs Soutar by way of “Teams” video meetings and e-mail. However, she said, in evidence, that she was “frustrated” with Mrs Soutar and that this was making her anxious.

10 54. At the end of March 2021, the claimant had the following e-mail exchanges with Mr Soutar (P.510-508):-

“31 March 2021 07:49

Hi Paul

15 *I need to take some time to day to manage my health. The work situation has triggered anxiety and the intense symptoms impair my ability to function. I would usually try to mask this but feel unable to continue. I will try to cover priorities.*

31 March 2021 at 07:55

20 *Morning Sharon*

I’m sorry to hear that. Your health is the most important issue here so please take what you need. Happy to have a call later to discuss what you need in terms of time off and whether we can do anything to assist.

25 *31 March 2021 08:05*

Hi Paul

30 *It would be good to discuss the ongoing work situation as it is directly impacting services and my health. I am not sure I can do this today in a way that would be constructive, perhaps in a few days or next week when my head is clearer.*

31 March 2021 08:10

Yeah that makes sense lets push it until at least next week.

01 April 2021 08:41

5 *Hi Paul*

Just checking in I'm still feeling highly anxious. I will however do my best to cover the priorities.

01 April 2021 08:54

10 *Morning Sharon,*

Understood – feel free to try to work more flexibly if that's possible ie: go ahead and take an hour out every few hours if you think that would help or do what you think is best for you. Maybe a few days out would also help, but that's your call. Just let me know that state of play so we can pick up anything that is required. If you think there is any value in professional support, please let me know so we can discuss.

01 April 2021 09:50

Hi Paul

20 *Thank you for your message. I have been using a solution focused approach to manage the symptoms. I have considered medication. However, it comes with many side effects. When I feel up to it, I would like to request a confidential discussion regarding the situation of Karen and I working together which is the cause of my anxiety.*

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01 April 2021 09:57

Hi Sharon

Ah I see. Yes of course, happy to listen to the feedback when you feel able.”

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55. On 14 April 2021, the claimant sent a further e-mail to Mr Soutar (P.508) marked "Confidential" in the following terms:-

5 *"I have attached Statement of Fitness for Work, dated 7 April 2021, covering period 31/03/2021 to 30/04/2021 (P.334). The document was amended from the original which stated I was 'unfit for work' which I feel is not where I am currently at. I had a follow-up with my G.P. yesterday, she agreed that my anxiety is situational and directly related to the working relationship with Karen. The doctor recommended that I take time out of my working day when necessary to manage my symptoms and to arrange a meeting with you when I feel up to it. We discussed medication and the G.P. supported my decision not to go down this route due to side effects and it not being a long-term solution."*

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- 15 56. Mr Soutar replied shortly thereafter as follows (P.508):-

"Thanks for the update on your situation I'm glad to hear that you feel you can manage the situation without meds. Doctor feedback noted and respected I'm happy for this to be effected each day as required in the short-term."

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Given the feedback, the one thing that perhaps comes to mind that may help is better partitioning/responsibilities of services between yourself and Karen such that there is less overlap and as such less interaction. Happy to hear your thoughts and input before we decide on anything."

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57. On 15 April 2021, the claimant received the following e-mail from Mrs Soutar which was copied to Mr Soutar (P.292):-

"I would like to arrange a meeting to discuss work going forward. Please can you let me know if you're available this afternoon."

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58. This upset the claimant. She said that she had requested a meeting with Mr Soutar *“in confidence”*; she told him the problem was Mrs Soutar; she was trying to manage the situation with Mr Soutar, not Mrs Soutar; It was unreasonable for her to meet Mrs Soutar when she was the cause of her anxiety.

59. The claimant did not reply to Mrs Soutar’s request for a meeting. Instead, she e-mailed Mr Soutar and had the following correspondence with him (P.292):-

10 *“Hi Paul*

I cannot deal with this at the moment. I should be signed off work with anxiety and only working because I feel anxious if work is not being covered. I fight panic attacks on a daily basis.

15 *This is an entirely unreasonable request and I am hugely disappointed that this would even be considered.*

Hi Paul

I am done. I am shaking uncontrollably at my desk. This is not acceptable.

20 *Hi Sharon*

I’m sorry to hear that, please take time out as you need.

25 *For reference, Karen was keen to discuss her stepping down from most duties (overlapping areas) to allow you the space to work services and avoid the conflict that is clearly in play and affecting everybody.”*

60. Mr Soutar denied sharing *“confidential information”* which the claimant had provided, with his wife. He said that Mrs Soutar wanted to speak to the claimant about *“stepping down”* which she did in April when there was a Company restructure.

61. Mrs Soutar also said that her husband did not tell her that the claimant had alleged that she was causing her anxiety and confirmed that she had wanted to meet her to discuss “*stepping aside*”. She claimed that the timing of her e-mail was no more than “coincidence”.

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62. Although the timing of Mrs Soutar’s e-mail so soon after the claimant’s allegations did appear suspicious, I was unable to find, on the evidence, that Mr Soutar had told his wife about the terms of the claimant’s confidential e-mail of 14 April 2021 (P.508) at that time.

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63. However, in my view it is highly probable, having regard to the fact that they were husband and wife, that all three of them worked together and that Mrs Soutar had decided to no longer work in the office due to the claimant’s conduct on 18 February 2020 that Mr Soutar did tell his wife, at some stage, that the claimant was complaining about her.

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64. In any event, I am satisfied that the meeting requested by Mrs Soutar was about her “stepping down”. However, it never took place and the focus of my attention was on how the claimant was treated by Mr and Mrs Soutar.

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Company restructure

65. As a consequence of a growth in the respondent’s business, with the resultant increase in administration and a need to update outdated systems, Mr Soutar decided that a restructuring of the business was required. In his view, this was essential. When the claimant returned to work on 19 April 2021 after the lockdown, Mr Soutar had discussions with her and they agreed on what was required by way of restructuring.

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30 66. One of the main changes was a decision to outsource “finances” which was “very manual”, to an external Accountant, Stephen Milne. This was about 10%-15% of the claimant’s work. It was done after discussion with the claimant and with her agreement. It relieved her of time-consuming manual

work. Mr Soutar also wanted to clarify the duties of the claimant and Mrs Soutar so that each knew exactly what they were required to do.

5 67. On 27 April 2021, Mr Soutar sent an e-mail to the claimant, copied to Mrs Soutar, with a summary of the changes (P.283).

68. The claimant replied by e-mail marked "Confidential" on 30 April 2021 (P.282/283). She requested a meeting with Mr Soutar to further discuss the changes and by e-mail on 2 May 2021 he advised her that they could utilise the "*Monday catch-up slot*" (P.282).

69. Following that meeting, Mr Soutar sent an e-mail to the claimant on 4 May 2021 with details of what had been agreed (P.519) and the claimant provided her comments by e-mail on 6 May 2021 (P.302).

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Spreadsheet showing role allocations after the restructure

70. The claimant prepared a spreadsheet showing everyone's role allocations following the restructuring (P.293/294). Mrs Soutar's name only appears twice, it being agreed that she would, "*step aside from the support business area*". Although Mr Soutar did not accept the claimant's allegation that she was being "bullied" by Mrs Soutar, there was clear conflict between the two of them and Mr Soutar thought it best to segregate them and get Mrs Soutar to deal with the Accountant.

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Recruitment of new employee

71. Mr Soutar also decided that another employee would be recruited, on a part-time basis, "*to fill the gap left by Karen*". It was agreed that the claimant would recruit and line manage the new employee. The claimant drafted a job description which was approved by Mr Soutar with some additions (P.312-314). However, this did not happen as the claimant was signed off work on

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15 July 2021 due to ill-health (stress at work). She did not return to work before her resignation on 21 February 2022 (P.433).

Claimant's access to Mr Soutar's "Outlook"

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72. Around 27 April 2021, following Mrs Soutar "*stepping down*", Mr Soutar restricted access to his "Outlook Calendar" which contained details of both his business and personal appointments, to only himself and his wife.

10 73. Prior to this, the claimant also had full access but after the change she could only see if he had business appointments. This change was made without any discussion with the claimant. There was correspondence on 27 April 2021 between Mr Soutar and the claimant about this (P.305). This ended with the claimant sending the following e-mail to Mr Soutar:-

15 *"Hi Paul*
You didn't need edit access. Just sometimes I am asked which meeting you are in. I can advise times you are busy/free and direct people your way."

20 Subscriptions

74. At their "*virtual meeting*" on 3 May 2021, Mr Soutar explained he had decided to "*transition over*" monthly fixed expenses and subscriptions from the Company credit card to direct debit payments.

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75. Prior to this, the claimant had been responsible for managing these payments. It is clear from Mr Soutar's e-mail of 4 May 2021 to the claimant that she was aware of what Mr Soutar proposed (P.302). This was why on 20 May 2021 the claimant received an e-mail to advise that the "user account" had been disabled (P.310). Mr Soutar explained this to the claimant in his e-mail of 11 May 2021 (P.520). It was to do with the "*financial tidy-up*" which

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he had decided was required. Transactions on the claimant's business credit card were moved to Direct Debits. Mr Soutar could not understand the claimant's concern about this as it had been discussed and agreed at their meeting on 3 May 2021.

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Alleged breach of data protection

76. As I recorded above, the claimant was signed off work due to ill-health on 15 July 2021 and she did not return to work after that. On that date, Mr Soutar asked her to set up her, *"out of office, to re-direct any correspondence to Karen"*, which she did (P.346). Around that time, an e-mail was also circulated in the office to advise staff that the claimant was absent on sick leave. The nature of the claimant's illness was not given.

77. The claimant became aware of this. She felt it was inappropriate to disclose that she was on sick leave and that a simple intimation that she was off work would have sufficed. She considered this to be a *"breach of confidentiality"*. On 15 July, she sent an e-mail to Mr Soutar to complain (P.541).

78. Mr Soutar replied later than day as follows (P.540 - 541):-

"Thank you for providing a copy of your sick note. I am very sorry to hear that you are suffering from work related stress and I want to do what I can to assist your recovery. Please do just let me know if there is anything that we can do to assist with this.

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I note that your sick note expires on 4 August and it would be helpful if you could keep me updated with how you're feeling before then. I will be sure to contact you just before 4 August to see how you are feeling.

In terms of the e-mail to the team, the intention was simply to advise them that you would be out of the office so that they knew to direct any enquiries to either Karen or I. It was well-intentioned but I appreciate that it could

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perhaps have been worded slightly differently and I apologise if that has caused you any unnecessary upset whilst you have been unwell.

5 *In addition, I just wanted to mention that you are of course not expected to carry out any duties whilst you are off unwell. Given that you are off with work-related stress I want to make sure that I do what I can to assist you and therefore I will temporarily suspending your access to our systems, only whilst you are off sick, just to ensure that you focus wholly on your recovery. I hope this will alleviate any work pressures that you may feel.*

10 *Hopefully this will give you some space so that you can make positive progress with your health.”*

Stress Risk Assessment

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79. On 18 August 2021, Mr Soutar sent the claimant a Stress-Risk Assessment Form for completion (P.551/550A/550B). The reason for this was a desire on Mr Soutar’s part to better understand the cause of the claimant’s stress so that any work-place issues could be properly addressed. Mrs Soutar had
20 *“stepped aside”* some time before and Mr Soutar felt he had insufficient information. He explained this to the claimant in his e-mail of 10 September (P.556):-

“Thank you for forwarding your latest fit note and I am sorry that you are still unfit to return to work.

25 *As we have explained previously, in order to better understand your absence and to consider whether there are any practical steps we may take as a business to assist in your return to work, we would be grateful if you could please return the stress risk assessment before your next scheduled update.*

30 *If we do not receive this, so that we may ensure that we are meeting our duty of care towards you, we may require to arrange a Company medical or, with your permission, obtain additional insight from your medical practitioner to supplement the detail provided on the fit notes.*

I am sure you will agree that the most useful form of information will be what you will be able to share yourself and we would very much appreciate you completing the stress risk assessment, attached again for your ease of reference.

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As always, if a call to discuss any of your concerns may be beneficial, I would very much welcome a chance to speak with you at a time convenient to you.”

80. However, in her e-mail of 27 September 2021, which was treated as a formal Grievance (P.460-462), the claimant said that she could not see the relevance of the “Stress Questionnaire” and said, *“I do not expect to be asked to do anything further with that”*.

81. Shortly after that, Mr Soutar wrote to the claimant’s G.P. to request a medical report (P.2/34-37). The report was sent to Mr Soutar around 29 November 2021 (P.570/571). The following are excerpts. These include, by way of corresponding numbered paragraphs, responses to the questions posed by Mr Soutar (P2/36/37):-

20 *“Thank you for your request for a medical report regarding Sharon Annand. She has been a patient at Albyn Medical Practice since 17/07/2015 and I have been looking after her myself since July 2021. Throughout her time as a patient at Albyn Medica Practice, Sharon has received help for long-standing issues with situational depression and anxiety, however, in a more recent time frame, this seems to be an acute worsening of her stress due to*
25 *situational developments from her work environment.....*

1.2 *No, Miss Annand does not have a physical impairment or mental impairment.*

30

1.9 *Miss Annand’s Company sick pay is due to expire in two months. Do you consider it probable that Miss Annand will return to work within this period?*

5 *Relates to my impression whether Miss Annand will be able to return to work in the two months period before the Company sick pay period expires. Unfortunately I cannot give a definitive answer on this, although I would suggest that if there are no further adjustments made to her working environment which seems to be contributing to her stress then this would be unlikely.*

10 *1.13 Is the health problem likely to recur or affect future attendance, and if so, what may be the exacerbating factors which may cause this?*

15 *This refers to the likeliness of this health problem recurring in the future. Miss Annand has had discussions with various doctors at our Practice for a number of years regarding her mental health which does appear to be a long-standing problem. She seems to have been coping rather well with her mental health for a number of years, however like any mental illness, this can be triggered by various external factors. I therefore cannot comment on whether it can recur as this would be entirely situational as per future events. Most recent situational anxiety related to issues of work, Miss Annand was initially happy for a maybe fit to work letter as opposed to being fully signed off as felt that changes at work would help her to continue with her work place.”*

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Claimant's Grievance

25 82. As I recorded above, the claimant's e-mail of 27 September 2021 was treated by the respondent as a formal Grievance (P.460-461). The Grievance was outsourced to a third party, Sarah Whitman, who has extensive experience of HR matters. She has a law degree, a Masters and a formal qualification in Personnel Development after two years study under the aegis of the

30 Chartered Institute of Personal Development (CIPD). She has undertaken numerous internal courses during her periods of employment and holds a qualification in psychometric testing. She had also spent a considerable amount of time in employment in HR departments before setting up her own

consultancy (Delfinity Ltd) in 2016. Her prior experience was as a generalist before working for 10 years in FTSE 250 listed Companies, including Centrica where she was Head of HR.

- 5 83. When she gave evidence at the Tribunal Hearing, Ms Whitman presented as credible and reliable. She described the claimant's Grievance as "*incredibly detailed*".

Grievance meeting on 25 November 2021

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84. Prior to the meeting, as requested by the claimant, Ms Whitman had provided her with a list of the questions she would be asking (P.218-219). As the claimant had advised that she preferred not to be on video, the meeting was conducted by "Zoom", using audio only. The meeting was recorded. The claimant was accompanied by a friend, Richard McKim. The meeting lasted some 2 hours 33 minutes. The claimant recorded the meeting clandestinely.

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85. The "App" which Ms Whitman used to record the meeting has the facility of typing the recording. Inevitably, there were some errors in the initial transcript. Accordingly, Ms Whitman went through the transcript and edited it so that it "*made sense*" before she sent it to the claimant for approval.

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86. There were numerous telephone conversations and several e-mail exchanges between the claimant and Ms Whitman after their meeting on 25 November and a further face-to-face meeting on 14 December at the claimant's house which lasted about an hour. Around 4 December, Ms Whitman had received some 400 pages of documents from the claimant which she read before the meeting on 14 December.

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87. The claimant was concerned that the editing of the transcript which Ms Whitman had done was more than just by way of clarification. She requested a copy of the original transcript which was provided to her.

5 88. The claimant then returned the transcript with her annotations in red (P.220-256). At the end of the meeting, the claimant thanked Ms Whitman for *“making difficult processes as easy as you can”* (P.256).

10 89. Ms Whitman then interviewed Mr Soutar, also by “Zoom”, on 6 December 2021. He had not asked for a list of Ms Whitman’s questions in advance and none was provided. The meeting lasted about an hour. A transcript was produced (P.257-271).

Ms Whitman’s report

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90. Ms Whitman issued her Report on 21 December 2021 (P.175-213). A number of Appendices were attached. She did not uphold any of the claimant’s Grievances.

Grievance appeal

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91. The claimant appealed against the outcome of her Grievance (P.392/393).

25 92. The appeal was also outsourced to an independent external agent. David Burnside of Burnside Legal Services Ltd, a retired solicitor with expertise in employment law, was appointed to consider the appeal.

30 93. Having been allowed two extensions to the period within which to submit her appeal, the claimant set out her grounds of appeal in more detail in her e-mail of 19 January 2022 (P.395-398).

94. Mr Burnside's remit was not to re-hear the Grievance, but rather *"to consider whether or not the outcome in the Delfinity report was fair and reasonable"* (P.418).
- 5 95. The claimant was the only person interviewed by Mr Burnside. Mr Soutar was provided with a copy of the grounds of appeal. His comments, which he confirmed in evidence remained his position, are to be found in red on documents P.402-408.
- 10 96. Mr Burnside issued his Report on 4 February 2022 (P.417-422). He upheld two of the grounds of appeal.
97. Although he did not make a finding that the claimant had been bullied by Mrs Soutar, he found that Ms Whitman's failure to interview Mrs Soutar, even
15 although she was likely to deny that she had "bullied" the claimant was, *"a failure to carry out a proper investigation"* (P.420).
98. He also found that it was, *"insensitive and inappropriate for the Company to offer him (AL) further employment which would bring him into contact, not
20 only with Sharon, but also with other females in an office and offshore environment"* (P.422).
99. He found that, *"It might have been advantageous"* for the claimant to have
25 had sight of Mr Soutar's comments and explanations following his interview with Ms Whitman (P.422).
100. He also said this in his Report (P422): *"The Grievance report is well written and obviously has involved a significant input of time, but to the limited extent
30 to which I have mentioned, I uphold this aspect of the Grievance"*. He also suggested that: *"as a very minimum some dialogue needs to take place about Sharon's future with the Company"*.

Supplementary report from Ms Whitman

101. On 10 February 2022, Mr Soutar sent an e-mail to the claimant in the following terms (P.424):-

5 *“Morning Sharon*

Thank you for your fit note, of which I can confirm safe receipt.

10 *Further to my e-mail on Monday, I confirm that the Company has instructed the Grievance Investigator, Sarah Whitman of Delfinity, to address the unresolved issues identified during your Grievance appeal and to prepare a supplementary report. In doing so, I would anticipate that Ms Whitman may be in contact with you to arrange a further investigatory discussion.”*

15 102. The claimant replied the next day as follows (P.423):-

“Afternoon Paul

20 *Thank you for the message I received on 10 February 2022. I note that you are proposing to instruct Sarah Whitman to address the unresolved issues identified in the Grievance appeal.*

25 *I was shocked to read nothing further in your note. The appeal decision was sent out a week ago. This upheld my Grievance about the events of last July. The appeal concluded that the Company’s role in those events was “insensitive and inappropriate”. That is not an unresolved matter. There is no need for Samphire to wait for Ms Whitman to do any further investigation on that point. Your short message to me does not acknowledge that in any way. My Grievance about that matter has been ongoing since last September, and the appeal on this point has found in my favour. Samphire has not acknowledged that. I have been offered no apology. There seems*
30 *to be no acceptance of the outcome from Samphire.*

I have no confidence in Ms Whitman. The appeal rightly upheld my criticisms of her approach to the report. I am disappointed that Samphire's proposal is simply to give her another chance to get this 'right' from its point of view. As far as I am concerned she has completed her role, and I do not think there is any merit in continuing to give her chances to prepare a proper report. I cannot see how she can do so independently and impartially in the circumstances.

Mr Burnside's conclusion in the appeal report was that 'as a very minimum' we need some dialogue about my future with the Company'. I think this is what has to happen to be able to move matters on. I fail to see how returning to an earlier stage of the Grievance will help in the same way. I was upset to see that you were not proposing to take up Mr Burnside's recommendation.

My view is that the only way for us to move on is to make arrangements for the discussion that Mr Burnside recommended to take place. I cannot see how any other step is likely to help in any way.

I would like to hear from you with your proposals for that discussion by Tuesday 15 February."

103. On 15 February, Mr Soutar sent an e-mail to the claimant to explain why he wanted Ms Whitman to provide a Supplementary Report (P.429):-

"Thank you for your e-mail. I thought it would be useful to clarify some points in order to avoid risking a misunderstanding between us/the Company's intentions.

Grievance & Appeal

The Appeal outcome was received by us both simultaneously and upheld certain aspects of your appeal point. There were matters however upon which Mr Burnside could not draw a comprehensive conclusion as he was not the investigator. Accordingly, Ms Whitman has been instructed to address the

points, upon which Mr Burnside has albeit made a finding, but requires an investigated outcome to be implemented.

5 *Once these points are addressed then your Grievance may be considered to have been provided the full and proper process it deserves, the Company can then determine how to implement any outcome or recommendation globally, rather than doing so piece by piece. This, I trust you agree, should ensure that no point of your Grievance is left unaddressed.*

10 **Discussion re Future**

15 *I have, I hope you would agree, always been available to discuss with you your position within Samphire. I have always offered the opportunity to for a call/discussion regarding your return to work right from the receipt/acknowledgment of your first fit note in July 2021 and nothing has changed since.*

20 *It may, given my explanation above, be beneficial though to conclude your Grievance in its entirety before discussing further. However, if you would like to have such a conversation in advance I would certainly welcome your proposal(s) in that regard.”*

104. However, the claimant declined Mr Soutar’s offer to discuss matters.

25 105. Ms Whitman interviewed Mr and Mrs Soutar but the claimant refused to cooperate with her further investigation. As anticipated, Mrs Soutar denied that she had bullied the claimant and said “*she was shocked by the allegations which she was not aware of until they were raised in the Grievance in 2021*” (P587).

30 106. Ms Whitman was unable to interview the claimant, despite requesting additional information from her.

107. Ms Whitman issued her Supplementary Report on 18 February 2022 (P.584-608).

Claimant's resignation

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108. On 21 February 2022 at 18:16, the claimant submitted her letter of resignation (P.610-611). It was in the following terms (P.433-434):-

"Dear Paul

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I am writing to intimate my decision to resign from my position with Samphire Subsea Limited, with immediate effect.

I consider that my contract of employment has been breached by Samphire in the following ways from 2020 to 2022:

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- *Making changes to my job role without consent*
- *Bullying by Karen Soutar, and failure to address that bullying*
- *Breach of Data Protection*
- *Being instructed to work with a known abuser*
- 20 • *Comprising me personally and professionally by including me in the proposal of the known abuser to a client, following my objections*
- *Carrying out an inadequate investigation into my Grievance*
- *Insisting on the original reporter, continuing with the Grievance, after the appeal upheld my complaint about how she handed (sic) the Grievance*
- 25 • *and when I have lost trust and confidence in her*
- *Unfounded slurs about my character/behaviour in both the Grievance process and the Police investigation into the abuse*
- *Refusing or delaying to apologise after the Grievance appeal found that offering my abuser further employment, which would have included*
- 30 • *contact with me, was "insensitive and inappropriate.*

I have thought very carefully about these issues. I consider them sufficiently serious to constitute, individually or collectively, a repudiatory breach of contract. I have no trust and confidence in Samphire, you or Karen. My resignation is acceptance of that breach or breaches. I consider myself to be constructively dismissed.

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I would appreciate if you could make courier arrangements to have Samphire's own IT equipment collected from my home address this week, on a pre-agreed date/time. Please also provide the PAC Code to allow me to transfer my personal mobile number. As the phone was authorised for personal use it contains personal information, I would like to offer to buy the iphone at the current market cost for a used iphone XR (2 years old). If this is not possible, I would require a signed document stating that personal data will not be retrieved, by any means for any purposes, following return of the mobile phone.

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Please arrange payment of accrued annual leave covering holiday years 2021 and 2022 in February salary payment run. The P45 should be sent to my home address or if provided electronically e-mail to

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109. Mr Soutar replied by e-mail the following morning as follows (P.610):-

"Morning Sharon,

I am very disappointed to receive your letter of resignation. Whilst your points are noted, I do not agree that you have been constructively dismissed. I explained to you previously that the Grievance investigator was asked to address the parts highlighted during your appeal as not having been thoroughly completed. It was then our intentions to of course confirm how the business would consider the completed Grievance, which we would have hoped to do in conjunction with yourself.

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Nevertheless, I interpret your request that your accrued but untaken leave be paid in the February pay run (minus any deductions due) as your intention to terminate your employment with immediate effect. Accordingly, I reluctantly confirm that your final day of employment shall be 21 February 2022, and I shall ascertain the extent of your outstanding holiday entitlement to this date and arrange payment.

In addition, I will be in touch further regards arrangements for our computing equipment (including any laptops, desktops, hard drives, screens, office chairs, any hard copy/electronic Company documentation and any other ancillaries ie: keys – desks/office, bank cards, readers, gym card, etc.) the PAC code for transfer of the mobile telephone number and our position regarding the Company mobile handset.

Regards”

Mobile phone

110. In her resignation letter, the claimant had asked for the transfer of her personal mobile phone number back to her.

111. On 25 February 2022, Mr Soutar sent an e-mail to her with an explanation of how that could be done (P.615-616).

112. It was agreed that the claimant would pay £750 for the transfer and that that sum would be deducted from her final pay.

113. On 3 March 2022, Mr Soutar sent an e-mail to the claimant to advise that she had 30 days “to complete the switch” (P.639). On 4 March 2022 he confirmed that the expiry date was 2 April 2022 (P.642-643).

114. The claimant left it until 1 April 2022 to take the necessary action. On that date at 14:37 she sent the following message to Mr Soutar (P.2/39):-

“Hi Paul.

There is an issue transferring my number over due to a line disconnection request being in place. Please can you contact Vodaphone today, otherwise the number will be permanently lost. The number is 191. I would be grateful if you could confirm when this is done.

Thanks

Sharon.”

115. At the same time, she also asked Mrs Soutar to ask Mr Soutar to assist
10 (P.2/40).

116. It was not disputed that the respondent had placed a line termination or disconnection request on to the contract.

15 117. Mr Soutar read the claimant’s messages and he accepted, in evidence, that he could have contacted Vodaphone but he didn’t as he was on holiday “*on the West Coast*” and he doubted whether any action was required on his part to achieve the transfer.

20 118. The deadline passed, therefore, the claimant’s personal number was not transferred to her but in due course £750 was still deducted from her pay.

Bonus

25 119. The claimant received a number of bonus payments throughout her employment with the respondent as follows:-

- 15 December 2012 email from Mr Soutar to her advising a gross bonus of £4,000 (P.440);
- 30 • 17 July 2013 letter from Mr Soutar to her advising a gross bonus of £3,500 (P.442);

- 24 March 2014 letter from Mr Soutar to her advising salary increased to £60,000 (P.443);
- Letter dated 15 June 2015 from Mr Soutar to her advising a gross bonus of £12,000;
- 5 • 30 November 2017 letter from Mr Soutar to her advising a gross bonus of £3,300 (P.446);
- 13 August 2018 letter from Mr Soutar to her advising gross bonus of £3,000 (P.447);
- 27 November 2018 letter from Mr Soutar to her advising gross bonus of
10 £6,000 (P.448);
- 14 November 2018 letter from Mr Soutar to her advising gross bonus of £9,000;
- 10 December 2020 letter from Mr Soutar to her advising gross bonus of £11,000 (P.450).

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120. Mr Soutar accepted that for the 7.5 months that the claimant was at work in 2021 her performance was good. Based on the claimant's bonus of £11,000 for 2020, the claimant sought a bonus payment of £6,875.

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121. Mr Soutar accepted that had a bonus been payable that would have been a fair sum. However, no bonuses were paid to any employees in 2021. Mr Soutar explained that the reason for this was that the respondent Company needed greater capital due to changes in the "IR35 Rules" which meant that a number of the Company's Contractors became employees and the number
25 of employees increased from 3 to 11. This meant that the Company had to pay an increased amount by way of PAYE and National Insurance and there was the additional financial burden of having to pay these employees sick pay. An increase in working capital was therefore required and this was the reason that no bonuses were paid in 2021. I was satisfied with his
30 explanation.

Claimant's business

5 122. The respondent alleged that the claimant, "*was herself in breach of her contract of employment by undertaking business in her own regard in Company time using Company resources*".

10 123. It was submitted that had the claimant not resigned she would have been disciplined on her return to work following her sick leave absence. The claimant denied that she was in breach of contract.

15 124. The claimant had a business providing hypnotherapy services. Her Company, "Behaviour Evolution", was incorporated in February 2020. She had told Mr and Mrs Soutar that she planned on doing so. They did not object and were agreeable to. the claimant using Company equipment for her business provided she did this work "in her own time", as she had contractual hours with the respondent: Monday to Thursday 8am to 6pm and Friday 8am to 12 noon.

20 125. After her resignation, the claimant provided Mr Soutar with a list of Company property which she would return (P.633). This included 2 desktop computers (P.646). Mr Soutar arranged for these to be "*forensically analysed*" which, he claimed, established "*personal use in Company time*" in 2021.

25 126. Snapshots of the analysis were produced (P.648-653) along with a comparison with the claimant's working hours, taken from her timesheets (P.654-717).

30 127. Mr Soutar claimed that this demonstrated "*reasonably significant misuse of time and equipment*".

128. This was denied by the claimant. She claimed that she never did any of her hypnotherapy work during her core hours with the respondent. She referred to a number of "*WhatsApp messages*" (P/2/5-29) which showed, she claimed,

that she did a considerable amount of work for the respondent outwith her core hours. She claimed, in any event, that Mr Soutar had told her that she could “*take time back*” for doing work for the business outwith her core hours and she never claimed overtime.

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129. She claimed she gave sessions to clients of her business during evenings and weekends and sometimes on a Friday afternoon. She only had 12 clients from March 2020 to the end of 2021.

10 130. I preferred the claimant’s evidence in this regard. It was consistent and convincing. She presented as credible and reliable.

131. I did not find the evidence which the respondent produced to be reliable. I did not hear evidence from the person who had carried out the analysis. I was unable, therefore, to be satisfied that he had the required expertise and that his methodology was sound. Mr Soutar could not remember his name.

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132. I found the respondent’s evidence difficult to follow. Also, the duration of the claimant’s computer access for alleged business activities was not always recorded and this had a bearing on the reliability of Mr Soutar’s conclusion.

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133. Mr and Mrs Soutar were aware of the claimant’s business. There was a degree of flexibility in the claimant’s working arrangements in what was a relatively small business with only a few employees. The claimant, for example, used her own car to pick up workers and equipment for the business. The claimant’s work was of a high standard. There was no evidence to suggest that her business activities impacted adversely on her work for the respondent. In fact, as I recorded above, she was a highly valued employee and received regular, significant, annual bonus payments. The claimant often did work outwith her core hours and never claimed overtime. That was why, I suspect, there were a number of examples of Mr Soutar’s flexibility and of him advising the claimant that she should take time off, as

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much as she required, particularly on the occasions when she was upset or unwell.

Claimant's submissions

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134. The claimant's Counsel made written submissions on 6 December 2022 and supplementary submissions, by way of response to the written submissions from the respondent's Counsel, on 15 December 2022. These are referred to for their terms. The following is a summary.

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135. In support of his submissions, Counsel referred to the following cases:

FC Gardner Ltd v. Beresford [1978] IRLR 63

Clark v. Nomura International Plc [2000] IRLR 766

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Bournemouth University Higher Education Corporation v. Buckland [2010] ICR 908;

Hilton v. Shiner Ltd [2001] IRLR 727

Woods v. WM Car Services (Peterborough) Ltd [1981] ICR 666

Kaur v. Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ978

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Waltham Forest v. Omilaju [2004] EWCA Civ1493

GAB V. Triggs [2008] ICR 529

Nottinghamshire County Council v. Meikle [2005] ICR 1

Logan v. Celwn House Ltd UKEAT/0069/12

Wright v. North Ayrshire Council [2014] ICR 77

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Malik and another v. Bank of Credit & Commerce International SA (in compulsory liquidation) [1998] AC 20

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136. Counsel confirmed that the complaints comprising the claim were: "unfair (constructive) dismissal; wrongful dismissal (9 weeks' notice pay); breach of contract in respect of a failure to pay a bonus and for the "mobile phone related payment of £750".

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137. The "First Chapter" of Counsel's submissions is a summary of the facts. I do not propose rehearsing these in any detail as my findings in fact are detailed above.

138. So far as the submissions in relation to the claimant's allegations about the way she was treated by Mr and Mrs Soutar were concerned, I have determined many of the issues between them in my findings in fact. I have concluded that where there was a conflict in the evidence Mr and Mrs Soutars' evidence was to be preferred.

Constructive unfair dismissal complaint

Implied term of trust and confidence

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139. Counsel set out the contractual provisions between the parties, the claimant's duties and made reference to certain parts of the Staff Handbook (P.62-168) with which I take no issue. Counsel explained that the claimant relied on a breach of the implied term of trust and confidence, with reference to **Malik** and other cases.

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140. He also submitted, with reference to **Hilton**, that while the contract did allow for change of duties (P53), the changes made to the claimant's duties were made to "cut out" or "undermine" her and that amounted to a breach of contract.

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"Last straw"

141. Counsel submitted that: "*The claimant in the present case has a 'last straw' case tabled. She argues that there was a breach of the implied obligation of trust and confidence consisting of a series of actions on the part of the respondent which cumulatively amounted to a breach of the implied terms of trust and confidence, even though each individual incident may not on its own have been such. In respect of that part of her case, the 'last straw' need not itself be a breach of contract; the question is whether the cumulative series of acts taken together amount to a breach of the implied term*" (**Woods**).

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Relationship between the Claimant and Karen Soutar

142. Counsel submitted that while Mrs Soutar's role as an administrative assistant had evolved from when she first started, she was "*still under the claimant's direction*" and that the claimant allocated work to Mrs Soutar. He submitted that the claimant "*managed or supervised*" Mrs Soutar and that Mrs Soutar, "*did not perform the duties as a Director with managerial duties*". He submitted that Mrs Soutar introduced herself as the "administrative assistant" rather than as a Director of the respondent Company and that when the claimant suggested that she should be designed as a "Director" when setting up her e-mail auto signature, Mrs Soutar responded by saying to the claimant, "*I'm a fake director. I'm only an Admin Assistant and you are my boss*".

143. So far as the use of the term "*subordinate*" by the claimant in relation to Mrs Soutar was concerned, it was submitted that nothing adverse ought to be drawn from this. As a matter of fact, Mrs Soutar was subordinate to the claimant in the "*traditional hierarchical management system with Paul Soutar at the top of the hierarchy and the claimant below him.*" Counsel submitted that the term "*subordinate*" was not a pejorative one. The only role which Mrs Soutar performed was that of administrative assistant with receptionist duties.

"Sexual Assault in 2013-AL"

144. Counsel set out, in some detail, the claimant's evidence about this which he submitted should be accepted. However, I have already made findings in fact in this regard. In short, I decided, mindful of both the evidence and Counsels' submissions in this regard, that the conflicting evidence of Mr and Mrs Soutar was to be preferred, particularly with regard to their state of knowledge of the claimant's allegations.

“The relationship between Karen Soutar and the Claimant and its development”

5 145. Counsel submitted that they had a good working relationship but that by around the beginning of 2020 their relationship was strained, “*as a result of Karen Soutar’s behaviours*”.

10 146. So far as the incident on 18 February 2020 and the claimant’s subsequent meeting in the following days with Mrs Soutar were concerned, Counsel submitted that the claimant’s evidence should be accepted.

15 147. Mr and Mrs Soutar decided, without discussing the matter with the claimant that Mrs Soutar would work from home and the claimant was also concerned that there would be no receptionist in the office.

148. Counsel submitted that “*objectively speaking*” the claimant was being bullied and that Mr Soutar “*did nothing to address this misuse of power.*”

Telephone system

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149. Counsel submitted that this was another example of Mrs Soutar’s “*abuse of power*”. The claimant had asked Mrs Soutar for log-in details so that she could use the telephone system to enable her to forward calls to the office when she was dealing with the receptionist function. The claimant was given
25 the wrong details and despite raising this with Mrs Soutar on approximately two occasions the issue was not addressed and persisted for around eighteen months.

“March/April 2021”

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150. Counsel submitted that, “*By the end of March 2021 and the beginning of April 2021 the claimant felt very anxious because of the situation at work*”

connected to her working relationship with Karen Soutar.” The claimant maintained that Mrs Soutar “did tasks in the way she wanted to”.

5 151. Counsel referred, in particular, to Mrs Soutar’s e-mail response on 6 April 2021 to a request by the claimant to check whether the correct code for hours had been used by, “*Tam McMahon*” (P.288). He submitted that this particular e-mail exchange “*illustrates the hostile views Karen Soutar had of the claimant and her willingness to attribute bad faith to the claimant. It also shows just how blunt and rude Karen Soutar was capable of being. Again* 10 *Karen Soutar was abusing her position as a director by being rude when the claimant had reasonably and constructively pointed out an error to Karen Soutar in her role as Admin Assistant.*”

“C requested a meeting with PS”

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152. By e-mail on 14 April 2021 (P.508), the claimant requested a meeting with Mr Soutar on the advice of her G.P. She told him that her relationship with Mrs Soutar was the cause of her ill-health.

20 153. It was submitted that Mr Soutar shared this with his wife and that was why on 15 April 2021 Mrs Soutar e-mailed the claimant to ask to meet her to discuss work, “*going forward*”.

154. It was submitted that this was a breach of confidentiality by Mr Soutar.

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“Claimant’s access to Paul Soutar’s Outlook”

30 155. It was submitted that the claimant was “*cut out*” and “*snubbed*” when her access to Mr Soutar’s outlook calendar was withdrawn, without any discussion or pre-warning.

“Accounts”

156. The claimant had managed the overall service provided by the respondent’s Accountant for some nine years. It was submitted that the transfer of all the accounts work to Stephen Milne without discussion with the claimant meant
5 that she was being “*frozen out*” and that “her job was being eroded gradually”.

“Mobile requested transfer number back to claimant”

10 157. Counsel also submitted that the respondent’s refusal to allow the claimant to transfer the number on her mobile phone back to her own name in connection with her new business was another example of the claimant being
“*undermined*”.

“AL in July 2021”

158. Counsel also made reference to the claimant being asked to facilitate AL’s employment with TAQA. He submitted that the claimant “*felt compromised personally and professionally*”.

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“Breach of confidentiality – email to staff”

159. Counsel submitted that the respondent’s email around 15 July 2021 to advise her colleagues that she was off sick was a “breach of confidentiality”.

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“Claimant’s Grievance and Grievance appeal”

160. Counsel was critical of the manner in which Ms Whitman addressed the claimant’s Grievance. He referred to the grounds of the Appeal which Mr
30 Burnside upheld.

161.

“Police involvement”

162. It was maintained that Paul Soutar and Karen Soutar did not co-operate with the Police investigation as much as they could have done.

5

“Bonus”

163. Counsel submitted that the respondent’s reason for not paying the claimant a bonus in 2021 namely because of IR35 changes was *“implausible”*. He submitted that Mr Soutar had acted in an *“arbitrary and capricious manner”* and had he not done so, the claimant would have been paid a *“fair bonus”*. He submitted that a *“fair bonus”* would have been £6,875.

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“Business activities”

164. Counsel submitted that the claimant’s business was, *“more of a hobby than a proper business”* and that the respondent knew about it and did not object. He disputed that the claimant would have been subjected to disciplinary proceedings as the respondent claimed and, in any event, *“Paul Soutar did not suggest in evidence he would have dismissed the claimant”*.

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“Reliability and credibility of the witnesses”

165. Counsel submitted that where there was a conflict in the evidence the claimant’s evidence should be preferred.

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Relevant law

166. In “Chapter 2” of his submissions, Counsel set out the relevant law with which I take no issue.

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Respondent's submissions

167. The respondent's Counsel also made written submissions. These are referred to for their terms. The following is a summary. He referred to the following cases:-

Polkey v. AE Dayton Services [1988] ICR 142

Western Excavating (ECC) Ltd v. Sharp [1978] ICR 221

Woods

Courtaulds Northern Textiles Ltd v. Andrew [1979] IRLR 84

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168. He denied that the claimant was constructively dismissed and denied that her dismissal was unfair. He further submitted, that the claimant would have been dismissed, in any event, because of misconduct in respect of her business activities which amounted to a breach of contract on her part and had she not resigned she would have been disciplined by the respondent.

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169. He submitted that the claimant presented as a "*difficult witness*" due to her "*steadfast refusal to answer many straightforward and direct questions put to her and attempts to dispute facts which were subsequently accepted as being uncontroversial or which had been so in the first place. She adopted an embattled stance and sought to argue her case at every opportunity and in respect of every detail*". He also submitted that, "*her overall credibility was seriously brought into question*".

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170. In contrast, he submitted that the evidence of Paul Soutar and Karen Soutar was both credible and reliable.

"The breaches alleged by the claimant"

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171. Counsel then addressed "*the nine bases*" upon which it was contended that there has been the requisite breach of contract, as averred in the claim form (P.24-26), these being largely replicated in the claimant's letter of resignation (P.433).

“Allegations 4 and 5 - the AL chapter of evidence”

172. Counsel referred to this as, *“the most emotive part of the claimant’s testimony,”* which, he submitted, *“was deliberately provided to illicit the sympathy of the Tribunal and to present the respondent in a bad light as an uncaring employer”*.

“Allegation 2 – bullying by Karen Soutar and alleged failure to address it”

173. Counsel submitted that the claimant was not subject to bullying behaviour by Mrs Soutar and accordingly it followed that there was no failure on the part of Mr Soutar to address such bullying.

“Allegation 1 – changes to job role without consent”

174. Counsel submitted that any changes to the claimant’s job role were done, *“in full consultation with the claimant and with her knowledge and agreement”*.

175. There were two main reasons for the changes in the claimant’s role. The first was, *“an effort to avoid overlap and conflict with Karen Soutar”* per Mr Soutar’s e-mail of 14 April 2021 (P.508).

176. The second reason was the requirement, *“to streamline and update outdated manual Company procedures, particularly around book-keeping and accounting……all as agreed with the claimant”*.

177. So far as the allocation of roles was concerned, Counsel referred to the updated spreadsheet which was, *“produced by the claimant herself”* (P.293-294). This revealed, it was submitted, that Mrs Soutar only had, *“a very limited role in the business moving on from April 2021”*. The claimant was to have overall control of the new resource and also the work to be undertaken by the accountant, Stephen Milne, *“thereby removing time-consuming manual input*

tasks from the claimant, leaving her free to concentrate on strategic management issues, again all as discussed in April”.

5 178. Counsel further submitted, for the sake of completeness, that the claimant’s evidence about other indicators that she was being, *“isolated or frozen out in some way”*, had no substance. In particular, he referred to *“the diary issue”* (the claimant’s access to Outlook); *the “sage issue”* (the change in accounting procedures); *the “Autodesk issue”* (the change to direct debit as part of the restructure).

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“Allegation 3 – breach of data protection requirements”

15 179. Counsel referred to the Grievance report by Sarah Whitman and the report by David Burnside on appeal. The claimant’s allegations in this regard were not upheld by either of them.

“Health”

20 180. This complaint related to the respondent’s e-mail around 15 July 2021 to staff to advise that the claimant was absent, on sick leave.

25 181. Counsel submitted that this did not amount to a breach of confidentiality. While Mr Soutar accepted that the e-mail could have been worded differently (P.540), *“the intention of the e-mail was to advise the Team that the claimant was out of the office so that they would know to contact either himself or Karen if they had any enquiries”*.

30 182. Counsel also referred to a similar e-mail which the claimant had sent previously (P.489) which began *“Ladies/Gents, Susan is off sick today”* and submitted that the claimant’s evidence that she had obtained consent from *“Susan”* in advance for her e-mail to be sent was, *“rather unconvincing”*.

“Karen”

183. The claimant relied on two instances in support of this complaint. The first was following the incident between the claimant and Mrs Soutar on 18 February 2020. The following day, Mr Soutar sent an e-mail to the claimant offering a meeting to discuss the incident (P.272).

184. The respondent is a small Company and it was only natural that Mrs Soutar would discuss the incident with Mr Soutar. Mrs Soutar is not only a Director and half owner of the respondent but also Mr Soutar’s wife. It was submitted, as Mr Soutar explained, that, *“he was attempting to obtain both sides of the story”*.

185. The other alleged instance was in relation to Mrs Soutar’s invitation to discuss work matters on 15 April 2021 (P.292).

186. It was alleged that this was in response to an e-mail which the claimant sent the previous day in which she alleged that Mrs Soutar was the cause of her anxiety (P.508).

187. He submitted that Mrs Soutar’s e-mail was designed to explain her decision to remove herself from most duties in the day-to-day running of the Company. However, there was no “coincidence”, as on 1 April 2021, some two weeks prior to Mrs Soutar’s e-mail, the claimant had made a request for a confidential discussion with Mr Soutar in relation to his wife (P.508-509).

188. In any event, it was submitted, that there were, *“no confidential issues to be respected. It would appear that the claimant has made an unwarranted assumption as to what had been discussed between Paul and Karen prior to 15 April 2021 in respect of an issue which was not in any event of a confidential nature”*.

189. Counsel also submitted that the claimant's claim in her e-mail that she was "*shaking uncontrollably*" and that this was an "*entirely unreasonable request*" was, "*entirely unwarranted by the request made by Karen against the known factual background*".

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190. It was submitted, therefore, that this was not another instance of any breach of the claimant's contract of employment on the part of the respondent.

"Allegations 6 and 9 – inadequate Grievance investigation"

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191. Counsel submitted that, "*in producing her report, Ms Whitman applied a rigorous methodology and considered an exceptionally large amount of material, including a substantial amount provided by the claimant herself which Ms Whitman described as "incredibly detailed and specific"*". He further submitted that, "*Ms Whitman's thoroughness and professionalism*" was initially acknowledged by the claimant by her comment at page 256: "*You've made a difficult process as easy as it could be*".

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192. Counsel disputed that the transcript of the claimant's evidence was in some way inaccurate, as the claimant alleged. It was only when the claimant received Ms Whitman's report and discovered that none of her Grievances had been upheld that the claimant considered the process to have been flawed.

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193. Counsel also referred to what he described as, "*the most revealing part of Ms Whitman's evidence*" namely, that having interviewed the claimant and been told that there was documentation to back up the grounds of her Grievance she anticipated upholding the Grievances. However, when she viewed all the documents she discovered that none supported the claimant's account when interviewed.

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“The appeal against the Grievance report” (P.417-422)

194. Counsel said this in his submissions:-

5 *“Most of the claimant’s grounds of appeal were not upheld on review by Mr Burnside. He found that Karen Soutar ought to have been interviewed by Ms Whitman even although she found that no bullying had occurred (and therefore the main point of the Grievance, that Paul Soutar had failed to take measures to deal with that, did not arise).”*

10 195. Mr Burnside also found that it would have been preferable for the claimant to have had sight of Paul Soutar’s comments and explanations following his interview with Ms Whitman. However, Mr Soutar did not have sight of the claimant’s interview transcript before delivery of the Report and Counsel submitted that, *“that criticism may therefore be considered a matter of*
15 *preference”*.

196. Counsel further submitted that the main finding of the appeal relied upon by the claimant was that it was, *“insensitive and inappropriate”* for Mr Soutar to seek to place AL on an assignment which would bring the claimant into further
20 contact with him and other females in the office, though in an offshore environment.

197. However, the basis for Mr Burnside’s finding, *“is made clear by the first sentence at page 421: “taking Sharon’s account of the incident with AL as accurate.....”*. Counsel submitted that her account was not accurate. Mr
25 Burnside’s understanding was based on the claimant’s, *“original version of events”* which was that the alleged assault occurred in March 2013 but she subsequently changed her position to the summer or autumn of that year.

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198. Counsel advanced a number of reasons why Mr Burnside's conclusion in this regard was wrong. In short, he did not have the detailed evidence which had been provided at the Tribunal Hearing. Counsel submitted that, *"far from finding that the original Grievance investigation was flawed, Mr Burnside found some procedural errors and an error in relation to AL which was based upon the claimant's version of events, rather than from a full understanding of the actual factual position.*

No criticism of Mr Burnside is intended in this submission as it was a likely outcome in the absence of a re-investigation (not within his remit) and having only interviewed the claimant herself with no opportunity for rebuttal being provided to the respondent.

It follows that the findings on appeal do not impugn the investigation carried out by Ms Whitman, which was thorough and complete and produced by an appropriate expert as discussed above, or her overall findings. It provides no support to the claimant that the respondent was in breach of contract."

"Allegation 7 – instructing Ms Whitman to revisit Grievance"

199. Counsel submitted that Ms Whitman's evidence that she wished to address some procedural issues highlighted in Mr Burnside's report; she was not carrying out a new Grievance investigation; all that she was doing was tying up loose ends, should be accepted. He claimed that, *"the shortcomings identified by Mr Burnside, limited as they were, were matters for Ms Whitman to address. It would have been disproportionate to commence a fresh investigation and thereby to have provided a renewed right of appeal."*

200. He submitted, that in any event, it was clear from the e-mail exchange in September 2021 (between the claimant and Mr Soutar) (P.377) that Mr

Soutar wished to have a *“proper discussion”* with a view to the claimant returning to work as soon as possible.

5 201. Further, in his email of 15 February 2022 (P.429) Mr Soutar advised the claimant that it was his intention to meet with her to address Mr Burnside’s points, including his recommendation to discuss matters.

10 202. Counsel submitted, therefore, that the outcome which the claimant wished, namely discussion, *“was already in train from September 2021 and the claimant’s objection, therefore, falls away”*.

15 203. It was submitted, therefore, that the revisiting of the Grievance, in light of Mr Burnside’s report, was not a breach of contract.

“Allegation 8 – alleged slurs on the claimant’s character”

20 204. This related to comments made by Mr Soutar to Ms Whitman when interviewed as part of the Grievance. Mr Soutar addressed each of the allegations (paras. (a) to (l)) when he gave evidence at the Tribunal Hearing.

25 205. Counsel submitted that none of what Mr Soutar said to Ms Whitman was without foundation. Any comments made about the claimant by Mr Soutar were well-founded and in good faith.

“Final straw”

30 206. Counsel submitted that, *“an attempt was made in cross to identify the actual final straw, but no satisfactory answer was provided as the claimant appeared to assert a number of final straws”*.

207. The claimant maintained in evidence that she did not consider that it was Mr Soutar's priority to rebuild the working relationship and it was at that point she decided to resign. However, the evidence referred to previously, "*contradicts that assertion*".

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208. Further, it was submitted that, when she was interviewed by Ms Whitman in November 2021, the claimant was already contemplating a claim for constructive dismissal and that cast further doubt on any of the matters which she now claims constituted a final straw.

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Conclusion

209. Counsel made the following submissions by way of conclusion:-

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"It has been submitted above that none of the individual allegations put forward by the claimant amount to a breach of the necessary term of the contract between the parties. This remains the case even if they are all to be viewed collectively.

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*Applying the test in **Sharp** referred to above, the claimant did not resign in response to a breach of contract on the part of the respondent as there was none. In the event that there was such a breach, it was in the claimant's contemplation at least since November 2021. She did not resign until 21 February 2022 which is too late. She must have taken to have affirmed her contract of employment and acquiesced in any such breach.*

25

In all the circumstances, and for the reasons provided above, it is submitted that the claimant has failed to make out a case for constructive unfair dismissal.

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Accordingly, the Tribunal is respectfully requested to dismiss the claim."

“Bonus”

210. Counsel denied that the claimant was entitled to any bonus in respect of 2021 for the part of the year that she was at work. Her contract of employment did not provide for a bonus; any bonus that was provided was discretionary; the bonuses paid to the claimant varied widely, including a nil bonus in 2016; no rational basis for the claim of £7,500 (sic) was made: *“in evidence, the claimant accepted on questioning from the Tribunal that the figure was selected because it seems reasonable. That is not an adequate basis for the claim”*.

211. Mr Soutar provided an explanation as to why no bonuses were paid to any employees in 2021, namely the changes in IR35 requirements introduced by HMRC.

“Deduction for mobile phone transfer”

212. Counsel submitted that the loss of £750 incurred by the claimant was, *“of her own making for which the respondent is not responsible”*.

“Polkey reduction”

213. Counsel submitted that in any event, “the claimant was herself in material breach of her contract of employment by undertaking a business on her own regard, in Company time using Company resources. This was contrary to the respondent’s disciplinary policy and, in all likelihood the claimant would have been disciplined in September 2021 had she returned equipment when first requested”. Counsel submitted that any award of compensation should be reduced to reflect the likelihood that the claimant would have been dismissed in any event.

“Claimant’s supplementary submissions”

214. On 15 December 2022, the claimant’s Counsel responded to the respondent’s submissions. The following is a brief summary.

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215. He submitted that the likelihood of the claimant being dismissed for carrying out work on the respondent’s equipment, *“is vanishingly small and can be ignored”*. There was no problem with the claimant’s work and no issue was ever raised by the respondent.

10

216. So far as the photograph of the claimant and AL at the party in May 2013 was concerned, Counsel submitted that that does not categorically disprove that there were a large number of people present at the venue.

15 **“Rebuttal submissions for the respondent”**

217. The respondent’s Counsel challenged the claimant’s submission, *“that for some reason Mr Soutar was not asked by his Counsel what he may have known about the assault”*. Mr Soutar was asked about his knowledge with reference to the claimant’s Grievance and her statement that she was sexually assaulted by AL while at work (P.215, para. 4).

20

“Disputed evidence”

25 218. Counsel referred to the “First Chapter of Submissions” by the claimant’s Counsel and detailed a number of aspects of the evidence which were not proved and indeed were subject to conflicting evidence by the respondent’s witnesses.

219. Counsel also made further submissions with regard to the evidence and the alleged assault by AL and submitted that, *“inescapable inconsistencies remain” in the claimant’s evidence*”.

5 220. He submitted that the respondent’s position was supported by documentary evidence in relation in particular to the anniversary party and that this aspect bears adversely on the claimant’s credibility overall.

221. Counsel submitted that there was no breach of the implied term of trust and confidence and, *“that is true whether the allegations are taken collectively, using the last straw doctrine, or individually”*.

10

Discussion and Decision

15 Relevant law

222. Having resigned, it was for the claimant to establish that she had been constructively dismissed. This meant that, under the terms of s.95(1)(c) of the Employment Rights Act 1996 (“the 1996 Act”), she had to show that she terminated her contract of employment (with or without notice) in circumstances such that she was entitled to do so without notice by reason of her employer’s conduct. It is well-established that that means that the employee is required to show that the employer is guilty of conduct which is a fundamental 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. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once.

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30 223. The correct approach to determining whether there has been a constructive dismissal was discussed in *Western Excavating*, the well-known of Court of Appeal case, to which I was referred. According to Lord Denning, for an

employee to be able to establish constructive dismissal, four conditions must be met:-

5 “(1) *There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.*

10 “(2) *That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law.*

15 “(3) *He must leave in response to the breach and not for some other unconnected reason.*

20 “(4) *He must not delay too long in terminating the contract in response to the employer’s breach otherwise he may be deemed to have waived the breach and to vary the contract.”*

224. Accordingly, whether an employee is “entitled” to terminate his or her contract
20 of employment, “*without notice by reason of the employer’s conduct*” and claim constructive dismissal, must be determined in accordance with the law of contract. It is not enough for the employee to establish that an employer acted unreasonably. The reasonableness or otherwise, of the employer’s conduct is relevant, but the extent of any unreasonableness has to be
25 weighed and assessed and the Tribunal must bear in mind that the test is whether the employer is guilty of a breach which goes to the root of the contract, or shows that the employer no longer intends to be bound by one or more of its essential terms.

“Trust and confidence”

225. So far as the present case was concerned, there is implied into all contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. That was the contractual term the claimant maintained the respondent had breached. Browne-Wilkinson, J in **Woods**, to which I was referred, described how a breach of this implied term might arise:

“To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.”

226. In **Malik**, to which I was also referred, Lord Steyn stated that, in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer’s behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively. This objective assessment was of some significance in the present case.

227. When I considered the authorities, I recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of trust and confidence.

“Last straw”

228. In the present case, one of the claims was constructive dismissal after a “last straw”. In **Kaur** the Court of Appeal reviewed cases on the “last straw” doctrine and formulated an approach to such cases, referring to the implied term of trust and confidence as “the **Malik** term”:-

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

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

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

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

 (4) *If not, was it nevertheless a part applying the approach explained in **Omilaju** of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (if it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given at the end of para.45 above).*

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

20 **Present case**

229. As there were so many conflicts in the evidence I heard, my views on the credibility and reliability of the witnesses’ evidence, which I expressed above, and my findings in fact, as a consequence, were pivotal when I came to determine the issues in the case, with reference to the relevant law, and, in particular, whether there was any substance in the many breaches of contract which the claimant alleged. When it came to determining conflicts in the evidence and issues of credibility and reliability of evidence, one of the recurring features was that the contemporaneous documents were often at odds with the claimant’s evidence, as Ms Whitman had found when she dealt with the claimant’s Grievance.

230. The claimant tended to overstate and exaggerate her evidence about the alleged breaches of contract. Some of the matters she relied upon were historic, relatively trivial and she had not complained about them, in any meaningful way, at the time. These were of little evidential value. They appeared to have been advanced as something of an afterthought, designed to establish that there had been a course of conduct on the part of the

respondent, and Mr and Mrs Soutar in particular, over a very lengthy period indeed, which cumulatively amounted to a fundamental breach of the implied term of trust and confidence, which entitled her to resign and claim constructive dismissal. This led to a very lengthy, emotive, Hearing, which put
5 an enormous burden on the parties.

231. I am also bound to say that so numerous were the claimant's allegations and over such a lengthy period, it appeared to me that she must have trawled through the entire period of her employment with the respondent to identify
10 possible criticisms of how allegedly she had been treated by Mr and Mrs Soutar. Although some of the allegations were trivial, the time devoted to ensuring that no point of substance was overlooked has been considerable.

The alleged breaches

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232. The claimant detailed the breaches she relied upon in her resignation letter (P.433). I deal with each, in turn. I should say at the outset that, having regard to my findings in fact, none of these individually, in my view, constituted a breach of contract. Further, in my view, by and large, the submissions by the
20 respondent's Counsel in response to these alleged breaches were well-founded. I was also mindful that when the claimant raised any concerns with Mr Soutar and told him about her health issues, he was invariably supportive and often told her she should take as much time off work as she needed. The e-mail exchanges between them in March and April 2021 are examples of
25 this (P507-511).

"Making changes to my role without consent"

233. The relevant averments in the claim form are at paras 11-14 inclusive (P20-
30 21). These are all examples of the claimant looking back almost a year before her employment ended and endeavouring to portray Mr and Mrs Soutar in the worst possible light.

234. While there were changes to her role, as I found in fact, for the most part they were either made in consultation with her and with her agreement, or there was a sound business reason for the changes and the need to restructure the business.

5

235. There was also an understandable desire on the part of Mr Soutar to minimise the risk of any further conflict between the claimant and Mrs Soutar following the incident in the office on 18 February 2020.

10 **Outlook calendar**

236. So far as the change to the “outlook calendar” was concerned, Mrs Soutar had stepped down from most of her duties and there was no need for the claimant to have details of Mr Soutar’s personal appointments.

15

Accountancy work

237. There was a sound business reason for outsourcing the accountancy work to Stephen Milne: with the growth of the business a requirement to update the systems to support that growth. It also meant that the claimant would be relieved of carrying out time-consuming manual input tasks. Mr Soutar discussed this with the claimant and she was aware of the reason for this change.

20

25 **The “new resource”**

238. The claimant was to have responsibility for the appointment of, and the overall control of, the “new resource”.

30

Changes to direct debit

239. The change to direct debit in May 2021 was a trivial matter. It was part of the required business restructure. The claimant's contention that she was
5 "undermined", when looked at objectively, had no substance.

Reception

240. While the claimant expressed concern about who would cover reception
10 when Mrs Soutar decided to work from home, that was not significant. Mr Soutar was unconcerned. There was not a great deal of "footfall" in the office, and it was not a problem if no one was at reception when a visitor arrived. The excerpt from the "Visitors Log" which was produced demonstrated this (P.483- 487). There were only some 5-10 visitors each week and some days
15 none at all. There had been no cover at reception, in any event, until 11am each day when Mrs Soutar started work.

241. The spreadsheet which the claimant prepared around April 2021 following the restructure, showing the allocation of duties did not reveal any diminution in
20 her duties (P.293-294). Indeed, arguably her responsibilities increased because of the restructure.

242. Any other claims by the claimant that she was being "*undermined*" or "*frozen out*" were minor, without foundation and of no evidential value.

25

"Bullying by Karen Soutar and failure to address that bullying"

243. It should be borne in mind that the claimant and Mrs Soutar worked together
30 successfully and amicably for some 8 years. I did not accept the claimant's account of the incident in the office of 18 February 2020. On the evidence, and with regard in particular to the claimant's conduct and messages

thereafter when she apologised to Mrs Soutar, her allegation of bullying was without substance. The claimant behaved that day in an unacceptable manner, shouted at Mrs Soutar and slammed the door. That was why she felt the need to apologise.

5

244. Her reference to Mrs Soutar as her “subordinate” and “assistant” were indicative of her attitude towards her. She was neither.

10

245. Mrs Soutar decided to distance herself from the claimant after that. She worked from home and only came into the office briefly on occasions to do photocopying.

15

246. There was no evidence of any “bullying” on her part, either on 18 February 2020, or thereafter. She had a very limited role in the business after April 2021.

247. Accordingly, the allegation of a failure to address bullying by Mrs Soutar (presumably by Mr Soutar) has no merit. There was none.

20

248. Neither Ms Whitman who heard the Grievance, nor Mr Burnside who heard the Appeal, found that there was any bullying.

“Breach of data protection”

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249. I have also dealt with this in my findings in fact.

30

250. The claimant maintained that the respondent’s e-mail of around 15 July 2021 to the staff to advise that she was off sick was one of the alleged breaches. While Mr Soutar accepted that his e-mail could have been worded differently, he explained that the purpose was to let the staff know that they should contact him or Mrs Soutar in the claimant’s absence. This claim also has to be considered in the context of a similar e-mail the claimant herself had sent

on 6 January 2015 in which she advised all the staff that an employee was “*off sick today*” (P.489). The claimant maintained that she had the consent of the employee concerned to send the e-mail in those terms, but I only had the claimant’s word for that and as the respondent’s Counsel submitted, that would mean that every time an employee was off sick and the respondent wanted to advise the staff of this, consent would have to be obtained, which would be rather impractical.

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251. Further, Mr Soutar apologised immediately when the claimant complained and explained why he had sent the e-mail (P540-541); the message was sent to everyone and there was no mention of the nature of the claimant’s illness.

15

252. Viewed objectively, this was not a breach of confidentiality and not a breach of contract.

20

253. The other two alleged “data protection breaches” related to Mrs Soutar. The relative averments are at paras. 9 and 10 in the claim form (P.18-20).

254. The first related to the days following the incident in the office on 18 February 2020, some two years before the claimant’s employment ended, and an allegation that Mr Soutar had shared “*personal information*” with Mrs Soutar: the claimant had told him that she found Mrs Soutar’s behaviour “*challenging*”.

25

255. However, this also has to be considered in the context of my findings of what had transpired in the office on 18 February 2020 and that it had been the claimant who was at fault, to the extent that Mrs Soutar had decided to stay away from the office.

30

256. It was inevitable that Mr and Mrs Soutar would discuss what had happened on 18 February 2020 and, as Counsel submitted, a demarcation between personal and business matters, “*as appears to be suggested by the claimant, is wholly artificial and impossible to apply in practice*”.

257. Further, Mr Soutar, a credible and reliable witness, denied that he had breached any confidence.

5 258. The other allegation related to an invitation to the claimant by Mrs Soutar on 15 April 2021 to discuss work matters (P.292). It was alleged that the catalyst for this was a confidential e-mail the claimant had sent to Mr Soutar the day before in which she told him her anxiety, *“is situational and directly related to the working relationship with Karen”*(P.508). However, as Counsel submitted, 10 the claimant had requested a meeting with Mr Soutar to discuss *“the situation with Karen and I working together which is the cause of anxiety”* on 1 April 2021, some two weeks previously (P.508-509).

15 259. In my view, the submission by Counsel that, *“the claimant made an unwarranted assumption as to what had been discussed between Paul and Karen prior to 15 April 2021 in respect of an issue which was not in any event of a confidential nature”*, was well-founded.

20 260. This was yet another example of the claimant interpreting an event for her own purposes.

25 261. Also, as Counsel submitted, her claim that she was *“shaking uncontrollably”* and that the request by Mrs Soutar was *“wholly unreasonable”* was unwarranted, when viewed objectively.

262. These allegations, therefore, of breach of data protection and breach of contract are not made out.

**“Being instructed to work with a known abuser/
Compromising me personally and professionally by including me in the
proposal of the known abuser to a client following my objections”**

5 263. These allegations can be taken together. The significant words in the allegations are a *“known abuser”*. AL was not a *“known abuser”*. Mr Burnside’s findings in this regard were predicated on AL being a *“known abuser”*. He was in error.

10 264. I have already addressed the issue of Mr and Mrs Soutar’s state of knowledge of the assault, at some length, in my findings in fact. In short, they were not aware of the claimant’s allegation until July 2021, at the earliest, some eight years after the alleged assault.

15 265. Nor was it ever established that the assault had actually occurred, as alleged by the claimant.

266. In 2015/2016 the claimant worked in the respondent’s offices at the same time as AL, for some 18 months and she never complained.

20

267. In July 2021, when Mr Soutar asked the claimant to assist in securing employment for AL with TAQA, a client of the respondent, he was unaware of the claimant’s allegation. As soon as he was made aware he advised the claimant immediately that if the matter were to progress he would, *“deal with the resource (i.e. AL) directly which shall be all remote”* (P.530).

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268. On the facts, as I found them to be, therefore, in particular with regard to Mr Soutar’s state of knowledge, this allegation is without merit . There was no breach of contract by the respondent.

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“Carrying out an inadequate investigation into my Grievance”

269. The fact that Ms Whitman did not interview Mrs Soutar as part of her investigation has to be considered in the overall context of how she dealt with the claimant’s Grievance which was both professional and thorough.

270. As the respondent Company did not have an HR Department, Ms Whitman was appointed to address the Grievance. Ms Whitman has considerable expertise in HR and experience of employment related matters. She has a number of formal qualifications. As the respondent’s Counsel submitted, her *“professional credentials are impeccable”*. She did not know the claimant or the respondent before her appointment. She was entirely independent and her evidence was credible and reliable.

271. As the respondent’s Counsel submitted: *“in producing her report, Ms Whitman applied a rigorous methodology and considered an exceptionally large amount of material, including a substantial amount provided by the claimant herself. The transcript of the interview with the claimant on 25 November 2021 (P.220-256) shows that she spent over 2½ hours in discussion in order to obtain the claimant’s side of the story as fully as possible”*.

272. Mr Burnside, who heard the Appeal against the outcome of the Grievance, (none of the claimant’s grievances were upheld by Ms Whitman) described Ms Whitman’s report as, *“well written and obviously has involved a significant input of time”* (P.422).

273. The claimant herself expressed her satisfaction with the manner in which Ms Whitman had conducted the Grievance when she said: *“you’ve made a difficult process as easy as it could be”* (P.256).

274. Ms Whitman spent a considerable amount of time interviewing the claimant, far longer than she spent with Mr Soutar, and also reading the some 400 documents with which she had been provided.
- 5 275. It was only when Mr Burnside issued his Report and expressed the view that Mrs Soutar should also have been interviewed, that the claimant claimed there was a breach of contract by the respondent.
- 10 276. Further, although Mr Burnside found that Mrs Soutar should probably have been interviewed, Ms Whitman made a finding that the claimant had not been bullied by Mrs Soutar which, in my view on the evidence she was entitled to do.
- 15 277. Considering the manner in which Ms Whitman did carry out her investigation, I am not persuaded that not interviewing Mrs Soutar meant that her Report was fatally flawed.
- 20 278. Ms Whitman did endeavour to address this “*procedural issue*” by interviewing Mrs Soutar subsequently and, not surprisingly ,she supported Mr Soutar’s evidence. Mr Soutar also intended exploring with the claimant how she might be able to return to work, as recommended by Mr Burnside. However, the claimant was not prepared to engage and decided to resign.
- 25 279. The other aspect of the Grievance appeal outcome the claimant relied upon was Mr Burnside’s finding that, “*it was insensitive and inappropriate for the Company to offer him (AL) further employment which would bring him into contact, not only with Sharon, but also with other females in an office and offshore environment*” (P.422).
- 30 280. However, Mr Burnside’s function was to review the outcome of Ms Whitman’s report, not to rehear the Grievance.

281. That finding was predicated on Mr Soutar having prior knowledge of the alleged assault which he did not have. Mr Burnside was not aware of all the evidence and supporting documentation which I had and which enabled me to make a finding that Mr Soutar was unaware of the alleged assault when he asked the claimant to assist in securing employment for AL with TAQA. His request, therefore, was neither *“insensitive”* nor *“inappropriate”*.

282. In any event, the claimant would not have had contact with AL. He would not have been working in the respondent’s offices. Mr Soutar had advised the claimant when she advised him of the alleged assault that he would deal with AL, *“directly which shall be all remote”* (P.530).

283. I found favour, therefore, with the respondent’s Counsel’s submission that, *“it follows that the findings on appeal do not impugn the investigation carried out by Ms Whitman, which was thorough and complete and produced by an appropriate expert as discussed above, or her overall findings. It provides no support to the claim that the respondent was in breach of contract”*.

284. My findings in this regard are equally apposite to the final breach of contract alleged by the claimant (P.433): *“refusing or delaying to apologise after the Grievance appeal found that offering my abuser further employment, which would have included contact with me, was “insensitive and inappropriate”*.

“Unfounded slurs about my character/behaviour in both the Grievance process and the Police investigation into the abuse”

285. The relevant averments are to be found in the claim form at pages 25 and 26, para. 8, (a-l).

286. Mr Soutar was a credible and reliable witness. He accepted, very fairly, that he had been *“casual”* with his comments and that he could have used other

terms when interviewed by Ms Whitman. However, he explained that he was responding to the claimant's Grievance and he wanted to provide "*frank feedback and to follow it through with Sharon in due course*". I believed him. Some of his comments were accurate; her behaviour on occasions was difficult to comprehend, and bordered on the "*bizarre*": her allegation, for example, that the e-mail she received from Mrs Soutar asking to meet "*to discuss work going forward*" was "*wholly unreasonable*" and had her "*shaking uncontrollably at my desk*" (P292) ; and some of her allegations were without foundation (h and I, for example). I believe Mr Soutar was well intentioned when he made these comments, that they were made candidly, honestly and in good faith.

287. The claimant, of course, had the benefit of knowing the questions she would be asked by Ms Whitman in advance of her interview. Mr Soutar did not have that benefit.

288. In my view, looked at objectively, none of these comments he made were without foundation. They were not slurs on the claimant's character.

Police investigation

289. The claimant also alleged that Mr and Mrs Soutar had made "*unfounded slurs*" about her character during the Police investigation. She also suggested that they had been less than candid with the Police. This was a very serious allegation indeed but it was without foundation, scurrilous, and was another example of the claimant trying to paint Mr and Mrs Soutar in a bad light and show that they were not favourably disposed towards her. In response to a "Data Request" on 18 January 2022 Mr Soutar sent the Police copies of all the relevant evidence he had (P.573). In evidence he said that he and his wife cooperated fully.

290. The reason the Police were not able to proceed further with the claimant's complaint of sexual assault was due to lack of evidence. With some reluctance, the claimant eventually agreed that was the case when giving evidence at the Tribunal Hearing. The decision of the Police was hardly surprising as the allegation related to matters which had occurred some 8 years previously and the unreliability of the claimant's own account, particularly as regards the date of the alleged assault and her failure to raise the matter for several years. This allegation did not feature either in her claim form or letter of resignation and can therefore be disregarded. However, this allegation is typical of the manner in which the claimant pursued her claim.

“Refusing or delaying to apologise after the Grievance appeal found that offering my abuser further employment, which would have included contact with me, was “insensitive and inappropriate”

291. This allegation has no merit as I found that Mr Soutar was unaware of the claimant's allegation when he asked the claimant to assist in securing employment for AL with TAQA. Also, it follows from my findings in fact that the claimant was herself was, or should have been, aware that Mr Soutar had no knowledge of the alleged assault at that time.

292. Had the claimant not resigned this is one of the matters Mr Soutar would have discussed with her in his endeavours to facilitate her return to work.

“Last straw”

293. As I recorded above, in my view none of the individual allegations amounted to a breach of contract.

294. I had to consider, therefore, whether the many alleged acts and omissions, viewed cumulatively amounted to a repudiatory breach, as the claimant alleged. In doing so, I had regard to *Kaur* in which the Court of Appeal

reviewed cases on the last straw doctrine and set out five questions which the Tribunal should ask itself.

5 295. The first question is: “What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?”

10 296. I am bound to say that I had some difficulty identifying the “last straw” which the claimant was relying on which triggered her resignation. However, as the respondent’s Counsel submitted, in evidence she said that it was in relation to the proposal to re-engage Ms Whitman and the failure to provide a timeous apology following the Grievance appeal report. I have addressed these matters above.

15 297. I also did not accept the claimant’s contention that it was not Mr Soutar’s priority to rebuild the working relationship and that was one reason why she decided to resign. It was clear to me that that was exactly what he wanted and intended to do. She was a valued employee who had been there from the start of what had become a successful business. He did not want to lose her. In his e-mail of 15 February 2022 (P.429), he offered to have a discussion with the claimant, “*regarding her return to work*”, “*in advance*” of Ms Whitman carrying out her further investigation in light of Mr Burnside’s Report, This was exactly what the claimant had requested in her e-mail of 11 February (P.423).
20 However, she chose not take up Mr Soutar’s offer and resigned instead.

25 298. I should add, that far from being unsupportive of the claimant and insensitive to her concerns, Mr Soutar presented as a caring, responsible and sympathetic employer and that he valued the claimant as an employee and recognised her contribution to the success of the business. The e-mails he sent her, throughout her employment, particularly when she was unwell, demonstrated that he was hugely supportive and understanding, telling her that her health was most important, that she should “*feel free to work more flexibly*” and that she should take as much time off as she needed to get better
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(P510-508, for example). As I recorded, the claimant was a highly regarded employee and that was why Mr Soutar made significant bonus payments to her and consulted her regularly concerning business matters, the restructure, for example, and got her agreement. It was clear he valued her opinion.

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299. I arrived at the view, therefore, that when the claimant's allegations were considered either individually, or cumulatively, there was no breach of the implied term of trust and confidence.

10 **Affirmation**

300. Having reached this decision, it rendered the remaining questions in *Kaur* otiose. However, it is at least worthy of comment, I believe, that even if I had found that the respondent was in breach of contract in any respect, issues of whether the claimant had affirmed any breach and time-bar would have arisen and if so her claim could still have failed. As I recorded above, some of her claims were historic; appeared to be something of an afterthought; she had not complained at the time in any meaningful way; she had continued to work, as normal. Fortunately, it did not prove necessary to do address these issues.

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Dismissal of unfair dismissal complaint

301. The claimant failed to establish that the respondent was in breach of contract. The onus was on her to do so. Accordingly, she was not constructively dismissed and her unfair dismissal complaint is dismissed.

25

30

Bonus

5 302. The claimant's written contract of employment did not provide for a bonus payment (P.53). Accordingly, any bonus payment was at the discretion of the respondent. That was why the annual bonuses paid to the claimant varied and in 2016 there was no bonus payment at all.

10 303. The claimant sought a bonus payment for the period in 2021 when she had worked. No bonus payments were made to any of the respondent's employees in 2021 and I accepted Mr Soutar's explanation as to why that was so. It was due to changes by the HMRC in the IR35 arrangements which meant that the respondent Company had to engage its Contractors as employees and the business had to retain more capital. In my view, that explanation was entirely plausible.

15 304. Further, and notwithstanding that the claimant had performed well in 2021, there was no question that the respondent had acted, "*arbitrarily, capriciously or inequitably*" (**FC Gardner**). Nor was there any question of the respondent acting "*irrationally or perversely*".

20 305. Also, her claim for a bonus payment of £6,875, as she considered this to be a "*reasonable sum*", was not an adequate basis for such a claim.

25 306. I had no difficulty, therefore, in arriving at the view that this claim was not well-founded and should be dismissed. This claim was wholly misconceived.

30

Mobile phone transfer

307. In this regard, I arrived at the view that the respondent was in breach of contract. The reason for this is that, while the claimant left the matter of the transfer to the “*eleventh hour*”, the message which she sent to Mr Soutar on 5 1 April 2022 was clear and timeous (P.2/39). It was read by Mr Soutar; he was aware of the urgency of the matter; and even if he was of the view that his consent was unnecessary he could and should have dealt with the claimant’s request. Had he done so, the deadline would not have passed and 10 the phone and number would have been transferred to the claimant. His agreement with the claimant concerning the phone and number transfer constituted a contract between them. Mr Soutar failed to implement his part of their agreement. The respondent was in breach of contract.

15 308. Accordingly, the claimant is entitled to an award of damages in the sum of £750, being the loss which she incurred. The loss was not “*of her own making*”, as the respondent’s Counsel submitted.

Claimant’s business activities

20 309. For the sake of completeness, I record that, had I been required to do so, I would not have found that the claimant’s business activities amounted to a breach of her contract with the respondent. The respondent’s evidence with regard to the computer analysis was not reliable. The arrangement between 25 the parties for the claimant to do her hypnotherapy work was a fairly flexible one. There was no evidence that the claimant’s work for the respondent suffered. The claimant did work for the respondent outwith her core hours and never claimed overtime. There was a loose arrangement between the claimant and Mr Soutar that she could “*take time back*” for the extra hours 30 she worked for the respondent. On the evidence, the claimant’s business activities did not amount to misconduct on her part and would not have justified disciplinary proceedings.

310. Finally, I would very much like to thank Counsel for the cooperative, courteous and constructive manner in which the Hearing was conducted and for their careful and comprehensive written submissions.

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Employment Judge: N M Hosie

Date of Judgement: 24 January 2023

Date sent to Parties: 24 January 2023