Case No: 1600917/2024

EMPLOYMENT TRIBUNALS

Claimant: Ms C Crean

Respondent: URGO Limited

Heard at: Cardiff; in person **On:** 9 & 10 September 2024

Before: Employment Judge R Harfield

Representation: Claimant: Mr Morris (Counsel)
Respondent: Ms Nicholls (Counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was constructively unfairly dismissed.

2. The claimant unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to decrease the compensatory award payable to the claimant by 10% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

3. The claimant contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by 20%.

4. It is just and equitable to reduce the basic award payable to the claimant by 20% because of the claimant's conduct before the dismissal.

5. The complaint of breach of contract in relation to notice pay is well-founded.

6. The claimant unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to decrease the notice pay award payable to the claimant by 10% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

7. A remedy hearing will be listed.

REASONS

Introduction

1. The claimant was employed by the respondent as a product specialist from 10th of January 2010 to 22nd of January 2024. The claimant resigned on 22 January 2024. She brings complaints of constructive unfair dismissal and constructive wrongful dismissal. The claim form was presented 27th of March 2024. The respondent defends the claims.

2. I had a hearing bundle extending to 335 pages. I had witness statements from the claimant, and for the respondent Rabinder Kaur and Helen Atkinson. At the start of the hearing I pre-read the documents requested by the parties. I also clarified the issues in the case with the representatives. I then heard evidence from the witnesses before receiving closing submissions. Ms Nicholls also provided written closing submissions. There was insufficient time to deliver an oral judgment and therefore judgment was reserved to be delivered in writing. For reasons of economy I do not summarise the parties' closing submissions in this judgment. Instead, I refer to them at the appropriate places in my conclusions below. But I did take into account all the submissions made.

The Legal framework

Constructive Unfair Dismissal

3. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if:

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

4. Case law has established the following principles:

(1) The employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

(2) A repudiatory breach can be a breach of the implied term that is within every contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 and Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.)

(3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels or believes they have been unreasonably treated.

(4) The employee must leave, in part at least, because of the breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach; the breach must have played a part (see Nottingham County Council v Meikle [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).

(5) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

(6) In appropriate cases, a "last straw" doctrine can apply. This states that if the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial. Moreover, the concepts of a course of conduct or an act in a series are not used in a precise or technical sense; the last act does not have to be of the same character as the earlier acts.

(7) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

(a) 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?
(b) Has he or she affirmed the contract since that act?
(c) If not, was that act (or omission) by itself a repudiatory breach of contract?
(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.
(e) Did the employee resign in response (or partly in response) to that breach?

(8) If the most recent conduct (or the matter pleaded as the "last straw") is not, in the tribunal's determination, capable of contributing to a breach of the implied term, the tribunal must then go back and consider whether earlier complaints constituted such a breach (and potentially if so whether affirmation is in play): Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19.

(9) Where the employer is in fundamental breach of contract the employee may elect to accept the breach as bringing the contract to an end or treat the contract as continuing and require the employer to continue to perform the contract. This is termed affirmation. Where the employee affirms they will lose the right to treat employer's conduct as having brought the contract to an end unless there is further relevant conduct that revives the earlier breach(es). Affirmation may be express or may be implied/inferred from conduct.

(10) Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation. But a prolonged or significant delay can potentially give rise to implied affirmation because of what happened during the period in question. In particular, if the employee acts in a way that is consistent only with the contract continuing, that may be liable to be treated as evidence of implied affirmation. Examples may be the employee proactively carrying out work duties, or the acceptance of significant performance by the employer by the way of payment of wages. However, if the employee communicates that she is considering and in some sense reserving her position, or makes attempts to seek to allow the other party some opportunity to put right the breach, before deciding what to do, then some performance of the job functions or the drawing of pay will not necessarily amount to affirmation. Each case turns on its own facts.

5. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

Contributory conduct

6. Section 122(2) of the Employment Rights act says:

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

7. Section 123(6) supplements section 123(1) to say:

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

8. For the basic award there is no requirement for a causative relationship between the conduct and the dismissal. The compensatory award does require a causal connection. The employee's conduct need only be a factor in the dismissal; it need not be the direct and sole cause. In Steen v ASP Packaging Ltd [2014] ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

(a) What is the conduct which is said to give rise to possible contributory fault?

(b) Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).

(c) Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?

(d) If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that: "*A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and*

equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."

9. In Nelson v BBC No 2 [1980] ICR 110 it was said:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But is also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

10. When assessing contributory fault, I have to directly assess the claimant's conduct for myself based on the evidence before me and applying the balance of probabilities

Breach of Contract / notice pay

11. The tribunal has jurisdiction to hear breach of contract claims under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (with some exceptions) where the claim arises or is outstanding on the termination of the employee's employment. A claim must be presented (in the sense at least of commencing Acas early conciliation) within 3 months beginning with the effective date of termination of the contract giving rise to the claim.

12. It is not in dispute that if the claimant succeeds in her constructive unfair dismissal complaint, she will also succeed in a constructive wrongful dismissal complaint (having resigned without notice). I therefore say no more about the relevant legal principles in that regard.

Acas Code

13. In certain types of claim, an employment tribunal awarding compensation has the power to increase or reduce that compensation where either party has unreasonably failed to follow the Acas Code of Practice on Disciplinary and Grievance Procedures (Acas Code) (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

14. When considering an adjustment the following questions have to be considered:

    (1) Is the tribunal awarding compensation to an employee in respect of one of the claims listed in Schedule A2 to TULRCA? This includes unfair dismissal and notice pay breach of contract claims.

    (2) Does the claim concern a matter to which the Acas Code applies? In other words, does it arise out of:

a. A disciplinary situation (which includes misconduct or poor performance. The disciplinary provisions apply where it is alleged that the employee has behaved unsatisfactorily in some respect for which they may be culpable, which may be because of misconduct, poor performance or "something else" which requires "correction or punishment"; or

b. A grievance (which is any concern, problem or complaint that an employee raises with the employer)? For the grievance provisions of

the Acas Code to be engaged, a grievance needs to be put in writing: SPI Spirits (UK) Ltd v Zabelin [2023] EAT 147;

(3) Has either the employer or employee failed to comply with the Acas Code?

(4) Was that failure unreasonable?

(5) Is it just and equitable for the tribunal to apply an uplift or a reduction to the compensation, and if so, how much (subject to a maximum of 25% of the overall award)?

The issues to be decided

15. On 12 June 2024 EJ Brace directed the claimant (who has been represented throughout) to provide additional information of what the respondent did that caused her to resign. The claimant was told that if she relied on more than one thing to list the events, identifying the approximate date on which the events took place and the names of those who were involved.

16. Regretfully the claimant's solicitor did not respond with the specificity that was directed or intended, saying:

"*1. The Claimant avers that the respondent mismanaged a disciplinary investigation, associated grievance and hearing, during the period July to December 2023.*

2. The matter subject to the disciplinary investigation arose from innocuous errors that any reasonable employer ought to have dealt with informally and with remedial guidance. This was recognised by the investigating officer at the earliest stage, who noted issues had arisen from a genuine misunderstanding.

3. The Respondent's heavy-handed, insensitive and oppressive management of the issues, including delays in communications were wholly unreasonable and disproportionate. The Respondent knew or ought to have known that this would cause the claimant enormous distress.

4. By the conclusion of the disciplinary and grievance process in December 2023 (the exact date is unclear), the Claimant's mental health had been so severely affected, that she was not in a position to make important decisions, including about her future employment.

5. By 22 January 2024 the Claimant had recovered sufficiently to make an informed decision about her continued employment, in light of the treatment that she had endured in the preceding months. At this point, the claimant resigned from her post."

17. I clarified further the alleged breaches of trust and confidence with the claimant's counsel at the start of the hearing. He identified the following (as summarised by Ms Nicholls in her written closing submissions):

    (1) The "oppressive and/or improper" use of the disciplinary policy including the decision to subject the Claimant to an investigation at all;

    (2) The "oppressive" decision to proceed to a disciplinary process;

    (3) The determination to characterise the allegations as gross misconduct as opposed to misconduct;

    (4) The determination that the allegation was proven;

    (5) The delay before and during the disciplinary process;

    (6) The failure to acknowledge the grievance;

    (7) The failure to provide disclosure before the investigation meeting;

    (8) The failure to allow a short postponement of the hearing; and

    (9) The failure to follow advice from OH in holding a welfare meeting.

18. It was also agreed with the parties that I would decide the liability issues and two distinct remedy issues relating to contributory conduct and any adjustment for breach of the Acas Code. Thereafter if the claimant succeeded in part or at all, there would be a further remedy hearing.

19. Ms Nicholls raised a concern that given the way in which the claim had been pleaded the respondent had not understood that the decision to move to an investigation was a specific complaint in the case and that the investigating officer had not been called as a witness. Ms Nicholls made a pragmatic suggestion that the respondent not seek a postponement, but proposed that no inference be called from the failure to call the investigating officer. Mr Morris did not object to that pragmatic suggestion, which I noted had been caused in part by the way in which the claim had been pleaded and the headline way in which the Claimant had responded to EJ Brace's direction for the provision of further information.

Findings of fact

Background

20. The respondent is a multinational company which designs, manufacturers and supplies products to the healthcare sector. The claimants job, in effect, was to be a sales representative for wound care products. She covered 5 of the 7 Welsh local health boards. Much of the claimant's time was spent out and about meeting healthcare professionals and providing training and product demonstrations to generate business. The claimant would work from home to undertake administrative tasks, but the rest of the time would be out on the road. The job involved a significant amount of time travelling, staying in hotels, attending conferences and events, and providing lunch meetings for healthcare professionals. The claimant often needed to purchase expenses which needed to

be reimbursed. Expenses could total (ignoring the impact of Covid/lockdown) around £1200 to £1600 a month.

21. Until 2020 the respondent used a manual expenses system which was time consuming, but the claimant did not have any problems with using it. In March 2020 the respondent announced they were introducing a new expense system called Concur. The Concur system involved using an app and scanning receipts and statements into it.

Training on Concur

22. Concur was introduced at the same month the entire team including the claimant were furloughed. The claimant says it was not in depth training and they were told more detailed training would be provided in due course; but I do note she received the same introductory training that everyone else received.

23. The claimant returned from furlough in July 2020 but like the rest of her team continued to work from home, and was not out on the road, and therefore only incurred minimal expenses. Site visits did not restart for the claimant until early 2021 and even then the claimant was still not undertaking the same amount of face to face visits that she did prior to the pandemic. The claimant says that it was perhaps around the beginning of 2022 that things got back to the level they were at before.

24. On 11 November 2020 Kerry Wilson [KW], Financial Accounting Manager, sent all staff a Concur user guide [160 and 180-206].

25. In September 2022 there was a regional meeting where refresher training on Concur was listed as being on the agenda. The claimant was due to be on holiday that day. On 22nd of September 2022 the claimant emailed her line manager, Bridget Stickley [BS] asking if she could be updated on the Concur training as she was missing the meeting and said: "*Any easy way to do Concur I'd love to know."* BS replied: "*Obviously and yes I will do that- let's not expect miracles but all tips will be sent on!! [*178]."

26. On 28 September 2022 BS sent the Claimant a copy of powerpoint slides headed "Expense Refresher" [89-99]. One of the slides said: "*If any of your expenditure is personal, please tick the DO NOT REIMBURSE box where applicable. This will then be recharged to you via your salary."* The claimant was also sent a feedback form where she provided the highest score of 5 for "*Did you feel the refresher was worthwhile?"* and "*Did you feel the information was relevant.*" When asked: "*What do you think should have been included?*", the claimant wrote: "*All include – Thank you*." When asked for any other comments she wrote: "*Easier way of doing expenses re Concur, very time consuming."* The claimant sent a covering email to KW, who provided the training saying she had not been present but she found the presentation (i.e. powerpoint), "*very informative."* The claimant said in evidence she did not read the whole powerpoint through and she found it confusing. I do not accept that to be the case given the response the claimant gave to KW at the time. According to the claimant's subsequent investigation meeting [65], a colleague TB, who was a Concur Champion (having used it in a previous workplace) also had spent an hour with the claimant to go through the expenses processes with

her. There was also a general WhatsApp group where colleagues would post queries or offer tips to each other.

27. In the claimant's December 2022 annual performance review feedback form the claimant wrote in relation to the technical skill of "SAP Concur": "*learning the best way to report expenses but still find it very challenging at times with uploading receipts etc."*

28. On 5th of January 2023 at an annual conference all employees were sent, by KW, an e-mail with a new expenses policy [49-60]. KW's email said: "*If you have any queries, please do not hesitate to contact me."* There is a section on page 59 which says:

"Recharges – What's included

- *Personal mileage – please tick box* Personal Expense (do not) Reimburse)
- *Personal purchases made on company credit card*
- *Allowable expense overspend*
- *Missing credit card transactions (on your credit card statement and not included in your expense submission)*
- *Motoring penalties and fines*
- *Consistent missing receipts"*

29. The claimant said in evidence she was confused by the tick box because it seemed to just relate to personal mileage. The claimant did not, however, raise a specific query with KW or anyone else about it.

Disciplinary investigation

30. Sometime in around June or July 2023 BS contacted Rabinder Kaur [RK], HR Manager, and told RK she had concerns about the claimant's expenses not being submitted correctly and she wanted there to be an investigation. RK asked BS to provide some documented examples of BS's concerns. RK said in evidence there needed to be some reasonable supporting information to demonstrate there was something to investigate further. BS produced some screenshots or printouts that I do not have but which later became, albeit presented in a different way, some of the appendices subsequently produced in the disciplinary process. BS talked her concerns through with RK.

31. On 20th of July 2023 the claimant returned from annual leave to receive an e-mail from Helen Atkinson [HA], the new commercial director, telling the claimant she needed to name every attendee in her expenses claim for meetings in May and June. The claimant had never had to do this previously and it was a new direction and new policy by HA. HA also, as I understand it rejected some expense claims and raised some queries.

32. HA had been covering for BS in BS' absence on annual leave. HA also gave some feedback to BS about ensuring that employee's expense claims were accurate. From what I understood from HA's evidence, which was at times not precise, at

around that time (the exact sequence of events is not entirely clear) HA was also aware of BS's wider concerns expressed to RK about the claimant's expenses. RW's subsequent investigation report says that in May and June a number of expense claims appeared to have been submitted incorrectly leading to them being rejected and a more detailed review being required, and which led to a review of the claims June 2022 to July 2023.

33. BS then appointed Rachel Winterton [RW], Regional Business Manager, to undertake a more detailed investigation into the history of the claimant's expense claims and any discrepancies. On 26th of July the claimant was sent a letter from BS saying she was under investigation in respect of discrepancies in the submission of expenses during the period June 2022 to July 2023. The claimant was invited to attend an investigation meeting via teams on the 27th of July at 3:30pm. The claimant was told she could be accompanied and to bring with her any information she thought might be useful to the investigation. The claimant was told the purpose of the investigation was to establish the facts by gathering as much relevant facts and information as possible. The letter said once the investigation had been completed the claimant would be informed in writing of the outcome, and if it is found there was a case to answer, she would be invited to attend a formal disciplinary hearing.

34. The claimant says that she was absolutely floored by receiving this correspondence out of the blue and she felt the tone of the correspondence was accusatory, hostile and frightening. On 27 July 2023 at 10:22am the claimant emailed RK saying she was totally shocked regarding the investigation and asking for details of what discrepancies had been found prior to the meeting so she could have the opportunity to prepare for the meeting. The claimant quoted the disciplinary policy which said at paragraph 4.5: "*The employee whose conduct is the subject of proceedings will be given access to all relevant document documentary evidence and statements at a suitable time prior to any hearing."* RK replied at 12:05 to say the discrepancies would be discussed during the investigation meeting, that it was not a hearing but a meeting where full information would be shared, and the claimant would be given a full opportunity to respond additional time where necessary. RK said in oral evidence that the information RW had pulled together was complex and it was felt it was better to go over it directly with the claimant. RK accepted her email to the claimant did not give that degree of explanation. The exchange with the claimant was of course happening the day of the planned investigation meeting.

Investigation meeting

35. The investigation proceeded on Teams on 27 July. RK attended to take notes. The notes are at [64-75]. The claimant was visibly upset saying she had never been in such a process before in 13 years of employment. RK offered to postpone to allow the claimant time to arrange to be accompanied, but the claimant was content to proceed. RW shared her screen with the claimant in the course of the meetings so the claimant could see the expenses that needed clarification. As I understand it these are the set of appendices found at [246-277].

36. The claimant was asked about a fuel receipt which had been put through as a claim for a business meal (Appendix 1). The claimant said she had a lot of problems with using Concur that KW and BS were aware of. She said when submitting an expense it would default to the same category as the last expense she submitted, and she had forgotten to change the category to fuel. When asked if she had looked at the receipt attached prior to submitting the expense, she said she simply looked at the figures to check they tallied up correctly and she would only change it if the system instructed her to do so. The claimant was also asked about the names put against the business meal and she explained she had not previously been required to list all the names, but when the claim had been rejected by HA she had gone back in and done so.

37. Appendix 2 was about £3.49 for printing. The claimant explained it was for copying a QR code for nurses to use.

38. Appendix 3 was an expense that was not showing up as a card transaction and had been put through as a cash transaction. The claimant had sent an email to BS saying she was waiting for the card transaction to show up on Concur. The claimant explained she had wanted to submit it before going on 3 weeks leave and did not know which period it would come through for.

39 Appendix 4 was a claim for a lunch allowance on an admin day. The claimant could not specifically recall, but said she would frequently drop items off to a customer on an admin day which could not be recorded as a meeting on the system. But she would then buy and claim lunch hence the expense claim.

40. Appendices 5, and 6 were about a duplicate claim. The claimant had submitted a card transaction for £76.70 on 26 April 2023 and then claimed it again as a cash transaction on 4 May 2023. It meant it had been paid initially on the respondent's credit card, but the second cash transaction meant she was also seeking personal reimbursement of the expense. The claimant explained it was a duplicate, she must have taken the photo twice in error and she had deleted the duplicate cash expense when HA rejected it.

41. Appendix 7 was an expense submitted for iPhone headphones. The claimant said it was a charger not headphones but agreed it was a personal expense. There is an explanatory note on appendix 7 which says: "*cash claim for iphone headphones £15.99 – I sent them back and asked to tick personal expense – instead did not tick recharge box – but added a note to say recharge which wouldn't get picked up."* The claimant said she would type a comment of "please recharge." She said she did not tick the box "personal expense (do not reimburse)" because she thought if she ticked that the value would be reimbursed to her by finance when it was a personal expense. The claimant said given the misunderstanding there would probably be a few more transactions with the same problem. The claimant said that if BS sent it back to her instructing her to tick the personal expense she would do so, but that BS had never explained the purpose of ticking the box as RW had explained the reasoning.

42. Appendix 8 was another fuel expense submitted as a business meal where the claimant had not changed the type of expense. The notes on appendix 8 say the claimant also did not check the personal mileage box and had done the same for

previous expenses in April that had been picked up by KW. The notes point out that a duplicate mileage warning was flagged on the system to the claimant. The claimant said she only ever ticked the personal expense box if instructed to do so and no one had ever explained why she should tick the box. The claimant said she had never asked BS or KW why they were asking her to tick the personal expense box if she thought it would result in her being reimbursed something she was not entitled to. She said she just actioned it as instructed. The claimant said she had not ever questioned why her expenses kept getting rejected and she had simply followed the instructions given when no one had explained why they were being rejected. It was put to the claimant why she did not question the instructions to tick the box if she thought it would result in her receiving money she was not entitled to. The claimant said she did not know why she did not ask, and perhaps she was rushing.

43. Appendix 9 was a cash expense for a micro SD card. The claimant explained it was a personal expense.

44. Appendix 10 was about a second duplicate claim put in as a cash claim when originally a credit card payment for £69.78. The claimant said again she must have mistakenly taken the photo twice, albeit she could not explain how she submitted a cash claim in April for a transaction in May.

45. Appendix 11 was a query about a business meal with a fuel receipt which had been picked up by finance and changed to fuel. The claimant said again she had forgotten to change the category. It also seemed to be a receipt in the wrong amount that the claimant could not explain.

46. Appendix 12 was an expense for £55.01 without a description. The claimant said she would need to log into her Amazon account to check. Appendix 13 was a query about a claim for shipping tape. The claimant explained it was a business item.

47. Appendix 14 was a query about expenses in Spain and foreign currency fees. The claimant explained she had been on a personal trip to Spain before a business trip to Dublin and had permission from BS to fly directly from Spain to Dublin and the day she flew was a working day.

48. Appendix 15 was an expense for the claimant's private car used for work. The claimant said BS had told her it was the same as fuel so had approved it. RW stated it was a running cost and not recoverable.

49. Appendix 16 was a private taxi fee where the claimant had entered a comment of recharge but did not tick the personal expense box and so it had been incorrectly reimbursed to her.

50. Appendix 17 was a private taxi fee where the claimant had followed the correct procedure in ticking the personal expense box. The claimant said she had probably ticked the box later on after the claim originally being rejected and after she had been told to tick the box.

51. Appendix 18 was a cash expense in September 2022 identical to a cash claim in August 2022. The claimant said she received duplicate warnings but as the system did not instruct her to delete it, she did not do so as the message only said it could be a duplicate. The claimant was also taken to an entry in August 2022 where she

had been told to tick the personal expense box so an expense could be recharged. The claimant said she clearly had not been ticking the box, but it was not for personal gain.

52. Appendix 19 was a claim for drinks where the claimant appeared to have used an old receipt. The claimant said she had simply used a random receipt as a means to state she had lost the actual receipt. She said she did not know how to do a missing receipt declaration.

53. Appendix 20 was a duplicate cash/card receipt. The claimant said she did not know what had happened and it must have been a mistake.

54. Appendix 21 was a further private taxi fee where the claimant had failed to tick the personal expense box but had put recharge in the notes section.

55. Appendix 22 was a query about the claimant's resubmitted May expenses after being rejected by HA. There had been a duplicate £5 lunch claim which the claimant said, when rejected and highlighted as a duplicate, she had deleted. The claimant had answered queries from HA that included the iPhone charger should be recharged. She had also explained a claim for a jar of coffee purchased for a customer base and the purchase of a plastic box for work supplies.

56. At the conclusion of the meeting RK said that due to planned absences it would not be possible to give any feedback prior to 7 August 2023.

57. The claimant says that on conclusion of the meeting RW said there was clearly a training need. It is not in the minutes. RK said she could not recall it being said but was not saying it did not happen, she just did not remember. On balance I think it is likely RW said something along those lines because of RW's ultimate conclusions.

Further investigations

58. Following her investigation meeting the claimant sent through further information from Amazon about the purchase of ink.

59. On 31 July RK sent RW the meeting notes for checking and said KW, BS and TB should be interviewed.

60. RW then met with BS on 8 August [74-75]. BS said there had been initial training when Concur was introduced, with refresher training in September 2022 that the claimant had not been able to attend and had been followed by a handbook sent to everyone. BS said there was also a stand at the sales conference in January 2023 for anyone who had questions, and the handbook had been sent out again after that. BS said when checking expenses she would look to see the claim matches the bank statement and have a quick look through the expenses. She said that when rejecting claims she would put comments why it had been rejected and occasionally the claimant would call to seek clarity if she was unsure why a claim had been rejected. BS could not see claims rejected by finance. BS said: "*I don't recall having any discussion with her regarding personal claims or her asking me any questions on this matter. My team are aware of the process that has been shared with them and unless my team advise me that they require any additional support I will expect that they understand and are comfortable with the process."*

BS said she did not think the claimant was struggling with expenses and the claimant had not made her aware of any concerns. BS said prior to the investigation she had typically rejected expense claims once or twice a year, usually because the figures did not match. BS said again she had no reason to believe the claimant was struggling as she had not rejected many claims prior to the investigation. BS also confirmed the travel to Dublin from Spain was on a working day and also clarified her view on what happened with the AdBlue car expense.

61. TB was also interviewed on 8 August 2023 [79-80]. TB explained her role Concur Champion. TB could not recall specifically giving training to the claimant. She said the information she would give in general about personal expenses was to tick the personal expense box for private mileage. TB could not remember the claimant raising concerns with her about submitting expenses. TB said some people did need a little more help at the outset. TB said there was also a whats app group where people asked questions and if no one could answer it she would direct them to speak to KW. TB confirmed the recent change implemented by HA where names of every attendee at a meeting had to be recorded in the expense claim.

62. KW was also interviewed on 8 August [81-82]. KW said her training included ticking the personal expense box both for private mileage or personal transactions mistakenly done on the corporate card. KW said she could not remember speaking to the claimant about the claimant's expenses but was aware they had rejected a few by email, for example, to do with missing private mileage. KW checked a taxi claim where the claimant had ticked the personal expenses box. KW said the whole claim had been rejected by BS as the value did not match the card statement

    with the claimant then correctly resubmitting the claim after amending the personal taxi expenses.

63. On 15 August RW did further analysis of the expenses [101]. RW also noted in her subsequent investigation report that there were delays due to annual leave being taken by the claimant, RW and RK.

Investigation report

64. By 16 August 2023 the investigation report had been prepared [101-103]. RW said in the report:

    - 4 expenses had been confirmed as legitimate business expenses (appendices 2, 4, 12, 13 and 14);
    - There appeared to be a number of duplicate expense claims (appendices 5, 6, 8, 10, and 22). RW noted the claimant's explanation that they had been submitted in error, probably due to taking duplicate photos of the same receipt and that the claimant found the expense submission process difficult. RW also noted that the system would flag a duplicate error, but the claimant had said she would not check on seeing the warning flag or delete the claim as the warning flag did not instruct her to do so. RW noted the claimant saying she would delete duplicate claims on instruction from the approver. RW also noted the concern that duplicates were raised as cash transactions in addition to the card transaction resulting in the wrongful

reimbursement of the expense if the approver did not identify the duplication;

- Some personal expenses were being reimbursed by the company because the claimant was not ticking the "personal expense do not reimburse box" but instead was recording a note in the comment section. RW noted the claimant saying she believed she would be wrongly reimbursed if she ticked the box. RW confirmed that appendix 16, where the claimant had ticked the box, had only been done when the claimant was instructed to do so following the expense being rejected. RW noted the claimant had not questioned ticking the box on being instructed to do so despite the claimant's belief she would be reimbursed for monies not owed, and the claimant simply acted on instruction. RW noted 4 expenses which were personal expenses that were not submitted correctly (appendices 7, 9, 15, 21, and 5/10);

- There was incorrect submission of expenses. RW noted two claims were for fuel were submitted incorrectly as business meals due to the claimant saying she had forgotten to change the expense type. A cash expense had been submitted in advance of the expense coming through on the bank statement as the claimant did not want submit the expense late with pending leave. One expense was submitted with a note advising the receipt was lost rather than making a lost receipt declaration. RW noted in relation to names for business meals that it had been confirmed that instructions had changed in that regard;

- RW noted the claimant had attended initial Concur training, had missed the refresher training but had a copy of the training materials which the claimant had acknowledged as informative. RW noted the claimant was apologetic and maintained there had been no deliberate intention to defraud the company. RW noted the claimant's clean disciplinary record throughout 13 years service.

65. RW said in conclusion that the claimant was aware of the expenses policy but repeatedly failed to submit expenses correctly resulting in a breach of the expense policy. RW said the claimant had not requested training prior to the refresher training or having missed it, had said the training material was informative, and had not raised concerns or questions. RW said the incorrect submission had resulted in 5 personal expenses being paid with a debt owed from the claimant of £109.09. RW said that in addition to duplicate claims and the wrongful submission of personal expense there were a number of errors in the submission of expenses which were in breach of the expenses policy. RW said based on the above there was sufficient supporting evidence to conclude there were significant breaches of the expense policy. RW's recommendation was that the matter be referred to a disciplinary hearing for failure to submit expenses correctly in contravention of the expenses policy resulting in financial losses.

Invite to disciplinary hearing

66. On 31 August RK sent the investigation report to HA, saying BS was on leave until 4 September but she needed to notify the claimant asap of the outcome of the

investigation. RK asked HA to book a venue in Cardiff and RK would send the invite [100]. The claimant says she had been left in limbo without updates. She says she called RK twice and on the first occasion RK said it was ongoing and on the second she left RK a message. She says she was then on holiday at the August and RK left her a reply but the claimant did not pick it up until she was back from leave 2 weeks later. The claimant says she felt very alone and it made her feel ill.

67. On 1 September 2023 HA then sent the claimant an invite to a disciplinary hearing 6on 7 September 2023 [106]. The letter said: "*This meeting has been arranged to discuss allegations of gross misconduct as detailed in the investigation report, which has been enclosed along with the supporting documentation. This report provides detail of your conduct that has been deemed to be unsatisfactory in light of the organisation's Disciplinary Procedure. The allegation is as follows: - Failure to submit expenses correctly in contravention of the expenses policy resulting in financial losses for the company*." The claimant was told of her right to be accompanied and was told: "*This is a serious allegation and you should be aware if, after considering the evidence, the disciplinary allegation is found to be proven, this could lead to your dismissal on the grounds of gross misconduct."*

68. RK said in evidenced that the decision to proceed to a disciplinary hearing and to proceed as an allegation of gross misconduct was made by RW albeit RK had talked it through with RW. I return below to the specific analysis of that point.

69. HA likewise said in evidence the decision was made by RW, but that as HA was chairing the disciplinary hearing, before sending out the invite letter she had checked that she also felt the allegations potentially fell within the category of gross misconduct.

Sick leave and Occupational Health

70. The claimant emailed RK to decline the disciplinary hearing date, explaining she was on annual leave. She says the letter was very frightening and she felt very confused and upset when there had been honest mistakes on her part. She says her mental health collapsed. On 4 September RK emailed HA to say BS had said the claimant had been signed off work for 4 weeks. RK said she would make a referral to OH to ascertain of the claimant was fit to attend a meeting with support whilst on sick leave [111]. BS told the claimant she would send an email to the team to not contact the claimant during that time. The claimant says she understood that was for work purposes and not wellbeing contact albeit in the later grievance process it was said BS had understood the claimant did not want contact.

71. RK made the OH referral on 8 September. The appointment took place on 14 September 2023 by telephone. On 27 September RK chased OH for an update [116].

72. On 2 October RK emailed the claimant saying she hoped the claimant was ok, and noted that the claimant's fit note expired that day. RK asked for an update. The claimant replied on 3 October to say she was still not very good and her doctor was giving her another sick note for 4 weeks. On 4 October RK emailed the claimant to saying they were still awaiting the report from OH and when in receipt she would be in touch, and in the meantime the claimant could contact RK or BS.

73. On 16 October RK then emailed the claimant to say they were in receipt of the OH report that had advised it was in the claimant's best interests to reschedule the disciplinary hearing off-site as soon as possible and it would be rescheduled for 19 October [125]. The claimant replied to say she still did not feel up to the meeting and when she had her interview with OH the OH practitioner had said she did not think the claimant would be up to the meeting and would advise a welfare contact. The claimant said when she got the report she had replied to OH to explain that before the report was sent out. RK replied to say what the claimant had said was contrary to the OH advice that the claimant was fit to attend any management meetings with adjustments, and they would be proceeding to invite the claimant to attend the meeting. Later on 16 October the OH client account manager then told RK that the report had been retracted from the portal due to there being an amendment request from the claimant which had been passed on to the clinician.

74. The request the claimant made to OH (albeit this was not copied to the respondent at the time) was that she said the OH practitioner had agreed the clamant was not well enough to attend a disciplinary hearing and suggested a welfare call/meeting to see how the claimant was. The claimant disputed the part of the OH report which said she could attend a disciplinary hearing, saying that she did not feel well enough to attend and felt very anxious about it. The claimant said to OH she had received an email from the HR manager and felt sick and anxious with the way RK had responded.

75. On 18 October the OH manager told the claimant that the clinician had advised she was unable to make the changes to the report. The claimant said she was not up to facing the meeting which had caused the stress and anxiety and said again the practitioner had only advised a welfare meeting at that time. The claimant said she had spoken to Acas who said she did not need to attend on sick leave and writing the email had made her really anxious and she was seeing her doctor. The OH manager suggested that they add that claimant's comments as an addendum

    to the report. Again this was private correspondence between the claimant and OH not copied to the respondent.

76. On 20 October RK emailed the claimant to say OH had confirmed they continued to support their original recommendation following receipt of the claimant's objections and they were therefore rescheduling the disciplinary hearing. RK said she would send the invite out in the coming days and asked if there were any days the claimant was not available the following week [124].

77. On 24 October the report was re-sent to the claimant. OH said they had been having issues with the system for releasing reports and so it had been resent. The OH manager said again the clinician had confirmed she would not make further amendments to the report. The claimant said again to OH that she was very upset and had seen her doctor as her symptoms were worse and she had now been prescribed medication. She said she was receiving emails from HR asking her to a disciplinary hearing and HR would not listen because they were going by the report. The claimant said OH could send the notes she wanted added/ changed and said again there was no agreement for a disciplinary to go ahead, only a welfare call/meeting. She asked if there was a recording of the meeting. The

claimant also emailed RK to say she would be submitting a formal grievance by the end of the week [129].

78. The OH report was formally sent to RK on 24 October [131-136]. The OH nurse advised the claimant was temporarily unfit for all work at the time. The OH nurse recounted the history from the claimant's perspective and said the situation with the expenses and the outstanding disciplinary hearing appeared to be the root cause of the current barrier to any return to work at that time. The OH nurse said it appeared to be a managerial rather than a medical concern and: "*Although Mrs Crean has become unwell as a consequence, it will be best resolved through continual positive dialogue between both parties."* The OH nurse said there did not appear to be evidence at the time of a significant underlying recognised mental health disorder such as clinical depression or generalised anxiety disorder. The OH nurse said the claimant was temporarily unfit for work pending resolution of the workplace issues and that constructive management interventions, rather than any specific medical considerations, were more likely to bring it to a successful conclusion. The nurse advised the claimant was unlikely to recover sufficient fitness to resume duties until such time the outstanding workplace issues were concluded and to the claimant's reasonable satisfaction. She said in principle the claimant was fit to attend any necessary management meetings with adjustments of a neutral venue, the right to be accompanied, and being given additional time in any meetings. The nurse said although the claimant would have increased anxiety immediately before and during any meetings, she considered the claimant would be able to contribute effectively and understand the proceedings.

79. On 27 October at 16:36 the claimant said she would send the grievance the following week [137]. RK replied at 18:34 to say the claimant had not given an explanation for the delay, and unless there was a reasonable explanation she would not accept the revised timetable as it could potentially delay rescheduling the disciplinary hearing. RK said she expected to receive the grievance by close of business on Monday 30 October 2023, and alternatively they would continue to schedule the disciplinary hearing for the second time. RK said if the claimant failed to attend without any good reason they would hold the hearing in the claimant's absence [137]. The claimant replied on 30 October to say the reason for the delay

was her solicitor was reviewing the grievance notes [139]. On 1 November the claimant emailed RK to say had seen her GP twice in the previous week as she was still not very good and had been given medication. She said she was sending a further fit note.

Grievance

80. On 2 November the claimant submitted her grievance [144 – 148]. Within the grievance the claimant said she was very disappointed, upset and devastated with the investigation and the non-compassionate way she had been treated with a lack of support so much she had been on sick leave with stress and anxiety. She said she had not received any welfare contact in the investigation period 27 July to 1 September, and had contacted RK before going on annual leave on 15 August as she was concerned and worried with sleepless nights and tearfulness. She said she received a call after work hours on 16 August when she was on annual leave which she did not listen to until her return two weeks later. The claimant said she

had not received support or wellbeing communication from BS or RK and had not been able to talk to anyone and felt isolated and anxious. She referred to the situation with the OH report, and that it had caused anxiety attacks. The claimant said she had a lack of training on Concur and had aired her issues with BS and KW but no training was offered as a refresher. She said she had not received the refresher training asked for from BS or KW. The claimant said the expense policy sent in January 2023 only said to tick the box for private mileage and not for personal credit card purchases.

81. The claimant alleged the minutes of the meeting with RW did not record RW saying there was a training need and a genuine misunderstanding of expense which needed addressing. The claimant asked why the issues were not highlighted and refresher training arranged if she was making mistakes and asked why she was the only one who had a disciplinary investigation. She said she had never been aware of there being a missing receipt declaration form and had historically submitted a post it note stating missing receipt and the amount and this had been authorised before. She said she had not been trained or corrected on this in the past 3 years. She said under the policy the approval manager should have been checking notes where she had written to recharge personal expenses. The claimant said she felt humiliated by being asked questions about whether she had approval to buy a coffee in the airport or what parcel tape was purchased for.

82. The claimant said she believed the situation could have been dealt with in an informal matter to give her full training or refresher training with the genuine mistakes being recharged to the claimant.

83. The claimant also said: "*After receiving the recording of the Occupational Health telephone meeting you can clearly see how distraught I was throughout the meeting. The conversation that they would advise a Welfare contact first*." RK said in evidence she did not at the time receive the recording (or a transcript) of the claimant's OH assessment. I accept RK's evidence in that regard as there is nothing to show the recording or transcript being sent at the time to RK or anyone else in the respondent. It is also supported by the record of the subsequent grievance hearing where HA records [229] that the respondent only had the report and not any recordings.

84. On 3 November the claimant submitted a further fit note signing her off until 29 November 2023.

Invite to grievance and disciplinary meeting

85. On 24 November the claimant emailed RK saying after 3 weeks her grievance complaints had not been resolved and she had not even had the courtesy of a reply or an acknowledgment. She asked RK to look into this and ensure the complaints were dealt with properly and without further delay [213]. RK replied that day to apologise for the delay in responding and to acknowledge receipt of the grievance. RK said the grievance was so intertwined with the disciplinary they would address both matters at the same hearing. RK asked the claimant for any unavailability dates in the following week.

86. RK said in evidence the delay had been caused by obtaining external legal advice about how to handle the grievance and its overlap with the disciplinary. I accept that evidence.

87. Also on 24 November RK emailed HA to say: "I *finally have a way forward from legal – as her grievance is so intertwined with the disciplinary we should address both matters in the same hearing."*

88. At 18:06 on Friday 24 November RK emailed the claimant with notification of the grievance and disciplinary hearing to take place on 30 November [216-217]. In terms of the disciplinary case, the substance of the letter was the same as the original invite, but the letter said the meeting was on 29 November, not 30 November.

89. On 28 November the claimant emailed RK to say the email had been sent late on Friday evening and there was a discrepancy in the date. The claimant said either way it was unreasonable for the respondent to have delayed in dealing with the situation for so many weeks and then give herself a few days to prepare. She said the letter said the respondent wanted 3 clear days to consider any documents the claimant would want to submit. The claimant said the thought of having to relive the injustice of it all and the pain it had caused, at such short notice was extremely upsetting. She said she had also told herself it needed to be resolved one way or another, so she was determined to attend a hearing as soon as possible. The claimant said she wanted to take some further advice from her GP and in relation to the disciplinary itself. She asked to rearrange for the next week or the week after.

90. RK apologised for the typing error and confirmed the meeting was on 29 November as per the formal invite. RK said the original hearing had been scheduled for 7 September and so the claimant's suggestion she had not had enough time to prepare was inaccurate. RK said the claimant had said delays had added to the stress, and so RK was perplexed why the claimant was seeking further delay. RK said they were making the adjustments recommended by OH. RK said she would be happy to discuss further if the claimant would like to call her, but for the reasons given the disciplinary hearing would proceed as scheduled.

91. The claimant said she did not know if she was more shocked or surprised to receive RK's email. She said as she was on annual leave on 7 September the first hearing should never have been arranged on that date and that her grievance had been ignored for 3 weeks. She said the arrangements for the 29/30 November had been a farce. The claimant said she was not seeking a long postponement and only asked for a week or so to refresh her memory and go through everything again.

She said she did not know why RK was being so hostile to her and her request. The claimant said she was not going to be able to attend that day, was not in the right state of mind and was ill prepared. She asked again for a brief postponement and said: "*but you will no doubt proceed as you think best. So be it*." The claimant said she would add to her grievance that she had been ignored for 3 weeks, the refusal to allow sensible time to prepare, being contacted on a Friday night, and the content of the email the previous day.

Grievance and disciplinary hearing

92. The hearing proceeded on 29 November in the absence of the claimant. The notes are at [225-232]. The claimant's grievance was addressed first between 12:20 and 13:35. Amongst other things, HA found no wellbeing contact was offered from 27 July to 1 September, albeit the claimant had not requested any and the respondent was not aware of any challenges being experienced in relation to the menopause. HA said the investigation did appear to be unduly lengthy, but it was largely due to the volume of expenses to be reviewed, preplanned holiday for RK and RW and short staffing in HR. HA said this did not negate the need for HR to keep the claimant informed of timescales and it was regrettable the claimant had to chase on 16 August and to then not pick up the return call until her return from holiday. HA said the level of communication from HR during the investigation was not adequate. HA also said the claimant had asked not to be contacted by colleagues when on sick leave and BS had understood that included her and BS had consciously given the claimant space.

93. HA said the claimant had received full training when Concur was launched and it was recognised that the claimant required a lot of support to transition to the electronic submission of expenses. HA said the claimant was repeatedly provided with one to one support from her manager and by KW with any queries the claimant had. In relation to the allegation the slides were not clear about ticking the personal expense box, HA said the slides explained the recharges list which includes personal expenses made on the company credit card. HA also said: *"Furthermore, you had repeatedly been instructed by both Kerry and Bridget to tick the box for personal expenses, which you actioned accordingly."* HA also said: "*You clearly demonstrated the knowledge to be able to submit personal expenses correctly as you had done so on several occasions and therefore, I do not accept that you did know how to submit personal expenses correctly as you clearly had submitted previous expenses correctly and had repeatedly received instructions on how to do so."*

94. HA said the OH report advised that the pending disciplinary was the root cause of the current barrier to any return to work, and it was therefore reasonable to give priority to completing the disciplinary process at the earliest opportunity to reduce the level of uncertainty that may have been contributing to the claimant's stress levels. HA did not agree that the matter should have been dealt with informally referring to the seriousness of the situation. Overall, HA apologised for any distress caused by the inadequate communication on timescales for the investigation and reasons for delay.

95. The disciplinary hearing was then conducted between 2pm and 2:52pm. It was noted the claimant's grievance contained lots of relevant information as mitigation. HA therefore ran through the claimant's grievance again, making similar responses to those made in the grievance part of the hearing. HA did not accept that the claimant had made a clear request previously for additional Concur training. HA

    then said: "*Whilst you did not intentionally submit expenses incorrectly, you repeatedly did so despite training and one to one feedback and guidance which resulted in you contravening the expenses policy and a financial loss for the company. The allegation is proven.*

In light of the information provided and the mitigation presented, my decision is to issue you with a first stage written warning for a period of nine months, effective from the day of today's hearing (e.g. 29th November 2023- 28th July 2024.) The warning will be placed on your employee file but will be disregarded for disciplinary purposes after the expiry period, provided there are no further breaches of the expense policy. Failure to maintain the sustained level of conduct or any repeat of conduct either similar or dissimilar in nature could result in further disciplinary sanctions up to and including dismissal.

Additionally, you will be given further one-to-one refresher training with the financial accounting manager as a priority."

96. It is the parties' agreed position that the claimant asked, and the respondent agreed, to delay in issuing the written outcome of the grievance and disciplinary hearing at that time and the claimant did not receive it until after she resigned. The claimant did, however, know of the intention to issue her with a 9 month first written warning.

Claimant's resignation

97. On 30 November the claimant said she would be forwarding on a further fit note [233].

98. On 22 January 2024 the claimant sent an email to RK that had an attachment called "Cheryl Crean Resignation Letter to Urgo" which is also marked as may contain malware [234].

99. On 26 January 2024 RK emailed the claimant saying: "*Please find attached outcome of your grievance and disciplinary hearing which you had previously instructed to delay issuing."* Attachments included the disciplinary and grievance hearing minutes and an outcome letter [235]. The outcome letter largely follows the minutes of the meeting itself. It notes that the claimant did not deny the incorrect submission of expenses had resulted in a financial loss of the company. The claimant was informed of her right to appeal to the medical affairs director within 7 working days.

100. Also on 26 January the claimant sent an email to RK containing the text she said she had put in her earlier resignation letter [244]. It said: *I write to confirm my "decision to resign from Urgo today January 22nd, 2024. With a very heavy heart I have taken this decision because I have lost all faith in the company to treat me fairly and with the dignity and respect that I believe I deserve. I worked for the company for 14 years, giving everything that I could to my role. To be accused of fraud and dragged through months of investigations has been absolutely devastating. I feel utterly broken by the way that I have been treated in the last 6 months and the lack of care and support that I have received during my time off on sick leave with Stress. I truly cannot believe that somebody with my performance, dedication and loyalty could be treated in this way. I have been brought down so low by all of this. I have barely been able to think about a way forward for me. I am only now feeling well enough to make important decisions and to put this nightmare*

behind me once and for all. I loved my job and worked with some fantastic people over the last 14 years. I wish them all the very best and hope the people at Urgo

concerned during this time will learn a few lessons about how to treat people and show care for them."

101. The claimant said in evidence that she only wrote one resignation letter, and she recalled that she had sent it and had not heard anything and had a phone call at home on the Friday with RK asking about the resignation. She could not recall resending her resignation letter but accepted it seemed that she had re-sent it.

102. The claimant did not pursue either a disciplinary or a grievance appeal.

103. The claimant says at the time of the disciplinary hearing she was in a terrible place and was unable to make important decisions about her career. She says that by mid January she was feeling a little better and able to reflect a little more insightfully as to how she felt she had been treated and how it left her feeling. She says she had then concluded that she could not go back and the way she had been treated meant her relationship of trust in the business had been shattered and there was no way back for her.

Disciplinary Policy

104. The respondent's disciplinary policy is at [278]. Paragraph 2.3 provides: "*Minor conduct issues can often be resolved informally between you and your line manager. These discussions should be held in private and without undue delay whenever there is cause for concern…Formal steps will be taken under this procedure if the mater is not resolved, or if information discussion is not appropriate (for example, because of the seriousness of the allegation).*"

105. Section 4 is headed "Investigations." Paragraph 4.5 says: "*The employee whose conduct is the subject of proceedings will be given access to all relevant documentary evidence and statements at a suitable time prior to any hearing."* It also says the investigation should consider whether there is a case to answer, and the investigating manager may discuss the situation with HR prior to deciding what the appropriate action might be.

106. Section 7 is concerned with notification of a hearing. Paragraph 7.3 says: "*We will give you written notice of the date, time and place of the disciplinary hearing. The hearing will be held as soon as reasonably practicable, but you will be given a reasonable amount of time, usually one week, to prepare your case based on the information we have given you."*

107. Section 10 is headed "disciplinary penalties". What are said to be the usual penalties for misconduct are set out, which includes a first written warning said to be usually appropriate for a first act of misconduct where there are no other active written warnings. Dismissal is also listed as a potential sanction in appropriate circumstances including where there is a finding of gross misconduct. The policy says: "*Gross misconduct will usually result in immediate dismissal without notice or payment in lieu of notice. Examples of gross misconduct are set out in our Disciplinary Rules."*

108. The Disciplinary Rules set out some examples / a non-exhaustive list of matters that will normally be regarded as misconduct and include: "(*a) minor breaches of our policies including the Sickness Absence Policy, Electronic Information and*

Communications Systems Policy, and Health and Safety Policies; (b) minor breaches of your contract…; (k) negligence in the performance of your duties."

109. The Disciplinary Rules say: "*Gross misconduct is a serious breach of contract and includes misconduct which, in our opinion, is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between employer and employee. Gross misconduct will be dealt with under our Disciplinary Procedure and will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal*)." The Rules then goes on to set out some examples/ a nonexhaustive list of matters normally regarded as gross misconduct. The list includes: *"(a) Fraud, forgery or other dishonesty, including fabrication of expense claims time sheets and activity reporting…; (m) Causing loss, damage or injury through serious negligence…;*

Discussion and Conclusions – Constructive Unfair Dismissal

The "oppressive and/or improper" use of the disciplinary policy including the decision to subject the claimant to an investigation at all

110. Here the claimant accepts that the respondent was entitled to ask her questions about apparent discrepancies in her expenses, but says that it should have been done by way of an informal process, and that the claimant would have been able to give the explanations to the respondent that she gave in the investigation meeting and any training she needed could have been arranged.

111. In my judgement, viewed objectively, the respondent had reasonable and proper cause to invite the claimant to a formal investigation meeting. The claimant worked in an occupation that inherently generated a lot of expenses and the respondent, even with checks by line managers and by finance, ran an expense process that placed a lot of trust in their staff. It was not possible to check the detail of every submission. The 22 or so matters that were raised as potential concerns (and which again the claimant does not take issue in being looked into and raised with her), even if about individually relatively small amounts of money, and even if only being a small percentage of overall expenses claimed, raised some potentially troubling themes. Of particular potential concern was the claimant on the face of it raising duplicate expense claims for the same expense; both as a card and then a cash transaction. The point being that the expense itself would have been paid on the company card without an initial personal outlay by the claimant. But a second cash transaction claim would result in the respondent paying the sum out a second time to the claimant by way of reimbursement for a sum of money she had not personally in fact spent. This was compounded by the fact the system would have flagged a duplicate warning to the claimant. Secondly, in my judgement, of particular concern was also the fact it appeared the claimant was not ticking the "personal expense – do not reimburse box" when accounting for personal items paid for on the corporate card and which appeared to have potentially resulted in the claimant being reimbursed for personal purchases. There were also the other individual queries and concerns that I accept overall raised a potentially worrying picture to the respondent.

112. In my judgement the respondent in those circumstances had reasonable and proper cause to decide not to address it as a minor conduct issue under an informal process with the claimant's line manager. The respondent did not automatically or

inherently know what was potentially going on was innocuous or a minor training need. The situation needed investigating, and they were entitled to do so as an investigation under their disciplinary policy. The disciplinary policy here says that the purpose of the investigation is to establish a fair and balanced view of the facts relating to any disciplinary allegations, before deciding whether to proceed with a disciplinary hearing and that investigative interviews were solely for the purpose of fact-finding. The policy says that no decision on disciplinary action will be taken until after a disciplinary hearing has been held.

113. As the respondent says, I also do not consider there was anything oppressive or improper about the letter on 26 July inviting the claimant to the investigation meeting on 27 July. It was an investigation meeting, not a disciplinary hearing. In my industrial experience it is commonplace for employers to give little or no notice of investigation meetings (as opposed to disciplinary hearings). Indeed, the claimant was given more information than is often the case, having been told it was about discrepancies in the submission of expenses from June 2022 to July 2023. There was no unreasonable or improper conduct in that regard.

114. I also do not find that there was anything improper or oppressive about the conduct of the investigation meeting by RW. RW shared her screen and showed and talked the claimant through the queries and the claimant was able to give her response and her explanations and was given time to do so. RW had genuine reasons for the questions she was asking about the specific queries, which the claimant generally accepted in cross examination. Where the claimant could not recall the full details of one specific purchase, the claimant had the opportunity to go away, look it up and clarify it and her explanation was ultimately accepted.

115. RW also undertook other appropriate enquires with BS, TB and RW.

The failure to provide disclosure before the investigation meeting

116. I do not find that the failure to provide documents in advance of the investigation meeting was conduct without reasonable and proper cause likely to harm trust and confidence. Paragraph 4.5 in the Disciplinary Policy could potentially be worded more clearly, however, I consider its natural reading to be that documentary evidence and statements would be given prior to any disciplinary hearing rather than an investigative interview (which is not a disciplinary hearing). This was explained by RK to the claimant when the claimant asked. Again, in my industrial experience it also is often the case that little information is given in advance of an investigative interview by an employer (again as compared to a disciplinary hearing). The claimant also was not disadvantaged. The claimant accepted in evidence she was able to understand RW's queries and give her full response to them (other than as already stated the one query which she subsequently looked up and reverted to RW about).

The "oppressive" decision to proceed to a disciplinary process

117. I do not find that the decision to proceed to a formal disciplinary process at all was without reasonable and proper cause. RW's investigation report was a fair and balanced summary of the evidence she had before her including the claimant's responses and explanations.

118. RW noted that four potential discrepancies had been confirmed as legitimate business expenses. RW then noted outstanding areas of concern. In particular, the duplicate expense claims, which the claimant had explained as potentially being duplicate photos of the same receipt but also nothing that the claimant would not

check on seeing a duplicate warning or delete the duplicate (unless directly told to do so, having first ignored the duplicate warning and submitted it). RW noted the concern that the claimant was raising duplicates as cash transactions potentially resulting the claimant being reimbursed a sum of money the claimant was not owed. RW noted the claimant was not ticking the "personal expense – do not reimburse" box. RW noted the claimant's explanation for that, but also that the claimant had never questioned being told to tick the box and had simply carried on in her habits, and that the claimant had received reimbursement of expenses she was not entitled to. RW noted some other issues with incorrect submission of expenses, some of which had been explained. Overall RW noted the claimant's explanation that the claimant was struggling with submitting expenses, but RW did not consider that fully explained what had happened, and the repeated failures to submit expenses correctly. RW also did not consider a lack of training was a full explanation, noting the claimant had not requested supplemental training and had told KW she found the powerpoint informative. I accept RW may well have said to the claimant at the end of the investigation meeting that there was a training need, but I do not find that in doing so RW was suggesting or indicating that was a complete answer to what had happened and that no disciplinary would following. It simply does not accord with RW's analysis in the investigation report which is itself, as I have said, a fair and balanced reflection of the evidence before RW.

119. The claimant may disagree with RW's analysis, but it was an analysis that RW was entitled to make and had an evidence base behind it. There was reasonable and proper cause for RW's evaluation. In turn there was reasonable and proper cause behind a decision to require the claimant to attend a formal disciplinary process. RW considered that overall the evidence seemed to show a failure to submit expenses in contravention of the expenses policy resulting in financial loss for the company. That allegation is not a complete match to any of the examples in the disciplinary policy. But the examples are non-exhaustive and they, at the very least, cover minor breaches of policies, and damage to property (which is somewhat akin to sustaining loss). RW's recommendation to proceed to a disciplinary process (rather than nothing at all, or dealing with it informally/arranging training) was not oppressive and in my judgement, viewed objectively, had reasonable and proper cause.

120. I should also add that in cross examination RK accepted the proposition that once explanations were provided the allegations were reduced down from 22 to 5, with 17 being explained. I do not, however, find that is a fair reading of RW's report, as HA herself said in evidence. There were 5 instances where the claimant had been reimbursed sums she was not owed, meaning the claimant owed an overpayment back to the respondent. But that was not the totality of the outstanding concerns in terms of submitting expenses in contravention of the expense policy.

The determination to characterise the allegation as gross misconduct, as opposed to misconduct

121. Whilst, viewed objectively, I find there was cause to pursue a disciplinary case against the claimant, I do also find that the respondent was without reasonable and proper cause in deciding to characterise the allegation as gross misconduct, as opposed to misconduct. Further, this was conduct likely to harm trust and confidence.

122. RW's investigation report does not include an assessment as to the grading of the alleged misconduct as being gross misconduct. But RK's evidence, which I accept, is that RW decided it was potential gross misconduct. That assessment was in turn supported by RK and HA. RK also accepted in evidence that following the investigation meeting the claimant was seen as having made errors rather than deliberately seeking to make a gain. RK said it was not always clear why all the errors had happened because the claimant could not always give an explanation; but she said the view of RW was that it was not planned or deliberate. RK went on to say in evidence that it was not seen as a minor breach of policy. RK said she did not see it as negligence in the performance of duties as she did not consider filing expenses was a core part of the claimant's duties as opposed to being supporting duties. RK accepted it was not being alleged the claimant had fabricated expenses as RK accepted that fabrication implied a deliberate act, and the case was not that the claimant had done it deliberately. RK accepted it was not an allegation of fraud, but pointed out the claimant had received funds the claimant was not entitled to. RK accepted it was not an allegation of dishonesty but said again that it had caused a loss and that it was serious negligence. RK said the best fit in terms of the broad examples in the policy of gross misconduct was causing loss, damage or injury through serious negligence.

123. In my judgement, viewed objectively there was not reasonable and proper cause to have deemed this ***serious*** negligence (my emphasis). In my judgement there is no evidence that proper thought was given to how it met that threshold. Rather the focus seems to have been that this category would be the right fit because some of the errors caused financial loss to the respondent and there were errors over a sustained period. But "ordinary" negligence is in the examples of misconduct rather than gross misconduct. "Serious" has to add something, and add something important. On an everyday meaning to the words, ordinary negligence is where the individual does not take the reasonable care or skill that a reasonably prudent person in the circumstances would do. Serious negligence has to be, in my judgement on an ordinary reading of the words, something substantially more than that; such as, for example, extreme carelessness, or a serious disregard or recklessness towards risk. In the demarcation of gross misconduct it has to be conduct that could potentially entitle the respondent to summarily dismiss / conduct that irreparably damages the working relationship and trust between employer and employee.

124. RW, in my judgement, had seen the claimant as being careless or not exercising the reasonable care and attention that would be expected of employees completing what, in that profession and industry were important expense documents. Hence the references in the investigation report to the claimant not checking for duplicates when she got a warning flag; not deleting a claim with a duplicate warning flag but

instead waiting to be told to do so and then carrying on with the same approach going forward; not questioning why she was on occasion told to tick the personal expense box; again thereafter carrying on with her same approach to personal expenses and the personal expense tick box; not changing the expense type on some expenses; not completing a lost receipt declaration; not requesting further training if she was struggling with submitting expenses or understanding and applying the policy. But I do consider there was a lack of reasonable and proper cause in not demarking that as being an employee failing to exercise the reasonable skill, care and attention they should be giving to their expenses (which had ultimately resulted on 5 occasions in the period where the claimant was overpaid) and being apparent misconduct, and instead demarking it as hitting that higher threshold of serious negligence. Put another way, even a reasonable, diligent employee may make mistakes with expenses from time to time. There is nothing to suggest the respondent would discipline all those who make a simple mistake, and indeed they had not in the past when the claimant had been advised to correct errors that had been noticed by BS or KW. Clearly, on the face of it, the claimant's handling of her expenses (following the detailed review and analysis that was undertaken by RW) fell short of the respondent's expectations of a reasonable employee. It was beyond the level or degree or duration or regularity of mistakes the respondent may expect. But that's what gave reasonable and proper cause to view it as potential misconduct (rather than being an error deserving of an expense rejection and/or feedback and falling outside the misconduct arena completely). I do not consider it gave reasonable and proper cause to deem the alleged conduct as hitting the higher threshold of serious negligence. This is particularly so when set in the context of the other examples of gross misconduct in the policy which demonstrates the really serious type of conduct the gross misconduct section in the disciplinary policy is concerned with.

125. This categorisation as gross misconduct in the circumstances was without reasonable and proper cause. I do not consider the categorisation was done in a way that was *calculated* to damage trust and confidence. The claimant subjectively clearly feels that RK was hostile throughout. But I do not accept that RK or HA (or indeed RW) set out to cause harm to the claimant. But I do consider the categorisation as gross misconduct was conduct likely to damage trust and confidence. It upped the anti. It resulted in the claimant not just being taken through a disciplinary process but a disciplinary process where the claimant was facing charges of gross misconduct, and therefore was told and had the understanding that if the allegation was found to be proven it could lead to her dismissal. Indeed, the respondent's policy states gross misconduct (if ultimately established) would normally lead to summary dismissal. The categorisation in context was likely to cause significant stress, worry, and upset to the claimant far over and above that would be caused by a disciplinary process at a misconduct only level.

The failure to follow advice from OH in holding a welfare meeting

126. It is important to remember that the respondent did not at the time have the transcript of the OH call between the claimant and the OH nurse. The respondent had the report itself which clearly stated the claimant was fit to attend a disciplinary meeting with adjustments. The respondent was told the disciplinary situation was the root cause of the current barrier of a return to work at the time. Whilst I

appreciate the wording was used in the call between the claimant and the OH nurse, the respondent was never in fact directly told by OH that OH was recommending a welfare meeting. What was said was: "*it will be best resolved through continuing positive dialogue between the parties"* and it was important that "*constructive Management interventions*" rather than medical interventions were more likely to bring it to a successful conclusion. The report did not set out what was meant by those expressions.

127. In my judgement, the respondent had reasonable and proper cause in those circumstances to consider that the appropriate way forward was to proceed with the disciplinary process and reasonable and proper cause in not understanding OH was telling them to hold a welfare meeting. The respondent was not, in my judgement, seeking to target the claimant. I have found there was a failure in the characterisation of the alleged misconduct as gross misconduct. But I do not consider that there was for example a pre-determined plan to push the claimant out or it was seen that inevitably she would be dismissed. I do accept there was an intention was to hold a fair hearing, evaluate the evidence and reach a decision. The intention was to follow OH advice and make the recommended adjustments for the disciplinary hearing. I do not consider that the respondent was without reasonable and proper cause in not appreciating the veiled references to positive or constructive interventions was suggesting they do something else in advance of the disciplinary hearing.

128. The respondent did have what the claimant was saying about what the OH nurse said. But they allowed her time to raise this with OH and ultimately the OH nurse refused to amend the report. Again, in those circumstances I find the respondent had reasonable and proper cause to understand the OH meant they could proceed to arrange the disciplinary hearing.

The failure to acknowledge the grievance

129. The claimant's grievance was only acknowledged once she chased it after the period of delay. I accept there was a reason for the delay in progressing the grievance itself because RK was seeking legal advice. But that is an explanation for the delay in progressing the grievance; it is not an explanation for a failure to acknowledge the grievance. RK could reasonably have acknowledged it and have given the claimant brief updates.

130. The delay in acknowledging the grievance was conduct without reasonable and proper cause and was likely to harm trust and confidence to an extent, albeit it was an ancillary contributor to the damage to trust and confidence rather than being a main cause.

The failure to allow a short postponement of the hearing

131. This was not a point that was significantly pursued in the cross examination of the respondent's witnesses. There were four clear days between the notification of the disciplinary/grievance hearing and the scheduled hearing date. 18:06 in the evening is not late at night, albeit I do accept it is at the close of the working day. The policy says an employee will be given a reasonable amount of time, usually one week to prepare their case based on the information the employer has given them. But as RK was saying to the claimant, the claimant had had that information

since the start of September. The claimant had also known since the end of October that OH were saying she was fit to attend with adjustments and OH were not going to change the report. As distressing as it was for the claimant (and I have of course already made my finding about the characterisation of the alleged conduct as gross misconduct) the disciplinary process needed to be brought to a conclusion. There was no medical evidence to say the claimant was not fit to attend or needed more time to prepare. In my judgement there was reasonable and proper cause to decline the postponement request.

The determination that the allegation was proven

132. In the decision letter HA upheld the allegation of failure submit expenses correctly in contravention of the expenses policy resulting in financial losses for the company. HA noted the claimant did not deny the incorrect submission of expenses had resulted in a financial loss to the company and then said she had considered

the claimant's mitigation. HA accepted the claimant had not intentionally submitted expenses incorrectly, but held the claimant had repeatedly done so despite training and one to one feedback and guidance and that it had resulted in the claimant contravening the expenses policy and a financial loss for the company [243].

133. It was put to HA in evidence that the evidence against the claimant was no more than minor breaches of policy. HA disagreed with that and said she considered the allegations to be gross misconduct allegations. HA pointed to the damage to the working relationship, although she accepted that the word "irreparably" was too strong a word. HA said she also considered it fell within "*fraud, forgery or other dishonesty, including fabrication of expense claims, time sheets and activity reporting."* HA relied on the "fabrication" element saying that in her mind that included the creation of expenses, referring in particular to the duplicate cash claims which she said in her mind were fabricated as they were made up. But HA also said there was no evidence it had been done deliberately by the claimant. HA also relied on "*causing loss, damage or injury through serious negligence*." HA said the serious negligence was the volume of expenses that were incorrect. HA accepted in evidence she had ultimately found the conduct to be gross misconduct at the disciplinary hearing.

134. In my judgement the respondent had reasonable and proper cause to find the allegation itself, in a factual sense, was proven for reasons already given when evaluating RW's investigation report and recommendations. However, it was clear from HA's evidence that part of finding the allegation proven was a finding it was proven at the level of gross misconduct (albeit HA decided to impose a sanction lesser than dismissal and one which could have been imposed for simple misconduct). I would not find that there was reasonable and proper cause for finding the allegation proved as gross misconduct, again for reasons given already above in relation to the finding that the conduct was "causing loss… through serious negligence." In terms of "fraud, forgery or other dishonesty, including fabrication of expense claims"; I accept that HA subjectively saw the submission of the duplicate cash claims as being fabricated in the sense of "made up". However, viewed objectively I do not find that it was reasonable to find gross misconduct established on the basis of this paragraph when read as a whole. Firstly, the ordinary meaning of "fabricated" is to invent something to deceive, when HA

accepted there was no evidence the claimant had acted deliberately. Secondly, the sentence is phrased in a way where the "fabrication" is included in the wider label of fraud, forgery or other dishonesty. Those are strong words, again indicating deliberate or dishonest action which HA accepted had not been established. Viewed objectively I do not consider that paragraph includes nondeliberate or non-dishonest but instead mistaken submission of duplicate expenses.

135. That all said I can see no evidence that the claimant knew HA had upheld a finding of gross misconduct against the claimant. It is not recorded in the outcome letter and the claimant in any event had not had the outcome letter at the time she resigned. All I know is that the claimant knew the respondent intended to give her a 9 month first written warning. But the most natural reading of that would tend more towards seeing it as a finding of misconduct, not a finding of gross misconduct. The claimant has to know about a breach for it to form part of her reasoning for resigning.

The delay before and during the disciplinary process

136. There was a gap between 27 July, when the claimant was interviewed, and then 8 August (so about 12 calendar days) when BS, TB and KW were interviewed. There was then a gap of 8 calendar days following completing the interviews before the completion of the investigation report on 16 August. There was then a further 14

days before the report was sent to HA on 31 August. The claimant was then promptly invited to a disciplinary hearing due to be held on 7 September 2023. I do not consider the gaps between 27 July and 1 August 2023 to be, when viewed objectively, conduct without reasonable and proper cause likely to harm trust and confidence. There was a need to consider what other investigations were needed, to interview others, to evaluate the evidence, write the report, and RK explained she then went through a process of double checking the report against the evidence. It was also the summer when people were taking annual leave.

137. The disciplinary hearing then did not go ahead as the claimant was due to be on leave and was then signed off sick, with then a pause to obtain OH advice. There was reasonable and proper cause to temporarily pause the process to obtain OH advice and indeed on the claimant's own case she did not consider herself well enough to attend a disciplinary hearing at the time. That the OH report took some time to come through, and that there was then further delay as the claimant was seeking to get the report amended in her contact with OH, is not the responsibility of the respondent and indeed, again, on the claimant's own case she did not want the disciplinary hearing to go ahead at that time as she did not feel well enough to attend. The claimant's grievance was also awaited as it was perceived it could potentially affect the disciplinary hearing process.

138. Once the claimant submitted her grievance there was delay between 2 November and 24 November 2023 in inviting the claimant to the disciplinary and grievance hearing on 29 November 2023. I accept there was reasonable and proper cause for that delay as RK was waiting for legal advice as to how to proceed given the grievance in essence was a defence to the disciplinary case.

Overall assessment – was there a dismissal?

139. I then stand back and look at the position cumulatively. In my judgement the characterisation of the allegation as gross misconduct, as opposed to misconduct, was without reasonable and proper cause and was conduct likely to seriously damage mutual trust and confidence. It meant the claimant, as an employee with long service who had never been in a disciplinary process before, was told she was facing allegations in a formal disciplinary process that, if proven, that would normally result in summary dismissal. It led to her going on sick leave, and at the time had a profound effect on her health and wellbeing as documented in the OH report and the GP sick notes. The breach was a fundamental one, and in my judgement an ongoing breach until the conclusion of the disciplinary process. It was an ongoing breach because the disciplinary process hanging over the claimant during that time was a gross misconduct disciplinary process. Subject to considerations of affirmation the respondent was in fundamental breach of the implied duty of trust and confidence entitling the claimant to resign and treat herself as dismissed.

140. The delay in acknowledging the grievance was also a contributing factor to the fundamental breach albeit in my judgement, a much smaller element.

141. The finding of the factual allegation of misconduct being proven did have reasonable and proper cause. But the allegation ultimately being upheld as gross misconduct did not. However, as already stated I cannot conclude on the evidence before me that the claimant knew there had been a finding of gross misconduct (as opposed to simply knowing an intention to impose a 9 month first written warning). The breaching conduct has to ultimately be a part of the reason for resigning.

142. But I accept that the mischaracterisation of the allegation as gross misconduct, the conduct of the disciplinary process until its conclusion under that gross misconduct umbrella, and the delay in acknowledging the grievance, were part of the claimant's reasons for resigning. They were effective causes.

143. I turn then to the question of affirmation. The ongoing breach came to an end on 29 November 2023. It seems likely that shortly thereafter the claimant was made aware of the intention to issue her with a 9 month first written warning, albeit by agreement she was not sent the outcome letter at that time. It is likely the claimant was aware of the intention to give the first written warning shortly after the disciplinary hearing, because otherwise it would have been sent out by the respondent at the time. The claimant then resigned on 22 January 2024. Whilst I do not have any medical evidence, it is not in dispute that the claimant was unwell during that time and indeed it the reason given by the respondent for agreeing not to send her the outcome letter at the time. In particular, RK says in her statement that it was not sent out at the time because the claimant was on a further period of sick leave. During that time I do not find that the claimant engaged in conduct that showed she was choosing to keep the contract alive even after the breach. Instead, it indicates an unwell individual who is needing time to consider their position. There was no affirmation.

144. The Claimant was therefore dismissed. The Respondents have not argued that there was a fair reason for dismissal and therefore the Claimant's constructive unfair dismissal claim is well founded and is upheld.

Acas Code Reduction?

145. The respondent argues that the claimant failed to exercise her right to appeal either the disciplinary or grievance outcomes, and that any compensation should be reduced by up to 25%. The claimant acknowledges that there was no appeal but submits there was good reason for that as the claimant remained off work on sick leave until her resignation.

146. The unfair dismissal claim does fall within the claims listed in Schedule A2 to TULRCA. It is a claim to which the Acas Code applies and the claimant did fail to comply. I do find that the claimant's failure was unreasonable. In doing so I acknowledge the claimant's health. I also acknowledge that the respondent was in repudiatory breach of contract entitling the claimant to resign and consider herself dismissed, and that contractually the claimant would be under no obligation to accept any offer to amends by the respondent.

147. However, by 22 January 2024 the claimant was saying that she was: "*only now feeling well enough to make important decisions and to put this nightmare behind me once and for all*" and tender her resignation. In those circumstances I do consider it likely that the claimant would have been well enough to have presented an appeal once she had the outcome letter on 26 January 2024. In not presenting an appeal the claimant deprived the respondent of the opportunity to hear that appeal and with it any opportunity to resolve matters at appeal stage. As already

stated, I appreciate that as the respondent was in repudiatory breach, the claimant was entitled to accept the breach and terminate the employment contract, and would not be obligated to accept any offer to amends. However, under the Acas Code the disciplinary appeal process is there (as set out in the Code) if an employee feels the outcome is too severe, or feels any stage of the disciplinary process was wrong or unfair. The grievance appeal process is there if the employee feels the outcome does not resolve the problem, or feels any stage of the grievance procedure was wrong or unfair. By not pursing either a disciplinary appeal or a grievance appeal (given how intertwined the two were in this case) the parties were deprived of the opportunity to ask questions, explain their positions, and explore whether there is a basis for any further resolution. By not pursuing an appeal there was no opportunity for the respondent to explain the reasoning behind the first written warning, or for the claimant to further set out how she felt the outcome did not resolve the situation, or whether there was any scope to restore and rebuild trust and confidence. This was potentially even more important where the claimant had not attended the grievance and disciplinary hearing and the claimant in her own evidence says she was not happy with the grievance outcome. Employers and employees, even in constructive unfair dismissal cases, do still sometimes go through appeal processes, so it is not the case there is never any potential benefit.

148. I do consider it just and equitable to apply a reduction to the compensation in those circumstances. I consider that a reduction of 10% is just in the circumstances because it is not the case that there had been no compliance with the Acas Code by the claimant. The claimant had submitted a detailed grievance which had informed the earlier disciplinary and grievance hearing stage. It was therefore not a case of wholesale deliberate flouting of the whole Acas Code.

Contributory conduct?

149. Turning to the question of contributory conduct, here I am assessing the claimant's conduct myself applying the balance of probabilities and based on the evidence before me. I find the claimant was careless and somewhat reckless in her approach to submitting expenses following the introduction of the Concur system. The claimant did not like the system. She found it glitchy in terms of difficulties sometimes with syncing or with photographed receipts moving over from her phone to the main programme on her computer. In particular she found it very time consuming. I consider that led to an attitude of some carelessness, and a desire to not spend more time on the system such that her approach was, in essence, to leave it to others to check the expenses and raise any issues rather than drilling down into it herself. I find that was demonstrated, for example, by the claimant not always noticing or not checking that she had used the correct expense category (with fuel expenses being submitted as business meals as they defaulted to the last used category). It was also shown by the claimant submitting duplicate claims, not noticing they were duplicates, and then when the potential duplicate flag was raised not then checking again or deleting the duplicate. The claimant would only

delete it when told by an expense approver to do so; making it their responsibility to do so and with it a risk that duplicates would not be noticed. The claimant also displayed that carelessness in submitting these duplicates as cash claims, rather than card claims and which would, if they have made it through, resulted in her being reimbursed sums she was not owed.

150. The claimant's attitude was also reflected in her lack of inquiry as to when she should or should not be ticking the "personal expense – do not reimburse box." She says she did not understand what it meant, and thought she would be wrongly reimbursed. But the claimant is clearly an intelligent person who had been generally able to conscientiously perform her duties for the respondent for a long period of employment. She says that differences between the two guidance documents was confusing. But if so, she had noticed it and did not raise it. There were various individuals the claimant could have asked including BS and KW. The claimant did not need a formal training session to do that (albeit she could have asked for that too). The claimant accepted that if someone came back to her and told her to tick the box she would do so and resubmit it, but says that no one explained it to her, and so she would then just go back to doing what she did before. But again, she was an intelligent person who was capable of asking questions or showing some level of interest, inquiry and self-learning. In my judgement, it is again redolent of the claimant, when faced with a time consuming system she did not like, engaging in the system to the extent she considered was the minimum needed to get her expenses submitted. She then left it for others to notice any glitches or errors and instruct her accordingly, rather than demonstrating proactivity and responsibility herself.

151. I do recognise the sums were small and that it has to be placed in the context of the large number of expenses submitted overall without problem. But likewise the amount of expenses the claimant accrued in her job also demonstrates the degree

of trust placed by the respondent in their employees and the need to take care. Moreover, the ongoing errors were more significant than other members of staff; hence the red flag being raised.

152. I do consider the claimant's conduct to be culpable or blameworthy. To adopt the language of Nelson, it was foolish or reckless conduct about a matter where the claimant had responsibilities that she did not adhere to. It is not, in my judgement, simply a matter of her saying she did not have sufficient training or that she had clearly and expressly asked for such training.

153. There is a dispute as to whether the blameworthy conduct caused or contributed to the dismissal. The claimant argues the claimant's dismissal was not the result of her getting her expenses wrong, but was the result of the respondent's overreaction to that situation. The claimant argues that it is not enough to say that the claimant's expenses was the genesis of the investigation, because that is not the same as contributing to dismissal. The claimant argues that it was not any breach of the expense policy by the claimant that gave rise to dismissal; but instead the dismissal was due to breach of the implied term of trust and confidence which the claimant did not contribute to. The claimant points out that here the respondent was not intending to dismiss but to give a first written warning.

154. The Employment Appeal Tribunal in Frith Accountants Ltd v Law UKEAT/0460/13/SM confirmed that the conduct need not be the principal or sole cause, or even the main cause, of the dismissal. This is because the test is whether the conduct contributed to dismissal "*to an extent*." Those words, it was said, are obviously and intentionally broad. The EAT said it is unusual, but there is no test of exceptionality, for a constructive dismissal to be caused or contributed to by the employee's conduct. That is because the conduct in question in a constructive dismissal is centrally that of the employer, which will have been found to be in fundamental breach of contract without reasonable and proper cause. The EAT also said causation is a matter of fact for the tribunal to determine. In Frith the breaching conduct was the employer contacting the claimant's son about her. It was said that the contributory conduct was her failure to accept criticism. But there was no finding that the employer had spoken to the son because of the claimant's resistance to criticism, and therefore no basis to say there was a contribution by that claimant to her dismissal.

155. In Upton-Hansen Architects Limited v Gyftaki UKEAT/0278/18/RN the EAT said: *"The discussion in Frith, and the line of authorities which it follows, do not, perhaps go quite as far to say that a pure, "but for" cause, could never be found to be conduct meriting a reduction under section 123(6)…*

I do not accept Mr Kohanzad's specific submission that the use of the words "to any extent" in Section 123(6) mean that a purely "but for" cause should lead to some consideration of a reduction. That is neither the natural meaning of those words, not would that approach be consistent with the guidance in the authorities. Rather, the conduct, must be found, in some material sense, having regard to its nature

and significance, to some extent to be a contributing cause, which the Tribunal regards as warranting a reduction of compensation to some degree.

I respectfully agree with Langstaff J that consideration of whether the conduct in question is a "but for" cause of the dismissal, is an unhelpful and overly philosophical approach to this area of law. It is, it may be said, necessary to a reduction under section 123(6), but most unlikely to be sufficient. I find it difficult to envisage a case in which a Tribunal might find the conduct to have been literally no more than it amounted to a "but for" cause, and yet that it was just and equitable for it to sound in a reduction in compensation."

156. On the facts here I do find that the claimant's carelessness in the submission of her expenses was to some extent a contributing cause to the claimant's dismissal. The main act by the respondent that put them in fundamental breach of contract was the decision to assess the allegation as being one of gross misconduct, rather than misconduct. It was not done, in my judgement, to deliberately cause harm to the claimant but was the genuine, albeit in my judgement mistaken, assessment undertaken by RW, that RK and HA agreed with. In my judgement a contributing cause to that was the claimant's carelessness and resulting errors with her expenses. I consider the claimant's conduct there was a contributing cause to in a material extent. It was not the case, as I have found, that the claimant made some simple mistakes with the submission of her expenses. She had, instead, on my findings adopted a laissez faire attitude which contributed to the stance the respondent then took. I regard it as warranting a reduction to some degree, albeit I appreciate that the lion's share of the cause lay with the respondent. I do consider it would be just and equitable to reduce the compensatory award in such circumstances, and I consider the just and equitable reduction is 20%.

157. Whilst appreciating the difference in statutory language for the basic award, I do consider that this is a case where I should apply the same approach to the basic award. I therefore find the conduct of the claimant before dismissal was such that it would be suitable and equitable to reduce the basic award by 20%.

158. I have also taken a step back and considered the overall adjustments in the round and again consider the outcome is just and equitable in the circumstances as found.

Discussion and Conclusions - Constructive Wrongful Dismissal

159. It follows from the above analysis that the Claimant was also constructively wrongfully dismissed and that complaint (i.e. the notice pay complaint) is also upheld.

160. Wrongful dismissal is also a complaint that falls within Schedule A2 to TULCRA and I make the same reduction of 10% to reflect the claimant's failure to present a grievance or disciplinary appeal.

Remedy hearing

161. A remedy hearing will be listed to decide the remaining remedy issues (unless the parties are able to agree terms).

Employment Judge R Harfield
18 November 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

07 January 2025

Adam Holborn
FOR EMPLOYMENT TRIBUNALS

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