EMPLOYMENT TRIBUNALS

Claimant: Miss N Ogilvie

Respondent: Alexander Optometrists Ltd

Heard at: Newcastle (by CVP)

On: 19 February 2025

21 May, 28 and 29 July 2025 (in chambers)

Before: Employment Judge Gould

Appearances:

Claimant: In person

Respondent: Mr A MacMillan (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The Claimant's complaint of unfair (constructive) dismissal is well-founded.

2. The Claimant's claim for unpaid holiday pay is dismissed upon withdrawal.

3. A further hearing will be listed to deal with outstanding remedy issues, to be heard by video with a time estimate of 1 day.

REASONS

INTRODUCTION

1. The Claimant, Miss Nina Ogilvie, brought a claim against Alexander Optometrists Ltd for unfair constructive dismissal by an ET1 Claim Form presented on 4 October 2024. This followed a period of ACAS Early Conciliation between 26 July 2024 and 6 September 2024.

2. The Claimant complains about the actions of the Respondent over a period of years and in particular the months before her resignation with notice on 12 July 2024. She alleges that the Respondent broke the essential implied term of mutual trust and confidence and the implied term that the employer will provide a safe workplace.

3. It was not possible to complete this hearing in the single day that was allocated. This was because of the need to identify the claims, two witness statements not having reached the Tribunal file until late morning during the hearing, the volume of documents and evidence to be considered, an application by the Respondent to rely on documents only disclosed during the lunch break, the need to discuss without prejudice and confidentiality of pre-termination negotiations with the Parties and technical difficulties with the video hearing. Cross-examination of witnesses concluded at 5.15pm, which was after the usual end of the Tribunal hearing day at 4.30pm. The Parties agreed to provide closing submissions in writing and I confirmed that I would provide a reserved decision and reasons in writing.

THE FINAL HEARING – INTIAL MATTERS

Issues to be decided

4. The Claimant's allegations relate to the the actions of Mr Alexander Surtees and Mrs Samantha Surtees, who are husband and wife and the directors of the Respondent.

5. The Respondent had provided an ET3 Response Form, setting out the response to the claim.

6. There was a discussion at the start of the hearing to establish what issues I had to determine.

7. The Claimant confirmed that her holiday pay claim was withdrawn, as the monies owed had now been paid to her. The only claim that remained for me to determine was her complaint of unfair constructive dismissal.

8. When asked what term of the contract she alleged had been breached, the Claimant confirmed that it was:
    a. A total breakdown of the implied term of trust and confidence; and/or,
    b. That the employer had breached its duty to look after her health and safety at work.

9. Mr MacMillan confirmed that this was the case as the Respondent understood it.

10. The Claimant initially stated that the breaches which caused her to resign were:
    a. The behaviour of Mr Surtees; and,
    b. That Mr Surtees had asked a question on 11 June 2024 to which she had responded. She felt that she had been detrimentally treated afterwards for raising a grievance.

11. The Claimant initially said that the final straw occurred on 11 June 2024 when the Claimant was offered a 'payout' to leave her employment, after Mr Surtees telling her that he was not going to change. The Claimant considered this to be her employer saying that he did not want to deal with the issues she had raised in her grievance and instead wanted to get rid of her.

12. The Claimant then, however, went on to confirm that it was seeing her job being advertised whilst she was off sick that was also part of the final straw. She stated that a meeting was called after this, but that the final build up, as she described it, made it quite clear that she was not going to be allowed to return to work. She relied on these as further breaches of the implied termS.

13. The Claimant added that she felt the investigation that was carried out into the incident of 11 June 2024 was not carried out in accordance with the ACAS Code of Practice for Disciplinary and Grievance Procedures. She clarified that this was the failure by the Respondent to involve her in the disciplinary investigation into her conduct and the failure by the Respondent to deal with the grievance that she stated she had raised. She stated that these failures contributed to her decision to resign.

14. When asked to clarify whether she was relying on anything before 11 June 2024 as causing or contributing to her resignation, the Claimant stated that there was a continuation throughout her employment of constant critical harassment on a daily basis by Mr Surtees. She repeated that the final straw was when she was offered a 'payout'. She related this to back to an incident when Debbie Linley was dismissed without notice and she believed that was what the Respondent intended for her also.

15. The Claimant had also alleged in her ET1 Claim Form that there was an issue regarding her pension payments. The Claimant's case was that there wasn't a workplace pension scheme in place and she did not recall opting out of a workplace pension. The Claimant confirmed that she was not alleging she had been unlawfully underpaid, but that the issue was about her pension contributions being paid into an ISA rather than a workplace pension scheme. She confirmed that contributions had been paid into an ISA for her. She stated that she suffered loss when she was out of work, as Universal Credit classed the money in her ISA as savings, which would not have been the case if it had been paid into her pension, and this had affected her entitlement to Universal Credit. The Claimant confirmed that she did have access to these savings whilst out of work.

16. The Respondent's position was that there was evidence in the bundle showing that the Claimant had opted out of the pension scheme, and that this did not fit as an unlawful deduction from wages claim.

17. On exploring the issue further with the Claimant, she stated that she considered there was something underhand about the whole thing. She questioned why the deduction was put on her payslip as a pension when it was paid into an ISA. She stated there had been a change in documentation and she was not aware of records being kept. When asked, she was not able to identify a term of her contract of employment which she considered had been breached. She concluded that this was a factual matter that she was raising which she considered set the tone of how the Respondent's business was run, rather than amounting to a separate legal claim.

18. Mr MacMillan confirmed for the Respondent that he sufficiently understood the issues to be able to cross-examine the Claimant.

19. He confirmed that the Respondent maintained that there had been a fair reason for dismissal, namely conduct, in the form of bullying of staff by the Claimant. In written closing submissions, however, Mr MacMillan alleged the fair dismissal for misconduct related to the Claimant's behaviour on 11 June 2024. The Respondent had also alleged in its Grounds of Resistance that there was 'some other substantial reason' for fairly dismissing the

Claimant, but this Mr MacMillan did not pursue this in the hearing or in written closing submissions.

20. The Claimant confirmed when asked in the initial discussion that she understood the Respondent was alleging that she had bullied staff, but alleged that this behaviour that had never previously been raised with her.

21. Mr MacMillan confirmed that the Respondent was relying on the same allegations of bullying, as well as the Claimant allegedly raising her voice at Mr Surtees on 11 June 2024, as evidence to justify a reduction in any compensation awarded for contributory conduct.

22. The same allegations were also relied on by the Respondent to contend that even if the Claimant had been constructively unfairly dismissed, she would have been fairly dismissed any event for alleged misconduct.

23. It was agreed that I would determine liability, meaning whether the claim succeeds or fails. I would also decide remedy issues that related to increases or reductions in compensation arising from any unreasonable failure by either Party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, contributory fault and whether the Claimant could or would have been fairly dismissed in any event, applying the case of ***Polkey.***

24. Based on this initial discussion and with the agreement of the Parties, I identified the legal and factual issues which it had to determine relating to the Claimant's claim of unfair constructive dismissal as contained in the List of Issues attached at Appendix A to this Judgment.

25. If the Claimant's claim was to succeed then a further hearing would be listed to deal with any remaining remedy issues.

File of documents and witness evidence

26. I was provided with a file of documents running to 163 PDF pages. This was prepared by the Respondent. I was also provided with a separate 9 page file of additional documents provided by the Claimant.

27. Unless included in case names, numbers in square brackets and in bold are reference to PDF pages numbers of the 163 page file and numbers in square brackets and in bold with the letters **AD** are reference to PDF pages numbers from the 9 page additional documents file.

28. The Claimant stated that she had only received the 163 page file on Friday 14 February 2025, which was only 2 clear working days before the Final

Hearing. She confirmed, however, that it appeared to include the original file of documents that she had submitted. She confirmed that she was ready and able to proceed with using this file at the Final Hearing.

29. I read witness statements and heard oral evidence from the following people:
    a. The Claimant;
    b. Mr Alexander Surtees; and,
    c. Mrs Samantha Surtees.

30. I was also provided by the Claimant with a witness statement from Mr James Blenkinsop. Mr Blenkinsop's statement was signed and dated, but the Claimant confirmed that he would not be attending to give oral evidence. Mr MacMillan confirmed that the Respondent was content that I read this statement and that he would make submissions on what weight should be given to the evidence. I have given little weight to the untested statement of Mr Blenkinsop, save where it is consistent with agreed facts or documents contained within the bundle.

Without prejudice privilege and protected conversations

Background

31. As part of the initial discussion, it was necessary for me to raise with the Parties the issue of without prejudice privilege and the privilege, or more properly described as confidentiality or inadmissibility of pre-termination negotiations under section 111A of the Employment Rights Act 1996, commonly referred to as 'protected conversations'.

32. It appeared from an initial review of the papers that PDF pages 44 and 45 of the bundle provided to me included information which could attract without prejudice privilege or disclose confidential attempts to engage in a protected conversation, under section 111A of the Employment Rights Act 1996.

33. Pages 44 to 45 contained an email from the Claimant on 12 July 2024 sent to Mr Surtees, where she gave her notice of resignation and referred to Mr Surtees having "…*offered to pay me off*". She refers to Mr Surtees indicating at a meeting on 11 June 2024 that he was willing to make a financial offer for her to leave employment. She stated that she would be "…*happy for you to propose such an offer…*"

34. Following a discussion about the relevant legal principles, Mr MacMillan submitted that the Respondent wished to waive privilege, including confidentiality of any protected conversation. It was the Respondent's

position that the Claimant referred to matters in her ET1 Claim Form and witness statement which could not be determined without reference to the otherwise privileged/inadmissible documents.

35. Mr MacMillan also took me to pages 40 to 42 and 80 to 81 as containing potentially privileged/inadmissible information.

36. Pages 40 to 42 are emails sent between the Claimant and Mr Surtees from 26 June 2024 to 29 June 2024, which all included the subject line "*Without prejudice – Protected Conversation*". They indicated that the Claimant had sought a protected conversation, but this had been declined by Mr Surtees. Pages 80 and 81 appeared to be a repeat of these emails, but they were not easily legible.

37. In the Claimant's email of 26 June 2024, she referred to it being untenable for her to remain in her job. It is clear that the request to start a protected conversation was made with a view to her employment being terminated on agreed terms.

38. This request was declined by Mr Surtees by email on 28 June 2024.

39. The final email on page 42 sent on 29 June 2024 did not take matters further. In it the Claimant accepted Mr Surtees response and stated that she intended to take further advice on how to move forward in resolving the matter amicably.

40. All three emails were sent before the Claimant's resignation and therefore termination of her employment.

41. When asked about the reference to protected conversations, Mr MacMillan confirmed that the Respondent did not object to these documents being included, but queried whether the inadmissiblity of these pre-termination discussions could be waived even bilaterally. He did not make submissions during the hearing as to whether this evidence could or could not be relied upon in the Tribunal, but raised in his written closing submissions that it could not be.

42. The Claimant confirmed that she understood without prejudice privilege and that she could decline to have evidence of without prejudice or pre-termination negotiations, (protected conversations), considered by me.

43. The Claimant confirmed however that she wished me to consider all of the documents at section (H) of the main hearing file; this was annotated in the index to run from pages 26 to 134. Although there appeared to be some

discrepancies in the file page numbers, it was clear that section (H) of the file included the potentially privileged/inadmissible documents.

44. The Claimant confirmed that the issues she wished me to determine included allegations relating to an offer of payment for her to resign, said to have been made Mr Surtees at a meeting on 11 June 2024. The Claimant stated that she believed I would need to read the correspondence at section (H), as she had included it to show the to show the tone and intimidatory tactics that she believed had been used by the Respondent towards her.

45. I asked the Claimant whether she wished to comment on whether I should read the email inviting the Respondent to a protected conversation. The Claimant confirmed that she had included all of the letters she had sent and had done so on the advice of ACAS and the Citizens Advice centre.

46. The Claimant had referred to the potentially without prejudice matters and/or inadmissible protected conversations her ET1 Grounds of Claim and the Respondent in its ET3 Grounds of Resistance. Both Parties had referred to these matters in their witness evidence and the documents had been included in the file of documents which both Parties wanted me to consider. This was potentially evidence of having already waived without prejudice privilege, but I find that the inadmissibility which arises under section 111A of the Employment Rights Act 1996 cannot be waived by parties.

47. Following these discussions, I was satisfied that both Parties understood that they were entitled to assert without prejudice privilege and had chosen to waive this privilege in order to complain about and respond to allegations about 11 June 2024 meeting. I therefore proceeded on the basis that the Parties had waived without prejudice privilege which could have been asserted.

48. Neither Party made a submission during the hearing about whether a different approach was required for documents inviting and declining protected conversations, or any other evidence of pre-termination negotiations. However, as this issue was flagged by Mr MacMillan, I considered the law and how to address the initial issue of whether I could consider this evidence.

<u>The Law:</u>

49. Section 111A(1) of the Employment Rights Act 1996 states that evidence of pre-termination negotiations is inadmissible in a complaint under section

111 of the Employment Rights Act 1996, which would include a complaint of unfair constructive dismissal; unless any stated exception applies.

50. Section 111A(2) of the Employment Rights Act 1996 defines 'pre-termination negotiations' as meaning "*…any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.*"

51. Section 111A(4) of the Employment Rights Act 1996 provides an exception to section 111A(1), where "*In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.*"

Initial considerations during the hearing:

52. As set out above, no issue remained following the initial discussion about admissibility of evidence on the grounds of without prejudice privilege, as both parties waived this privilege.

53. As to evidence of a 'protected conversation'; it was not apparent that the comments alleged to have taken place on 11 June 2024, or the Claimant's inviting the Respondent to a protected conversation and Mr Surtees declining this invite would amount to an "*offer made or discussions held*", which would be an inadmissible evidence of pre-termination negotiations. I was mindful that this evidence had not yet been tested in cross-examination, and neither party was asserting that the evidence was inadmissible under section 111A of the Employment Rights Act 1996.

54. The Claimant was alleging improper behaviour in relation to both the comment she alleged Mr Surtees made on 11 June 2024, suggesting he may be prepared to pay her a sum to leave her employment, and his later approach to her invite to a protected conversation.

55. I considered that that I would need to hear evidence and submissions in order to decide whether the behaviour alleged occurred, whether it was improper and if so, to what extent confidentiality should be preserved in respect of any pre-termination negotiations. This was not a matter I could determine as a preliminary issue.

56. I therefore decided that I could hear evidence and submissions regarding the documents at bundle pages 40 to 42, 44 to 45 and 80 to 81 and the ET1 Grounds of Claim, ET3 Grounds of Resistance and witness evidence related to these documents and the allegations about the meeting on 11

June 2024, in order to determine admissibility and if appropriate, relevance to the Claimant's claim.

Decision on admissibility:

57. Having considered all of the evidence and read the Parties closing submissions, I have reached my decision on admissibility of evidence of pre-termination negotiations ('protected conversations') as part of this Reserved Judgment.

58. I have made the findings set out below about what occurred on 11 June 2024. I have found that the words used by Mr Surtees were "*what would it take for you to go?*" and the Claimant responded "*What, pay me off?*"

59. Mr Surtees does not accept that his words were intended to offer the Claimant a payment of money to leave her employment, but the Claimant understood this to be what his comment meant.

60. There was however no offer made by either individual. No terms for the Claimant's termination of employment were discussed. There was no negotiation. They were comments made in the heat of the moment by both people.

61. I therefore find that these words did not amount to pre-termination negotiations for the purpose of sections 111A(1) and 111A(2) of the Employment Rights Act 1996. As such, the comments made on 11 June 2024 are admissible evidence in the Claimant's claim for unfair constructive dismissal.

62. In the Claimant's email of 26 June 2024 she simply stated that she would like to start a protected conversation with a view of reaching a settlement agreement and asked Mr Surtees how he would wish to progress the matter. She did not make or refuse any offer or suggest any settlement terms which would indicate any negotiation or settlement discussions in her email. Mr Surtees response stated that he did not see the purpose of having a protected conversation. Again, no offers were made or discussed. As I have found above, the Claimant's further response of 29 June 2024 headed "*Without prejudice - Protected Conversation*" did not add anything further.

63. No discussions or negotiations took place between either party in this series of three emails. No offer of terms on which to terminate the Claimant's employment were made. The emails were simply an invite to start a protected conversation, which was refused. No pre-termination

negotiations took place. There is therefore no evidence in these emails of pre-terminations.

64. I therefore find that the content of these emails did not amount to pre-termination negotiations for the purpose of sections 111A(1) and 111A(2) of the Employment Rights Act 1996. As such, these emails are admissible evidence in the Claimant's claim for unfair constructive dismissal.

65. Given my findings that the evidence in question is admissible as it was not evidence of pre-termination negotiations, I do not need to go onto consider whether there was improper conduct under section 111A(4) of the Employment Rights Act 1996.

D. New Documents:

66. When the hearing re-started after the lunch break, and whilst the Claimant was still under oath, Mr MacMillan raised that there were new documents which the Respondent wished to rely on.

67. The new documents included 19 pages of handwritten notes said to have been taken by Mrs Surtees when interviewing the individuals referred to in paragraph 14 of her witness statement. Also included were 3 or 4 pages of annotated payslips requesting the Claimant's pension to be transferred to an ISA.

68. I confirmed that an email had been received, but I had not yet read the attachments.

69. The Claimant had not had the time to read the new documents. After her evidence finished, a break for the Claimant to read these new documents. I then heard the Respondent's application for permission to put the new documents before me and rely on them, and the Claimant's response to that application.

70. For reasons that I gave during the Hearing, I concluded that the Respondent's application to rely on the late produced documents would be refused.

THE FACTS

71. The Claimant was employed by the Respondent as an Optical Assistant from 12 June 2018 until 11 August 2024.

72. The Claimant's employment terminated after she resigned on notice on 12 July 2024.

73. The Respondent is a local opticians based in Northallerton. It is a small business, with 7 members of staff.

74. The Respondent is owned and operated by Mr Alexander Surtees. Mr Surtees is a registered optometrist and was regularly present at the Respondent in his role as owner and optometrist.

75. Mr Surtees' wife, Mrs Samantha Surtees, is a director of the Respondent. She is also a qualified optometrist but her role within the Respondent largely involved certain administrative duties such as invoicing, payroll, GDPR compliance and staff appraisals. Mrs Surtees did not regularly work at the Respondent's premises, but would attend on occasion and work on the shop floor as and when required.

76. The Claimant's duties as an Optical Assistant included receptionist work, greeting clients, booking appointments and other administration including emailing doctors and other NHS specialists, as well as filing.

77. Mr Surtees was the Claimant's manager and had been since around July 2021. Prior to this, Mr James Blenkinsop had been the Claimant's manager. Mr Surtees was the owner and optometrist during Mr Blenkinsop's employment, but his role does not appear to have been recruited into following his departure.

Contractual Terms

78. The Claimant stated in her resignation email of 12 July 2024 [**44**] that she did not have a copy of her contract and did not know what her notice period was. She did not dispute that the contract provided in the file [**60-69**] was a genuine copy of her contract and I find that it was a copy of her contract of employment with the Respondent.

79. Clause 11 of the Claimant's contract of employment [**63**] stated that her hours of work were 34 hours per week with normal start and finish times being from 09:00 to 17:15 Tuesday to Friday and from 09:00 to 13:00 on Saturdays. This was stated in her contract to be "*all the hours that the store is open*". This totalled 37 hours per week.

80. Clause 11 confirmed that the Claimant was entitled to a 45 minute lunch break for each full day (09:00 to 17:15) which was unpaid. No provision was made for a break on the shorter working day on Saturdays. This therefore amounted to 34 hours paid per week.

81. Clause 11 also stated:

"*The Company reserves the right to vary these times as necessary to meet the changing needs of the business.*
The Company reserves the right to vary your hours of work (including the days on which You work) to accommodate the needs of the business.

You may be required by the Company to work additional hours in addition to your normal working hours as the Company considers necessary. This may include additional hours for example when attending regional meetings or training seminars which take place outside of your normal hours.

You will be given reasonable notice of any requirement to work such additional hours ('Overtime'). You will be paid for completing such Overtime or You will be given time off in lieu. Overtime will be allocated at the Company's complete discretion and you have no contractual right to work Overtime. The rate of pay for working such Overtime will be confirmed to you at the time of instruction to work such Overtime. No payment will be made for Overtime, or time off in lieu given, unless the completion of such Overtime was authorised in advance by the Company."

82. Clause 12 of her contract of employment [**63**] confirmed that the Claimant's rate of pay was £8.00 per hour, which accrued from day to day. I was not provided with any evidence of increases in the Claimant's hourly rate of pay.

83. The Claimant asserted [**paragraph 11 C's WS**] that at around 5 years previously (which would have been early 2020), her hours and those of her full time colleagues were changed to start from 09:00 to 08:45. This was to complete a rota of tasks before the store opened. This would have commenced at a time when Mr Blenkinsop was the Claimant's manager. The Claimant stated in cross-examination that prior to this she could attend work at 08:55.

84. The Claimant stated that this was a change to her original contractual hours that was, in essence, imposed on her. She complains that this was a breach of her employment contract by failing to pay her for these additional 15 minutes.

85. The Respondent's position was that there had been no change to the Claimant's hours, or that of her colleagues, to require them to start work at 08:45.

86. In cross-examination, the Claimant denied having ever complained to Mr Surtees about this change in her hours and lack of pay. Counsel for the Respondent asked the Claimant whether she had ever requested overtime pay or time off in lieu, which she confirmed she had not.

87. Mr Surtees evidence in cross-examination was that the Claimant's contracted hours started at 09:00. He stated that the Claimant was still able to come into work at 08:55. He gave evidence that she was confusing the rota with being required to get into work early. He stated that the rota was instigated by himself, Debbie (a former employee), Mr Blenkinsop. He stated that Mr Blenkinsop was always in early at 08:20 and set the whole shop up. He stated that the rota was to make sure everyone knew to do everything.

88. Mr Surtees maintained that he never told anyone to arrive at 08:45 and that James had been put in charge of the rota. He did not give evidence about who was in charge of the rota after Mr Blenkinsop's departure in or around July 2021.

89. The Claimant put to Mr Surtees in cross-examination that on unspecified occasions he would make comments about staff being late if they attended work at 08:46, which Mr Surtees denied.

90. The Claimant relied on a number of documents to support her case that there was a requirement for her to attend work 15 minutes early and that she was unpaid for this, including:
    a. [**143**] a text message exchange between the Claimant and Mr Blenkinsop where he appears to confirm that there was a requirement to work 15 minutes per day from around 5 years previously. The Claimant confirmed in cross-examination that these text messages were sent after her resignation.
    b. Witness statement of Mr Blenkinsop, confirming the requirement to come into 15 minutes early unpaid.
    c. [**144**] an undated text message exchange between Madison Kitchen and the Claimant where Madison states "*…Also I won't be coming in at quarter to anymore even if I am in the car park I'll be turning up at 5 to. If he doesn't have the decency of paying me at least for the Wednesday when my graduation was (as in my opinion that is work) then I won't be giving him any of my time for free!…*". It is apparent from the content of this message that it was sent before 7 June 2024, as it was sent whilst Madison remained both employed by the Respondent and in contact with the Claimant.

91. On balance I find that the Claimant had been required for around 5 years to attend work each day at 08:45, rather than the previous 08:55. This was in order to complete tasks on a rota of duties to be completed before the store opened. I have reached this conclusion on the basis of evidence showing that the Claimant, Ms Kitchen and Mr Blenkinsop believed that they were required to attend work at 08:45 to complete tasks before the

shop opened, when they were not paid until 09:00. I also conclude this as Mr Surtees relied on Mr Blenkinsop having implemented the rota and did not explain how this was put into effect or who had enforced this after Mr Blenkinsop's departure.

92. The Claimant's contract has an express term stating the hours and days she was required to work each week. The contract provided for her to be paid overtime or provided with time off in lieu for any time worked in addition to her set shifts. There is no evidence that she was paid for this additional time worked, or provided with time off in lieu and I find that she was not.

93. Clause 16 of the Claimant's contract [**64**] is titled 'Discipline & grievance'. The only detail provided in relation to grievances is that the Company reserves the right to suspend the employees from work for the purposes of carrying out any grievance procedures or investigations.

94. It was put to the Claimant in cross-examination that a grievance procedure was available in the staff handbook which was available in the store. The Claimant disputed this. She also queried why the grievance policy had not been sent to her. No mention was made of a grievance policy being available in a staff handbook in store in the Respondent's witness evidence. No copy of any grievance procedure was included in the hearing file. I therefore find that even if the Respondent did have a grievance procedure during the Claimant's employment, it was not known to the Claimant or drawn to her attention.

<u>Claimant's Performance and Workplace Relationships</u>

95. The Respondent states at paragraph 3.2 of it's ET3 Grounds of Resistance that there were no performance issues with the Claimant.

96. Despite this, Mr and Mrs Surtees contend in their witness statements and the Respondent relies on documents to demonstrate that there were relationship issues between the Claimant and her colleagues, which were said to be caused by bullying behaviour of the Claimant.

97. This was not raised with the Claimant prior to her commencing sick leave on 12 June 2024, from which she did not return to work before to the termination of her employment.

98. Although Mrs Surtees sent the Claimant an invite on 12 July 2024 to attend an investigation meeting, the only specific detail provided to the Claimant was that the meeting would investigate the events of 11 June 2024.

99. Mr Surtees prepared a statement following the 11 June 2024 incident where he makes reference to a number of historic matters said to involve the Claimant. These were historic and were not put to the Claimant in cross-examination.

100. Evidence from the Claimant's colleagues that I have read is in the form described above; namely, a summary of notes written by those colleagues and information that they told to Mrs Surtees. This is not only hearsay evidence (which is admissible in the Tribunal but potentially of less weight than evidence from direct witnesses) but is a summary of what Mrs Surtees was told and what the witness wrote, not a direct recollection of what the person had said or written. The Claimant questioned why the handwritten notes were only provided during the hearing and why the summaries from witnesses had been provided late in the Tribunal process. She did not, however, allege that they had been fabricated.

101. I have seen other evidence which would appear to suggest relationship difficulties between staff members. This includes the following:
    a. An email which appears to be Mr Surtees sending to Mrs Surtees on 2 December 2024 [**34**] a copy of a WhatsApp message from Simon from 2 February 2023 stating "*…Thought best to let you know Nina had a 'meltdown' this afternoon. Accused Kaitlyn of pushing in and taking over with a patient. And that no one else gets a chance to do dispense…She voiced her opinion loud enough for Kaitlyn to hear whilst doing a dispense in back room. Kept Kaitlyn busy in back for remainder of day doing course work so not to make the atmosphere any worse. Obviously both upset and no doubt the subject will be raised tomorrow. Sorry.*"
    b. A series of undated text messages between the Claimant and Ms Kitchen [**154**] which state "[Madison] *Simon has stayed to have a chat with Kaitlyn x [*Claimant] *Well that's obvious he was going too (sic) .. he must have told her to stay in back out of way .. well I'll be in the shit tomorrow then as sure he'll talk to Alex x [*Madison] *[unclear face emojis] well we can both be in the shit cos I said summit too… [*Claimant] *Was I nasty about her?…so she'll go into melt down and it be my fault.. not looking forward to tomorrow.. bet Simon will speak to Alex tonight .. xx [*Madison] *I don't think you were nasty at all you were just letting him know how you feel. No I'm not looking forward to tomorrow but we will just see what happens x [*Claimant] *Sorry for saying something and for you to have to say something to.. [Screaming face emoji]*";

102. The Claimant does not suggest and I do not find that the 'statements' prepared by Mrs Surtees have been fabricated, but I also cannot find that they are a reliable retelling of the evidence that colleagues gave either in

writing or orally to Mrs Surtees. This is in particular due to them being summaries and not including the questions that they were asked. I do not know whether the staff members had given a full and accurate picture of the relationship difficulties in the store when being interviewed by Mrs Surtees, the wife of Mr Surtees, who was the subject of the Claimant's criticism.

103. The Claimant has made general allegations regarding the behaviour of Mr Surtees, namely that she was the subject of constant critical harassment on a daily basis by Mr Surtees. She does, however, state in her ET1 Claim Form that she was generally happy at work and she agreed this was accurate when challenged in cross-examination.

104. The Claimant gave examples Mr Surtees' behaviour which she stated created a stressful and toxic work environment, including him:
    a. Being highhanded and unpleasant at times;
    b. Hanging around when not with a client, hovering over the Claimant;
    c. Interfering with the Claimant's work;
    d. Pointing at the Claimant when she was on the telephone making appointments;
    e. Wrongly highlighting mistakes he thought she had made, and doing this publicly in front of other team members and clients;
    f. Taking over payments with clients that the Claimant was processing;
    g. Having a negative attitude;
    h. Never praising staff members;
    i. Wrongly blaming the Claimant for the dismissal of Debbie Linley.

105. The Claimant relied on evidence to support her allegations, including:
    a. [**130**] an email from Debbie Linley referring to the stress she felt reading the Claimant's request for a witness statement, saying "*…which is why I didn't take him to a tribunal myself…I tried to make Alex aware of the harm he was causing and I had hoped he had taken it on board. Obviously not. The whole situation was making me very ill and caused huge self doubt in my abilities and affected my mental health so much that I did not work for well over a year and never want to work in optics again, I immediately cancelled my optical membership. I'm unsure what to do. This just brings all the crap back.*"
    b. [**131-134**] emails between Mr Surtees and Mr Blenkinsop where Mr Surtees apologised for his behaviour, there being a "*not pleasant*" working environment, him being obsessed with trying to control something whilst Mr Blenkinsop did his best to try and please him and felt undervalued as Mr Surtees was "*stropping around*" and

separately Mr Surtees referring to himself as behaving "*like a petulant child*".

c. [**146**] reference to Ms Kitchen wanting to leave the Respondent's employment because of Mr Surtees.
d. [**145**] following on in the undated text message exchange between Madison Kitchen and the Claimant starting at [**144**] where Ms Kitchen states "*Yeah I'm okay, just being with my friends from college reminds me how toxic out work environment is!…*".
e. [**142**] an undated text message from Mr Blenkinsop where he states "*Madison texted me when she was thinking of taking the new job and she wanted to leave due to him being a complete cock.*"
f. [***150-151***] an undated text message exchange between the Claimant and Mr Blenkinsop where he states "*…he certainly loves creating a toxic environment, you need to be rid of him as it's the only way you will find peace, I think Madison turned the new job down as they were apparently messing her about with days off etc…*" and "*…he could have still had his dream team if he wasn't such a cock…*"
g. [**153**] a series of messages sent by Ms Kitchen to an unnamed recipient who does not appear to be the Claimant or Mr Surtees, but appears likely to be Mr Blenkinsop. She states "*It's mainly Kaitlyn to be honest! Although he's made Nina go home crying today! Fun times*" and "*…Today is a bad day it's resorted to nina and I having a picnic in the car!*".

106. The Respondent sought to rebut these allegations, including by relying on text messages between Mr Surtees and Mr Blenkinsop which appeared to show a good relationship between the two men following Mr Blenkinsop's resignation. Mr Surtees also gave evidence that Ms Linley had been into the the Respondent's store with her daughter since her departure for an eye test and had glasses for herself.

107. The Claimant contended that text messages between her and other staff members disappeared following her resignation. She also contended that messages between Ms Kitchen and Mr Blenkinsop disappeared. She put to Mr Surtees in cross-examination that this was done on his instruction. He was clear that he did not understand how texts could be deleted from the recipients messages. It is a serious matter to allege that relevant evidence has been destroyed. I do not consider that the oral allegation put and denied is proof that such messages had disappeared or that this was done on Mr Surtees instruction. The Claimant did not explain what relevance such messages would have had to her being able to prove her claim.

108. Ultimately it was the Claimant's own evidence that the treatment she alleged Mr Surtees subjected her to prior to 11 June 2024 was too numerous for her to be able to recall specific instances. But that is what would be required for me to make findings of fact about whether the alleged behaviour took place and whether it could amount to a breach or breaches of any implied terms of her contract.

109. I accept the Claimant did her best to be honest in recollecting how she felt whilst working for the Respondent, but she has not provided sufficiently cogent evidence of specific incidents prior to 11 June 2024 for me to make findings of fact as to whether they occurred. I also note that the Claimant gave evidence that she was generally happy at work. She did not raise a grievance about matters prior to 11 June 2024, but for the reasons set out below that is of limited weight. She contends that she did no more than have an occasional word with Mr Surtees about his behaviour, which would improve before reverting to be as it was before.

110. The general examples given by the Claimant such as taking over payments and interfering with the Claimant's work require detail and context for me to be able to decide if they occurred and if so whether they could amount to breaches of implied terms of her contract.

111. I accept from the documentary evidence provided that other colleagues, particularly Mr Blenkinsop, Ms Kitchen and Ms Linley had issues or concerns with Mr Surtees' management at times. But again, insufficient specific allegations have been provided for me to determine whether they are relevant to the Claimant's claim and if they occurred.

112. Ms Linley declined to provide a witness statement to the Claimant. The Claimant asserts that she was wrongly blamed for Ms Linley's dismissal by Mr Surtees. Mr Surtees denies this. Mr Blenkinsop does not address this in his witness statement. In the absence of evidence from Ms Linley, it is difficult for me to determine what was said to her or others about her dismissal, although I accept that the Claimant believed that she had been wrongly blamed. However, Ms Linley left the Respondent's employment in or around 2021 and the allegation that the Claimant was wrongly blamed did not feature in her resignation email.

113. I conclude that there were a number of issues in the relationships between colleagues, including Mr Surtees and the Claimant, Mr Blenkinsop, Ms Kitchen and Ms Linley. These issues persisted for a number of years up to and including the time of the Claimant's termination of employment. It does not appear that there was clear communication about these concerns by any party involved and they had not been fully

addressed, for example in a formal process or mediation. This is relevant, as it appears to set in context the events of 11 June 2024.

114. It appears that the Claimant was already aware that Ms Kitchen was going to resign in early June 2024 [**152**]. In a text message from Mr Blenkinsop to the Claimant he states "*…Hi Nina, it's great news for Madison, is she telling him tomorrow? I bet he really won't see that one coming, same as when I left lol, 3 years here in August and ma really enjoying it to be honest, I work hard but there is no hidden agenda here, no people coming in in bad moods, had a pay rise, I'm left alone to choose new brands and all that…I really think it's time for you to look elsewhere as Madison asked me if it was better working elsewhere and the answer is a resounding yes, hope you are keeping well xx*".

11 June 2024

115. Both the Claimant and Respondent's cases appear to agree that prior to the resignation of Ms Kitchen on 7 June 2024 and the meeting on 11 June 2024:
    a. The Claimant had frustrations with Mr Surtees style of management and behaviour, which she had not raised with him recently either directly or in writing;
    b. Mr Surtees was not aware of any concerns about behaviours or relationships that staff, including the Claimant and Ms Kitchen, had in the workplace;
    c. Ms Kitchen felt that the workplace was so "*toxic*" that it led her to resign from the Respondent.

116. The Claimant and Respondent's cases are also consistent, or substantially consistent, on the many of the matters that occurred to 11 June 2024, including the following:
    a. On 11 June 2024 Mr Surtees required staff, including the Claimant to attend a meeting at the end of the working day. Staff did not know the specifics of what this meeting was going to be about;
    b. Mr Surtees asked staff if they knew why Madison had resigned;
    c. Mr Surtees made reference to Ms Kitchen calling the workplace a "toxic" environment;
    d. The Claimant responded, agreeing that the workplace was toxic and blaming Mr Surtees for this;
    e. The Claimant referred to Mr Surtees micro-managing the staff or words to that effect;
    f. The Claimant stated that all other staff felt this way;
    g. The other staff present, Simon and Kaitlyn, declined to agree with the Claimant;
    h. The Claimant was emotional;

i. The Claimant left the room where the meeting had taken place and went upstairs;
j. Mr Surtees followed the Claimant upstairs a short while later and the conversation continued between them without witnesses present;
k. Mr Surtees expressed that he was not going to change. The Respondent's case is that this was a reference to him being the business owner and that he would be present at the business. The Claimant took this to mean that he was not prepared to address his behaviour;
l. Mr Surtees asked the Claimant "*What will it take for you to go?*"
m. The Claimant responded "*What, pay me off?*"

117. There are some disputes about what occurred on 11 June 2024, with some conflicting evidence. I find that the following occurred:
    a. The Claimant did raise her voice and spoke in a direct tone. Whilst not intending to shout, it could be construed by some observers as shouting (as seen in the contemporaneous statements or Simon and Mr Surtees), even if others did not consider it to be (this was not mentioned in Kaitlyn's statement and the Claimant denies shouting);
    b. The Claimant's response to Mr Surtees was, or at least became, sharp. She responded to the unexpected opportunity to air her dissatisfaction about his behaviour which she had not expressed in a detailed way to him previously, or at least not recently.

118. The key issues for me to determine are the circumstances of the comments "*I'm not going to change*" and "*what will it take for you to go?*"

119. I accept Mr Surtees evidence that he felt the Claimant was saying that he could do no right in her eyes. I find that he had not expected to be met with such allegations when he called the staff meeting, as he would not have done so in such a public forum if he had expected such criticism. He was surprised about what he was being told. It accept that it was upsetting for him to hear.

120. I also find that what the Claimant said to Mr Surtees were her genuine views about his management style, about how she felt and what she believed the other members of staff also felt. I accept she was responding to an opportunity to tell Mr Surtees what she thought the issues were in the workplace, which in her belief his behaviours had caused. She did this in front of two other members of staff, as that is the context in which she had been asked the question by Mr Surtees. Whilst emotions may have been heightened, I do not find that she acted in an offensive or insulting manner.

121. In the circumstances, I find that Mr Surtees used the words "*I'm not going to change*" or very similar language to mean that he was still going to be there present in the workplace, rather than that he was not going to alter his behaviour. He did not, however, use language at this point of the conversation which indicated he accepted anything the Claimant was saying might be true, or that he was going to modify his behaviour. I find that the Claimant interpreted what Mr Surtees said as meaning that he was not going to change his behaviour to address any of the concerns that she was genuinely raising.

122. I am not clear what Mr Surtees evidence is about what he meant when he said "*what will it take for you to go?*". I understand his position is that he felt that he could not do anything right in the Claimant's eyes and he felt in that moment that he did not know what he could do, as the business owner and optometrist at the store, to resolve the concerns that the Claimant was raising.

123. The Claimant inferred from this comment that she was being asked to state how much it would cost for her to resign. I find this to be the natural and reasonable conclusion to draw from an employer stating in such circumstances "*what will it take for you to go?*". I do not accept the Respondent's case that it was the Claimant who raised the issue of being "*paid off*" first. Whilst no actual negotiation took place and no offers were made, the Claimant interpreted the words used by Mr Surtees as being a reference to money and it was reasonable for her to do so. I accept that she believed at that time that Ms Linley had been paid a settlement sum in relation to the termination of her employment. Whether the Claimant mentioned Ms Linley by name at that time or not, the circumstances were in her mind when she responded to Mr Surtees.

124. In Mr Surtees' statement prepared shortly after the meeting [**26**] he recalls the Claimant then asked "*why should I leave I love my job. I'm great at my job. I love the customers.*" I accept the Claimant did say this and even after the previous elements of the meeting, it reflected how she felt about the suggestion of her leaving her employment.

125. The Respondent suggests that a text message sent by the Claimant to Mr Blenkinsop in the following chain was evidence which indicated that she was not as upset as she describes "[Mr Blenkinsop] *How's work today Nina, is Alex kicking off after Madison gave him the news xx [*Claimant] *Yep we just had a meeting so I told him what for it's toxic he's undermining critical and talks to us like crap [3 x laughing crying face] of course no one else said a word*". The copy in the bundle does not show the time the message was sent. Mr Surtees suggested in his evidence that this was after the staff meeting but before he had spoken to the Claimant on her

own. I do not find that this message or the use of 'laughing crying' emojis indicated that the Claimant was not upset by the meeting. It appears that all participants were upset to a degree after the meeting ended.

126. The Claimant left the store shortly following these comments being made.

127. Mr Surtees states that he asked Kaitlyn and Simon to make a note of what occurred at the meeting on 11 June 2024 immediately afterwards. I have seen typed notes [**33**] which are written in the first person and therefore unlike the later interview notes, appear to be the words used by the original authors. It is apparent from these notes the Kaitlyn and Simon did not feel the same way as the Claimant about Mr Surtees. The Claimant accepted in cross-examination that she had not discussed this with Kaitlyn and Simon, but concluded that they felt the same.

128. Later that evening the Claimant sent a text message to Ms Kitchen [**35**] stating "*Shit to do this tonight sorry [downward looking emoji face] .. I am no longer employed [laughing crying face emoji] has asked for my £ pay off fig ! He called a meeting this afternoon to discuss you leaving asked if we were happy…. I spoke up .. had as if I wouldn't [laughing crying face emoji] didn't want to do this tonight with you and mum at take that ., I'm done not going back .. walked out and told him what for no holds barred (had too) I'm gone babe no notice waiting for pay off £ .. said my it on behalf of everyone but silence from all as I let him have it .., I wish you all success my dear and every success for future but I won't be back after today [3 x laughing crying face emoji and 1 x heart emoji] enjoy take that and celebrate the future xxxx*".

129. Mr Surtees gave evidence that he did not see this text message until 6 September 2024 [**paragraph 6 Mr Surtees WS**]. His case is therefore that he had not seen it's content, including that the Claimant did not anticipate returning to work for the Respondent, prior to her resignation. This is not consistent with the summary of Ms Kitchen's statement prepared by Mrs Surtees [**28-29**]. This summary is dated 27 June and refers at paragraph 15 to the Claimant's text message to Ms Kitchen on 11 June 2024 indicating that she would not return to work. The statement states "*(ref: e-communications pg2).*" Mrs Surtees gave clear evidence as to how the summaries were prepared from witnesses own evidence and it therefore appears that by at least 27 June 2024 the Respondent, by Mrs Surtees, was aware of this text message. This apparent inconsistency was not tested with Mr Surtees in cross-examination however.

130. Ms Kitchen replied the next day stating "*Oh shit hope you're okay & get something sorted asap. Take That were amazing xx*".

131. The Claimant was questioned in cross-examination about her text message to Ms Kitchen. She stated that she thought it was in Mr Surtees hands whether she was going back or not and that he had offered to pay her off, which she understood meant she was not going back.

132. The Claimant also gave evidence that following the events of 11 June 2024 she was not going to go back into that environment, given the way she had been spoken to. She was open to Mr Surtees 'paying her off' if he wanted to. She thought from what he had said that he would not change.

133. Later in cross-examination the Claimant stated however that she still considered herself to be employed. This was why she obtained a sick note to provide to her employer.

Events from 12 June 2024 onwards

134. The Claimant sent emails to the Respondent on 12, 13 and 14 June 2024 confirming that she was too unwell to attend work.

135. On 14 June 2024 Mr Surtees responded "*Thanks for letting us know. Hope you feel better soon.*" [**72**].

136. According to page 4 of the Additional Documents bundle provided to the Claimant one working day before this hearing, on 13 June 2024 Ms Kitchen wrote a letter asking to take back her resignation. She referred to a discussion with Mr Surtees that took place earlier that day. No evidence was provided about what was said in that meeting. Mr Surtees gave evidence [**paragraph 13 Mr Surtees WS**] that "*Madison told me that she now understands how toxic and coercive Nina's actions were…*" Ms Kitchen's letter goes onto state that the source of her toxic work environment was Nina, the Claimant. She stated that because the Claimant would not be returning to work, Ms Kitchen would love to continue working for the Respondent. I find that whether through what Ms Kitchen had told Mr Surtees or through him seeing the text message from the Claimant of 11 June 2024 earlier than he suggests, Mr Surtees was aware by 13 June 2024 that the Claimant had expressed to Ms Kitchen that she would return to work following the events of 11 June 2024.

137. Ms Kitchen's letter did not accord with what the Claimant understood of their relationship. It was also inconsistent with what she understood Ms Kitchen had told Mr Blenkinsop about her reasons for leaving. The Claimant questioned why the document had been provided at such a late stage. She did not suggest it had been fabricated, although she also did not accept the content of the letter was accurate.

138. The timing of Ms Kitchen's return, alongside her letter, does suggest that she returned to work after becoming aware that the Claimant had resigned. I find that Ms Kitchen did have some concerns about working with the Claimant, as seen in her statement summary [**28-29**]. I concluded however that the reason for Madison returning to work for the Respondent at this time does not inform my decision making about the reasons why the Claimant resigned. The Claimant did not know at that time about the existence or content of this letter, which she has not alleged has been fabricated.

139. The Claimant had an appointment with her doctor on 14 June 2024. She reported to her doctor the events that had occurred on 11 June 2024 and her feelings about work that had preceded this [**106-107**]. She was diagnosed with work related stress.

140. The Claimant's doctor provided a fit note which stated that she was suffering with "*Stress at work*" and that she may be fit for work with workplace adjustments. Comments were provided "*Would benefit from changes to ensure work environment is supportive, may benefit from time away from work until such changes can be made*" [**76**]. This fit note lasted from 15 June 2024 to 13 July 2024 and was provided to the Respondent on 15 June 2024.

141. Mr Surtees responded by email on 18 June 2024, thanking the Claimant for sending in her "*sick note*" [**38**]. He stated "*…As your sick note finishes on and includes the 13th July you are not allowed to work here before Tuesday 16th July 2024. You get two weeks full sick pay this will be from 12th to 25th July, then from 26 July statutory sick pay (SSP) will start.*" I find that these dates were intended to refer to June, not July.

142. Mr Surtees appeared to read the fit note as saying that the Claimant was too unwell to work at all, rather than the detail which states that the Claimant may be able to return to work when changes had been made that would ensure a supportive work environment. The Claimant herself appears to have considered that she was not fit to return to work at this stage and had told her employer this [**paragraph 19 ET1 Grounds of Claim**]. I do not find it likely that she would have returned to work at this time if invited to do so.

143. The Claimant is critical in paragraph 19 of her witness statement that Mr Surtees did not contact her regarding her wellbeing or ask how he could support her back into work. The Respondent contends that contact was made with the Claimant. I find that this contact did not contain enquiries about the Claimant's health beyond platitudes such as hoping that she was feeling better. The Respondent, whether Mr or Mrs Surtees or anyone on

their behalf, did not contact the Claimant to seek to understand the concerns that she had raised about Mr Surtees on 11 June 2024 and whether there was anything that could be done to resolve the situation or that would enable her to return to the workplace, as indicated in her fit note.

144. On 19 June 2024, the day after he told the Claimant that she could not return to work for the duration of her fit note, Mr Surtees emailed the Claimant to inform her that the Respondent was going to be "*…placing a job advertisement on facebook/indeed/Northallerton jobs type places and wanted to inform you incase you saw one. Obviously with changes to staffing levels and the needs of the business we need to recruit, please do not read anything into this than the fact it is recruitment. This email is sent so that you are not surprised.*" [**39**].

145. The Claimant subsequently saw the job advertisement on Facebook stating [**79**] "*WE ARE RECRUITING Receptionist/admin position available full time (34 hours per week) Previous experience preferred but full training will be given.*"

146. The Claimant replied on 26 June 2024 [**40**] stating "*Although your email has made suggestions to not read anything into it, my job description and duties have been advertised whilst I am currently signed off with stress. As a result I now feel it would be untenable for me to return to my job…*". The Claimant then requested a protected conversation with Mr Surtees in the same email.

147. Mr Surtees replied on 28 June 2024 [**41**] stating "…*You have misunderstood. It is not your job that we are advertising. We are recruiting for additional front of house staff due to Madison being qualified in six month's time and therefore she will be off the shop floor and in the testing room. We are doing this now as it may take some time to recruit, the new person is likely to need to give notice to leave their existing job and it will take a while to train whoever we take on. Therefore, I do not see the purpose of having a protected conversation. I hope you are better soon.*"

148. Mr Surtees confirmed in cross-examination that the Respondent's current employees were himself, Mrs Surtees, Ms Kitchen, Simon and Annie the receptionist. He referred to Kaitlyn later in his evidence too. In response to a question from the Claimant challenging his explanation about recruitment being needed for when Madison was trained up, he replied that "*with everything going on*" (the meaning of which he did not explain, but I find to be a reference to this claim) they had decided that they would delay their exams. He stated that they had only decided this a couple of months ago. Now Ms Kitchen would qualify in October and Kaitlyn in December.

149. No evidence was provided by the Respondent to demonstrate what steps were taken to recruit an additional receptionist prior to Ms Kitchen and Kaitlyn deciding to delay their exams in the couple of months prior to this hearing.

150. I find that Mr and Mrs Surtees had determined that the Claimant would not be returning to work and the advert for a receptionist/admin position was an advert to recruit a replacement for the Claimant.

151. Prior to and after the Respondent advertised this role, it had not taken any meaningful steps to ask the Claimant how her health was, to invite her to a meeting to discuss her concerns or to invite discussion about what more supportive measures could be put in place to allow her to return to the workplace.

152. Instead, Mrs Surtees gave evidence [**paragraph 7 Mrs Surtees WS**] that on "*19/06/2024 Alex and I sought professional advice on how to start disciplinary proceedings against Nina after her behaviour on 11/06/2024.*" I understand Alex is Mr Surtees, Mrs Surtees' husband and the person that the Claimant criticised on 11 June 2024. It therefore appears that by 19 June 2024, both directors of the Respondent, including Mr Surtees who had been involved in the events of 11 June 2024, had determined that the Claimant should be the subject of disciplinary proceedings about that meeting.

153. Mrs Surtees states that she was advised to start an investigation gathering staff statements from everyone.

154. Whilst this was said to be an investigation into the Claimant's conduct on 11 June 2024, it appears to have involved obtaining wide-ranging information and allegations from the Claimant's colleagues, including from staff who were not present at work on 11 June 2024.

155. I do not know what if any questions were asked about Mr Surtees conduct to understand whether there was any basis for the Claimant's comments to him. I find that it may well have been difficult for staff to be entirely open with Mrs Surtees as Mr Surtees was her husband and she was an infrequent attender at the Respondent's store.

156. The staff summaries do raise a number of relationship issues and challenging behaviours involving the Claimant which an employer could reasonably be concerned to address with an employee.

157. The Claimant attended her general practitioner again on 8 July 2024 [**110 and 108**]. She reported that she had become really anxious again, was not

sleeping and had a panic attack. Additionally, she told her doctor that she had no contact from her employer and that this was causing her lots of stress. She reported that her job had been advertised.

158. According to paragraph 23 her ET1 Grounds of Claim [**16**] the Claimant decided to resign on 9 July 2024.

159. Mrs Surtees sent an email at 12:56 on Friday 12 July 2024 [**43**] inviting the Claimant to a meeting to ask her some questions about the 11 June 2024 incident and get her version of events. She stated that she would also be asking questions regarding other matters that had come to light since she started her investigation, but did not provide details of what those matters were or who they related to. It was not apparent on the face of this email whether this was an invite to an investigation into a disciplinary, a grievance, or any other matter. The Claimant was invited to meet with Mrs Surtees at 9.00am on Tuesday 16th July, her first working day after the end of her fit note.

160. The Claimant denied in cross-examination that she thought from this email that she was going to be facing disciplinary proceedings.

161. The Claimant sent her resignation at 14:44 on 12 July 2024 [**44**], less than 2 hours after Mrs Surtees email inviting her to a meeting.

162. The Claimant denied in cross-examination that she resigned in order to avoid facing a disciplinary investigation. She instead stated that she thought this was another intimidatory tactic which would be used to get her to resign. She denied that this was her opportunity to put the record straight, saying that it was not clear what the content of the meeting would be. The Claimant's case was that she felt Mrs Surtees had a conflict of interest and she was therefore suspicious of this invite.

163. In cross-examination the Claimant also criticised the Respondent for no asking any questions about her health and whether she was fit to come in. She felt that the invite was sent to cause her more distress when she was off sick with what she described as severe stress and anxiety. She repeated that she felt this was something being done to try and intimidate her and that she felt it was untenable for her to return to the Respondent's employment.

164. I accept the Claimant's evidence that she did not read the meeting invite from Mrs Surtees as being an invite to a disciplinary investigation. I conclude, however, that this was what Mrs Surtees intended it to be. It was to be a meeting which may have allowed the Claimant to provide her version of events of 11 June 2024, but on Mrs Surtees' own evidence, she

and Mr Surtees had already decided that the Claimant should be subject to disciplinary proceedings in relation to that meeting. Any meeting with the Claimant would also have involved putting the allegations made by colleagues including Mr Surtees to her, which the Claimant had not been told about.

165. Whilst the Claimant has suggested that the lack of detail about the content of the meeting was a breach of ACAS procedures (meaning the ACAS Code of Practice on Disciplinary and Grievance Procedures), she accepted that she did not think about ACAS procedures until after she had resigned. It therefore cannot have been a reason why she resigned.

166. In her resignation email [**44**] the Claimant stated that she felt she had "*…little option given the impact your behaviour towards me has had on my health and mental wellbeing.*" She referred to speaking about about these matters on 11 June 2024 and provided a summary of the issues and "*current developments*" as she described them. They included her criticisms of Mr Surtees' behaviour which as in this claim, did not give specific examples. She also referred to him telling her that he had no intention of changing his attitude and offering to pay her off, which I take to be a reference to the 11 June 2024 events.

167. No reference was made in her resignation email to her being invited to a meeting by Mrs Surtees, to her job being advertised or to her pension contributions being paid into an ISA.

168. The Claimant confirmed in her oral evidence that she was not well after the events of 11 June 2024. She stated that she went to see her doctor but that her health was still not getting better. She wasn't leaving the house. She stated that as time went on and there was more correspondence sent to her, she realised that she could not go back into the environment of the Respondent and decided to resign.

169. The Claimant attended her General Practitioner again on 15 July 2024 [**111 and 109**]. Her notes record that "*…Has been in touch with ACAS, still ongoing.; Not planning to stay in current job but still awaiting formal meeting to negotiation leaving.; Worried that without nfit note will be firted (sic) for breach of contract…*"

170. Whilst this is shortly after her resignation, the content of these entries is relevant to understanding the Claimant's thinking at the time of her resignation.

171. Further GP notes dated 16 July 2024 [**115-112**] state that "*…Has now resigned after seeking advice Ongoing support from both ACAS and CAB*

from the regulation and legal perspectives; Struggling to leave the house for fear of seeing others that might ask why she is not at the Opticians anymore Feels upset and disappointed with self; Found over the past couple of years been feeling anxious at work due to the negative, critical, micromanagement and being undermined in front of patients by boss.;…Has not been sleeping but observed an improvement over the past couple of days…Struggling with the content of the emails being sent to her by her boss, has worked for the practice for 7 years; Has been told that there is an ongoing investigation but feels that this will be biased as conducted by boss's wife. ; has already been told that her job is being advertised…Feels that her confidence levels have been eroded over the past couple of years and is upset with self that she had not seen how this was effecting her.; Stated that she was unable o have space to herself at work when needed which did not help the situation…"

172. The Claimant raised as a background matter that her pension contributions were paid into an ISA, which she did not recall agreeing to. I accept that the Claimant had agreed to her pension contributions being paid into an ISA, as this is demonstrated by the document from Nest pensions [**AD6**]. I find that the Claimant had forgotten about this process in the intervening years. She suggested that there were errors as to how this was shown on her payslip, but did not provide payslips to evidence this allegation. In any event, there was no contemporaneous evidence that this was a matter in the Claimant's mind at the time of her resignation or which caused or contributed to her decision to resign.

173. The Claimant also gave evidence that she was required to engage in practices such as not providing prescriptions unless requested by clients or not diarising NHS patients for two-yearly reviews. She stated that these practices made her uncomfortable. This was not put to Mr Surtees and no corroborative evidence was provided. In any event, there was no evidence that the Claimant was concerned about this at the time of her resignation.

174. During the Tribunal process, the Respondent hand-delivered documents to the Claimant's home. The Claimant made an allegation that after her resignation, in December 2024, two milk bottles of yellow liquid were left on her doorstep. Her neighbours witnessed someone in a grey van visiting her home. She alleged that the bottles appeared to contain urine and questioned whether they were left there by Mr Surtees, who had also delivered documents to her home. I do not find that there is evidence to support this allegation.

THE LAW

<u>Constructive unfair dismissal - liability</u>

175. All of the authorities that have been referred to in written submissions have been taken into account, whether the authority is mentioned in this Judgment or not.

176. The claimant claims (1) that her resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under section 98 of the Employment Rights Act 1996 (ERA).

177. Dismissal for the purposes of section 98 includes the circumstances stated at section 95(1)(c). "*…..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.*"

178. In considering the issue of unfair constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract **(Western Excavating (ECC) Limited v. Sharp [1978] QC 761)**.

179. It is an implied term of every employment contract 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 (see for example **Malik v. BCCI [1997] IRLR 462** at paragraphs 53 and 54). ("**the "Implied Term**").

180. In considering the Implied Term, Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** ("**Woods**"), said that the tribunal must "*look at the employer s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*"

181. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: **Lewis v Motorworld Garages Limited [1986] ICR 157 CA**.

182. The last straw must be at least part of the reason for the resignation.In the judgment of the Court of Appeal in **Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75**. Dyson LJ stated as follows in relation to the last straw.

"*A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have*

is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant."

183. In **Williams v Alderman Davis Church in Wales Primary School [2020] IRLR 589**, the EAT decided that even if the last straw was not part of the sequence of events so long as it formed part of the reason to resign then there could still be an unfair constructive dismissal. It must be decided:
    a. Whether the earlier course of conduct was repudiatory;
    b. That there has been no affirmation by the Claimant of that repudiatory breach; and
    c. The final matter at least contributed to the eventual decision to resign.

184. The Court of Appeal decision in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833** ("**Kaur**"), commented on the last straw doctrine. The judgment includes guidance to Employment Tribunals deciding on unfair constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ states:-

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

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

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

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

(4) If not, was it nevertheless a part (applying the approach explained in [LB Waltham Forest v. Omilaju [2005] ICR 481] of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [implied term of trust and confidence]? ……

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

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

185. In **WA Goold (Pearmak) Limited v. McConnell [1995] IRLR 516** the EAT decided that employers should reasonably and promptly afford a

reasonable opportunity to the employees to obtain redress of any grievances they might have.

186. Applying **Morrow v Safeway Stores plc 2002 IRLR 9 EAT**, where an employer breaches the implied term of mutual trust and confidence, this is inevitably to be deemed a fundamental breach. It is of no relevance to the breach if the employer intended to end the contract or not, nor does the employer's subjective motivation matter. It is an objective question of contractual interpretation. There two key questions a tribunal must consider where breach of the implied term of trust and confidence is engaged are:
    a. Was there reasonable and proper cause for the employer's conduct? and,
    b. If not, was the conduct calculated or likely to destroy or seriously damage the employment relationship? (**Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**).

187. An employee is not justified in leaving employment and claiming unfair constructive dismissal based solely on the employer's unreasonable conduct. The law requires something more than unreasonableness (**Bournemouth University Higher Education Corporation v Buckland 2010 ICR 901 CA**). This means that an employer's actions can lie outside the range of reasonable responses without this triggering an unfair constructive dismissal.

188. Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in **Nottinghamshire County Council v. Meikle [2004] IRLR 703** ("**Meikle**") is helpful (my emphasis):

"*33. It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the*

employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation."

189. In **Western Excavating v Sharp**, Lord Denning confirmed that an employee "*must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.*"

190. Recent authorities however, including **Leaney v Loughborough University [2023] EAT 155** have established that affirmation of contract is not a question of the passage of time but rather a matter of conduct. The Employment Appeal Tribunal confirmed that affirmation may be expressly communicated or may be implied from conduct.

191. In **Chindove v William Morrison Supermarkets plc EAT 0201/13** the Employment Appeal Tribunal ruled that the mere passage of time prior to resignation will not, in itself, amount to affirmation. However, given the ongoing and dynamic nature of the employment relationship, a prolonged or significant delay may give rise to an implied affirmation because of what occurred during that period. Where the injured party is the employee, the proactive carrying out of duties or the acceptance of significant performance by the employer by way of payment of wages are liable to be treated as evidence of implied affirmation. However, that will not necessarily be the case if the injured party communicates that he or she is considering his or her position or makes attempts to seek to allow the other party some opportunity to put right the breach of contract before deciding what to do.

192. When an Employment Tribunal decides that the termination of a claimant's employment falls within section 95(1) the burden is on the employer to show the reason for dismissal and that the reason for dismissal was a potentially fair one under section 98(1) and (2) ERA.

193. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (**Berriman v. Delabole Slate Limited [1985] IRLR 305** at para 12).

194. As it is first for the employer to show an explicitly pleaded potentially fair reason, if that reason is found by a Tribunal not to be the actual reason, the dismissal will be unfair even where an alternative might have been argued (**Murphy v Epsom College [198] IRLR 271, CA**).

195. Then, it is necessary for the Tribunal to be satisfied that in the circumstances the employer acted reasonably in treating the reason as a sufficient ground for dismissing the employee. It will not be in a position to do this if the reason in fact relied upon (or indeed an important ground constituting that reason) is neither established in fact nor believed to be true on reasonable grounds (**Smith v City of Glasgow District Council [1987] IRLR 326, HL**).

196. When considering the burden of proof, the burden usually rests with the person who is asserting something to be a factual allegation and the standard of proof is on the balance of probabilities as summarised by HHJ Auerbach in **Hovis Limited v Louton [2021] UKEAT/1023/20/LA**.

197. The Claimant also sought to rely upon an implied term that the employer would look after the health and safety of an employee at work. This is a claim made in relation to the same factual circumstances as the breach of the implied term of mutual trust and confidence, namely the behaviours and actions of Mr Surtees.

198. The employer has a duty to "*provide and monitor… so far as is reasonably practicable, a working environment which is reasonably suitable for the performance*" of their employees 'contractual duties (**Waltons and Morse v Dorrington 1997 IRLR 488, EAT**).

199. The Employment Appeal Tribunal held in **Moores v Bude-Stratton Town Council 2001 ICR 271, EAT** that the implied term to provide a suitable working environment must apply to protection from unacceptable behaviour and unauthorised interference in work duties.

200. Unlike a breach of the implied term of mutual trust and confidence, a breach of the duty to provide a safe workplace is not always or automatically a fundamental breach of contract.

<u>ACAS Adjustments</u>

201. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 allows an uplift (in the case of an employer's failure) or reduction (in the case of an employee's failure) in compensation of up to 25 per cent to be made in a claim including constructive unfair dismissal, where:
    a. The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice, here the ACAS Code of Practice for Disciplinary and Grievance Procedures applies; and,
    b. The employer or employee had failed to comply with the Code in relation to that matter; and,
    c. That failure was unreasonable.

‘Polkey’ - Whether the Claimant could have been fairly dismissed if a fair process had been followed

202. Applying **Polkey v AE Dayton Services Ltd 1988 ICR, 142, HL**, in a case where a dismissal has been found to be unfair a reduction in compensation can be made on a ‘just and equitable’ basis under section 123(1) of the Employment Rights Act 1996 to reflect the likelihood that the employee would have been fairly dismissed in any event or at a later date.

203. As seen in **Zebrowski v Concentric Birmingham Ltd EAT 0245/16**, this principle was applied in a successful unfair constructive dismissal claim where the employer asserted that the employee who resigned would have been fairly dismissed at a later date in any event.

204. In **Software 2000 Ltd v Andrews and Others 2007 ICR 825, EAT**, Mr Justice Elias summarised the following principles for Tribunals to apply:
    a. In assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;
    b. If the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);
    c. There will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;
    d. However, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;
    e. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

205. Mr Justice Elias continued at paragraph 53 of **Software 2000**:

"*The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.*"

206. In **Contract Bottling Ltd v Cave and Another 2015 ICR 146, EAT** Mr Justice Langstaff set out at paragraph 13 further general guidance for Tribunals to apply when determining a claimant's compensation, following on from **Software 2000**.

"*A Polkey decision is part, but part only, of a complex assessment of the losses which arise as a result of dismissal. Prima facie, what a dismissal causes an employee to suffer is the loss of their job and their income which comes from that job. On the face of it, this loss is open-ended and at the full amount of the pay which that employee was receiving. This prima facie position is, however, almost always moderated in practice by two major assumptions. The first is that at some stage in the future after dismissal the employee has a chance of obtaining another job. Indeed, if it is shown that the employee has acted unreasonably in failing to obtain such a job by the time of the tribunal hearing by the respondent's evidence, they may be said to have failed to mitigate their loss. The second assumption, implicit in the calculation, is that they would have remained in receipt of the same income from the same job.*"

207. Langstaff J went on to provide further guidance about determining loss on principles other than Polkey, but they are not relevant to the decisions that I am currently making and will only arise if the Claimant's claim succeeds.

Contributory Fault

208. Sections 122(2) and 123(6) of the Employment Rights Act 1996 ("ERA") impose an absolute duty on employment tribunals to consider the issue of contributory fault in any case where it was possible that there was blameworthy conduct on the part of the employee.

209. They provide as follows:

a. Basic Award 122(2): 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.
b. Compensatory Award 123(6): 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

210. The fact that an employer has failed to establish a potentially fair reason for dismissal within the terms of section 98(1)(b) and (2) ERA does not preclude a finding of contributory conduct.

211. In order for a deduction to be made to the Compensatory Award under section 123(6) ERA, a causal link between the employee's conduct and the dismissal must be shown to exist.

212. Whether or not the duty pursuant to section 123(6) is triggered will depend on the findings of fact made by the tribunal and, in particular, whether those findings reveal proven conduct attributable to the employee that potentially caused his or her dismissal or contributed in any way to it.

213. When considering the issue of contributory fault, tribunals are also entitled to rely on a broad view of the employee's conduct, including behaviour which, although not relating to the main reason for dismissal, nonetheless played a material part in the dismissal.

214. However, the wording of section 122(2) (deduction from the Basic Award) makes it clear that, unlike deductions from the compensatory award for contributory fault, it is unnecessary that the employee's conduct should have caused or contributed to the dismissal.

215. Langstaff J set out the approach for Tribunals to adopt in **Steen v ASP Packaging Ltd [2014] ICR 56**, as follows:

"*10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.*

11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.

12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer s behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer s assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer s view of the wrongfulness of the conduct. It is the tribunal s view alone which matters.

13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).

14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. 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."

216. The just and equitable consideration in the context of contributory conduct applies only to the proportion (i.e., the percentage amount) by which the tribunal reduces the award. It does not apply to whether or not to make a reduction in the first place, or entitle the tribunal to take into account matters other than conduct that is causative or contributory to the dismissal (**Parker Foundry Ltd v Slack 1992 ICR 302, CA, per Balcombe LJ**).

217. In **Hollier v Plysu Ltd 1983 IRLR 260, EAT**, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories, although a Tribunal retains its discretion:
    a. Wholly to blame (100 per cent);
    b. Largely to blame (75 per cent);
    c. Employer and employee equally to blame (50 per cent);
    d. Slightly to blame (25 per cent).

DISCUSSION AND CONCLUSIONS

218. I have received helpful written submissions from both the Claimant and Mr MacMillan for the Respondent. I read and considered them before making my decisions and drafting this Judgment. They have helped my findings of fact and also made references to a number of helpful legal precedents.

Did the Respondent commit conduct which breached either of the implied terms in the contract of employment?

219. The Claimant relies on a number of factual allegations as amounting to breaches of the implied term of mutual trust and confidence in her contract, either as individual serious breaches or cumulatively amounting to breaches of contract.

220. Whilst the Claimant alleges that two implied terms have been breached, I will consider first the allegation of breach of the implied term of mutual trust and confidence, as all breaches of this term are fundamental breaches of the employment contract. Only if that allegation fails will I go on to consider whether the implied term to provide a safe workplace was breached and if so, whether that breach was fundamental.

221. Was the Claimant required to work an additional 15 minutes unpaid each day from 8.45am to 9am?

222. As set out in the findings of fact, I find that on balance, the Claimant was required to work an additional 15 minutes unpaid each day from 8.45am until 9am, for around 5 years prior to her resignation.

223. Counsel for the Respondent submitted in closing that this conduct, if it had occurred, had continued for a period of around 5 years and was therefore incorporated into the Claimant's contract by custom and practice. This submission was not consistent with the Respondent's case before and during the hearing, that there had been no variation of her contract.

224. Mr MacMillan did not provide me with any authorities to support the submission that a variation of a contract ought to be incorporated by custom and practice, when there was no suggestion that consultation took place and such variation would contradict an express term of the contract, namely clause 11. I find that courts and tribunals will be slow to find incorporation a contractual variation which is contrary to an express term.

225. The Claimant was asked in cross-examination whether she had ever requested overtime or time off in lieu for this additional time worked. It was not submitted that she was not entitled to such contractual benefits if she worked additional hours.

226. I am not satisfied that the Respondent has demonstrated that there was an variation to an express term of the Claimant's contract by virtue of custom and practice.

227. Clause 11 of the Claimant's contract provided for payment or time off in lieu for hours worked in excess of her standard hours defined in the contract. I find that the contractual power in clause 11 to vary hours and days of work cannot be read to the exclusion of the contractual right to overtime or time off in lieu for any additional time worked.

228. As such, the failure to pay her for these additional hours was a breach of an express term of the Claimant's contract, which required her to be paid overtime or to be given time off in lieu, neither of which were provided to the Claimant.

229. Whilst the Claimant did not put her case for unfair constructive dismissal as being based upon a breach of an express term of her contract, I find as a fact that there was such a breach. I further conclude the Respondent's failure to pay the Claimant or provide her with time off in lieu also amounted to a breach of the implied term of mutual trust and confidence.

230. It does not appear that this allegation relates to a breach of the implied term to provide a safe workplace, and I have therefore not considered it as such.

231. Was there constant critical harassment of the Claimant on a daily basis by Mr Surtees?

232. As set out in my findings of fact above, I conclude that there were relationship difficulties between colleagues in the Respondent's store. This included difficulties that the Claimant felt she had working with Mr Surtees.

233. As I have also found above, however, the allegations made by the Claimant are not specific enough for me to be able to make findings as to whether they occurred and if so, whether they amounted to a breach of contract.

234. Even on the Claimant's case, she was generally happy at work. There were days that she did not work with Mr Surtees. Therefore her allegation that he subjected her to "*constant*" critical harassment on a "*daily*" basis is unlikely to have been made out even if the Claimant had been able to provide more specific evidence of her allegations.

235. I therefore do not go on to consider this allegation as a potential breach of either of the stated implied terms.

236. On 11 June 2024 was the Claimant offered a payout to leave her employment, whilst in the same conversation being advised by Mr Surtees that he was not going to change?

237. As set out in my findings of fact, I find that Mr Surtees did use words to the effect that he was not going to change. He intended this to mean that he was the owner of the business and would remain in place, however the Claimant reasonably interpreted this as him stating that he was not going to change his behaviour.

238. I do not find that this alone amounted to Mr Surtees breaching the implied term of mutual trust and confidence.

239. Objectively viewed, Mr Surtees had reasonable and proper cause to reply in this way, namely the Claimant's criticism of him as a manager and colleague, which on her own case had continued for 25 minutes - although I note that witnesses are often inaccurate when recalling timings.

240. I have found that Mr Surtees was intending to convey that he would remain in the workplace as he was the owner of the business. In the circumstances however, attempting to convey this in a manner that was reasonably understood by the Claimant to mean that he would not change his behaviour, was likely to seriously damage mutual trust and confidence. As Mr Surtees was acting with reasonable and proper cause, however, it does not on its own amount to a breach of the implied term of mutual trust and confidence.

241. As I have found that Mr Surtees was acting with reasonable and proper cause, I find that his comment that he was not going to change also did not breach the implied term imposing a duty on an employer to provide a safe workplace.

242. I have not found that the Claimant was explicitly offered a payout by Mr Surtees on 11 June 2024, but as the Parties agreed and as I found above, Mr Surtees said to the Claimant words to the effect "*what will it take for you to leave*". I understand this to be the comment that the Claimant complains about.

243. I find that Mr Surtees asked the Claimant, along with 2 other staff members on 11 June 2024 for their views on the alleged toxic workplace that Ms Kitchen had referred to in her resignation letter. It is not in dispute that the Claimant and her colleagues were not told in advance what the meeting would be about. Mr Surtees ought therefore to have recognised that asking staff such an emotive question, in circumstances where one staff member had already resigned citing a "*toxic*" workplace and not putting the staff on notice of the subject of the meeting could lead to emotive and difficult responses. He ought to have recognised when asking an open question about the cause of the toxic workplace, that staff might view him as the cause of the toxicity and might tell him so.

244. I find that as Mr Surtees was not acting with reasonable and proper cause and did act in a manner calculated or likely to destroy or seriously damage mutual trust and confidence by his words "*what will it take for you to go*". It followed on from a difficult meeting on a difficult topic, but one which Mr Surtees had asked about in a meeting that he had arranged as owner of the business and manager of the staff that were present. His comment was not necessary or appropriate and clearly conveyed an intention not to be bound by the employment contract, for example to address any of the issues that the Claimant had raised.

245. Was the Claimant's job advertised whilst she was on sick leave?

246. The Claimant was informed by email on 19 June 2024 [**39**] that a job advert was going to be placed, but Mr Surtees asserted that this was not an advert for her role.

247. I have concluded in my findings of fact that it was the Claimant's job that was advertised by the Respondent whilst she was on sick leave.

248. The Respondent has not alleged that it had reasonable and proper cause for advertising the Claimant's job role. Even if it had, I would not have found that there was reasonable and proper cause, because at the time this job role was advertised, the Respondent had not spoken to the Claimant to obtain her version of events or to find out if she had changed her mind since her message to Ms Kitchen, which could have been sent in the heat of the moment.

249. There had been no attempt by the Respondent to engage with the Claimant about what supportive measures could have been put in place to allow her to return to work, as suggested by her doctor. Prior to the email from Mrs Surtees of 12 July 2024, there was also no communication from the Respondent that indicated it was prepared to discuss the issues the Claimant had raised regarding Mr Surtees. The Respondent had not been told by the Claimant that she was not intending to return to work.

250. Based on the above findings, I do not consider that the Respondent was acting with reasonable and proper cause in advertising the Claimant's job role from around 19 June 2024.

251. I also conclude that the Respondent's action advertising the Claimant's role was calculated or likely to destroy or seriously damage mutual trust and confidence.

252. Did the Claimant raise a grievance and did the Respondent fail to deal with this grievance?

253. Paragraphs 31 and 32 of the ACAS Code of Practice on Disciplinary and Grievance procedures states:

"*31. If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance*

32. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received."

254. There is no suggestion that the Claimant made a grievance in writing.

255. I accept that in colloquial terms, she aired 'grievances' that she had with Mr Surtees during the events of 11 June 2024, but this was not a formal grievance that would require the Respondent to take action in accordance with the ACAS Code of Practice.

256. The Respondent is critical of the Claimant for not raising a formal grievance. She contends that she did not have a copy of her contract, including stated this in her resignation email. Even if she did have access to a copy of her contract, it was not compliant with sections 1, 3(1)(b)(ii) and 3(1)(c) of the Employment Rights Act 1996. It did not tell the Claimant to whom she she make a grievance, the manner in which she should do this or the further steps that she should take. I find that the Claimant was not aware of or did not have access to a grievance policy in a staff

handbook at the Respondent's store. I therefore find that she did not behave unreasonably in failing to raise a formal grievance.

257. After the Claimant aired her grievances about Mr Surtees to him, there was no attempt by the Respondent to seek to understand the her grievances and how they could be resolved. This could have been done following 11 June 2024 when emotions could have calmed down. I have accepted the Respondent's own case that Mrs Surtees email of 12 July 2024 requesting to meet with the Claimant was in relation to potential disciplinary allegations against her, not an attempt to understand her grievances regarding Mr Surtees.

258. The Respondent received the Claimant's fit note on 15 June 2024 [**76**] which gave advice that she may benefit from changes to make the workplace more supportive. The fit note stated that the Claimant may be fit for work if such changes were implemented, but that she may benefit from being away from the workplace whilst such changes were being made. The Respondent's response was for Mr Surtees to email the Claimant telling her she was not allowed to return to work during the currency of the fit note [**38**]. At no point did the Respondent contact the Claimant to discuss what changes might be needed, which could have involved a discussion about the grievances she had raised about Mr Surtees.

259. Whilst the Respondent did not act in breach of the ACAS Code of Practice, I find that the failure by the Respondent to communicate with the Claimant to provide an opportunity to discuss her grievances following 11 June 2024 was capable of at least contributing to a cumulative breach of the implied term of mutual trust and confidence.

260. Was the Respondent's investigation into the Claimant's conduct in breach of the ACAS Code of Practice on Disciplinary and Grievance?

261. The Claimant has not stated what paragraph of the ACAS Code she contends the Respondent breached. Her evidence in cross-examination was that the content of the email inviting her to the meeting was not sufficiently detailed. This is reference to the email from Mrs Surtees to the Claimant on 12 July 2024 [**43**]. The Respondent contends that this was an invite to a meeting to understand the Claimant's version of events, i.e. an investigatory meeting.

262. There is no explicit provision in the ACAS Code that requires employers to inform employees of the problem or allegations when inviting them to an investigatory meeting. It is only at the disciplinary stage, if and when it has been decided that there is a disciplinary case to answer, that this is

required. This is confirmed by paragraph 9 of the ACAS Code, which states:

"*9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*"

263. The invite that was sent to the Claimant explained that the meeting was to discuss what happened on 11 June 2024. Mrs Surtees refers to her conducting an investigation, but does not state that the Claimant herself is the subject of that allegation. The invite does not state that the Claimant was the subject of disciplinary allegations. It does not specify what other matters are to be discussed with her.

264. The Claimant was suspicious of the invite, fearing that the meeting would be used to pressure her to resign. She considered there was a conflict of interest because the meeting was held by Mrs Surtees.

265. As I have found above, there was a potential conflict of interest in Mrs Surtees conducting this meeting, as according to her evidence she had sought advice from a HR professional with Mr Surtees, who was at least a witness to the any allegations from 11 June 2024. This advice was taken to establish how the Respondent could discipline the Claimant for her actions on 11 June 2024. This indicates that there was a real risk that Mrs Surtees had already pre-judged matters regarding 11 June 2024, at least to the extent that the Claimant was at fault and ought to be subject to a disciplinary process as a result; however, there is not similar evidence regarding the allegations arising from the summary of reports from colleagues.

266. Whilst there is a risk that Mrs Surtees had prejudged matters regarding 11 June 2024, I do not consider that the same risk existed in respect of the matters raised by colleagues, which Mr Surtees had not been witness to and which were not the reason for originally obtaining HR advice.

267. On balance, I find that when Mrs Surtees invited the Claimant to the meeting, she did so to get the Claimant's version of events about what happened on 11 June 2024 and about the matters raised by colleagues. The email states as much, it is not phrased in a way to accuse the Claimant and does not put a particular allegation to her that she is accused of, even regarding the 11 June 2024.

268. I must consider whether the Respondent's conduct, by Mrs Surtees inviting the Claimant to a meeting and the content of the invite, amounted to the employer acting without reasonable and proper cause *and* in a manner calculated or likely to destroy or seriously damage mutual trust and confidence. I am reminded by Mr MacMillan in his written submissions that something more than unreasonableness is required to establish a breach of the implied term.

269. I accept Mrs Surtees evidence that she was following HR advice at this time and I find that she was therefore acted with reasonable and proper cause by sending this invite in these terms either on advice or following her interpretation of the advice she had received.

270. I also find that the employer was acting with reasonable and proper cause by Mrs Surtees being the person who invited the Claimant to the meeting, which was to be conducted by her. This was a very small employer. Neither Party submitted that there would have been anyone more appropriate to conduct this investigation. Mrs Surtees was a director of the business and someone who was not a witness to events.

271. The Claimant wanted the Respondent to contact her to discuss steps to return to work and alleges that it ought to have heard her 'grievance'. She does not suggest that this should have been conducted by someone outside of the organisation or a colleague who was junior to Mr Surtees. Engaging someone more junior to conduct such a process could have led to other allegations of unfairness.

272. Given the Claimant's ill health and her reasonable concerns about the potential conflict of interest of a spouse hearing an investigation into events involving the other spouse, I find that it was not unreasonable for the Claimant to decline to attend this meeting. I also make this finding on the basis that it had taken 1 month before the Claimant had been invited to this meeting and during this time, there had been no attempt by the Respondent to engage with the Claimant to understand what supportive measures it could put in place to comply with the advice in the Claimant's first fit note. Additionally, the Claimant considered and I find as a fact that her job had been advertised whilst she was on sick leave.

273. As the Claimant has accepted that the ACAS Code of Practice was not something that she thought about prior to her resignation, compliance with that Code cannot have been a reason why she resigned.

274. For the reasons set out above, I do not find that the invite from Mrs Surtees to the Claimant to meet with her created an unsafe workplace and

therefore did not breach the corresponding implied term in the Claimant's contract of employment.

275. Summary of findings

276. I conclude that the following factual allegations of breaches of implied term of mutual trust and confidence occurred:
    a. The Claimant required to work an additional 15 minutes unpaid each day from 8.45am to 9am. This was a breach of an express term at clause 11 of the Claimant's contract and amounted to a breach of the implied term of mutual trust and confidence.
    b. On 11 June 2024 the Claimant offered a payout to leave her employment, whilst in the same conversation being advised by Mr Surtees that he was not going to change. The use of the words "*what will it take for you to go?*" was a breach of the implied term of mutual trust and confidence.
    c. The Claimant's job being advertised whilst she was on sick leave.
    d. The Claimant raised grievances about Mr Surtees conduct and the Respondent failed to deal with her grievances by failing to invite the Claimant to address them following the 11 June 2024 meeting.

277. I find that the failure to pay the Claimant for 15 minutes of work each morning for approximately 5 years, stating to her on 11 June 2024 "*what will it take for you to go?*" and advertising her job whilst she was on sick leave in June 2024 all individually breached the implied term of mutual trust and confidence.

Cumulative conduct

278. Although I have found three individual breaches of the implied term of mutual trust and confidence, I will still go on to consider whether there was conduct which cumulatively amounted to a breach of this implied term.

279. When stepping back and considering matters together, I find that the failure to address the grievances the Claimant had communicated on 11 June 2024, in combination with asking her "*what will it take for you to go?*" and advertising her job whilst she was on sick leave, would and did destroy or seriously damage the Claimant's trust and confidence in her employer. I have already found that these were actions which were not taken with reasonable and proper cause. I therefore find that in this combination, the 'grievance failure' contributed to a breach of the implied term of mutual trust and confidence.

Fundamental breach

280. I have found that the implied term of mutual trust and confidence was breached. Any breach of this implied term is deemed to be a fundamental breach of contract, thereby entitling the Claimant to resign and claim unfair constructive dismissal.

What caused the Claimant's resignation?

281. This has been a difficult matter to determine. At the start of the hearing the Claimant initially said that she had resigned in response to the events of 11 June 2024, but soon clarified this was also due to her job role being advertised. The Respondent points to the Claimant's message to Ms Kitchen on 11 June 2024 as evidence that she had decided at that time she was not going to return to work. The Respondent also contends that the Claimant had engineered matters in an attempt to secure a 'pay out' from the company.

282. I do not accept that latter submission. As I have found above, the Respondent accepts that it was Mr Surtees who used the words "*what will it take for you to go?*" before the Claimant asked "*what, pay me off?*" I have found that Mr Surtees comment was a reference to payment. I therefore conclude that it was not the Claimant who first raised the issue of a payment to secure her resignation. She believed Ms Linley had been paid a settlement sum at the time of her departure. But it is ultimately through the lens of Mr Surtees comment that I view the Claimant's text message of 11 June 2024 to Ms Kitchen. The Claimant did not want to resign from a job she enjoyed and was good at, and had financial worries about doing so when she did not have another job to go to.

283. The Claimant states [**35**] "*…I am no longer employed [laughing crying face emoji] had asked for my £ pay off fig !…he asked me for a £ pay off fig…I'm not going back,,walked out and told him what for…I'm gone babe no notice waiting for pay off £…I won't be back after today…*"

284. I accept the Claimant's witness evidence that she considered that she was technically still employed. This is consistent with her providing the Respondent with fit notes and her concern expressed to her doctor that this was required for work.

285. I also accept the Claimant's evidence that she considered whether she remained employed, or more importantly when her employment was terminated was in Mr Surtees' hands.

286. I read the Claimant's text message as considering that she was no longer welcome at work and would not be returning to work, but that her exit was to be negotiated with Mr Surtees. She understood from Mr Surtees'

comment asking her "*what will it take for you to go?*" that he was saying he wanted her to leave her employment and was prepared to pay her to do so.

287. The Claimant had not resigned by this point. I also find that when she wrote her text message to Ms Kitchen on 11 June 2024, she did not envisage that she would be returning to work. I do not accept that she had however made up her mind that she would resign. I accept she still considered that she enjoyed her job and was good at it and did not feel that she ought to leave because of what she saw as problems caused by Mr Surtees. I also note that the Claimant was worried about the financial impact of leaving her role before her resignation [**152**].

288. The Respondent relied on the fact that the Claimant had been looking for alternative work prior to 11 June 2024 [**152**]. I find the Claimant had been looking for employment but as stated in this message to Mr Blenkinsop "*I keep looking but just is nothing secure or hours or money…*" I find that the Claimant did not resign in order to accept alternative employment. She did not have another job to go to. When she did resign, she was in contact with Jobcentre Plus from as early at 6 August 2024 [**116**] because she did not yet have alternative employment. She obtained one interview for 19 August 2023 [**119**] and confirmed to her Jobcentre advisor on 23 August 2023 [**120**] that she had obtained alternative employment at a care home.

289. I note that the Claimant had previously not wanted to resign when she had not been able to find suitable alternative employment, but on 12 July 2024 she did resign without another job to go to.

290. The Claimant understood from the end of the 11 June 2024 meeting that Mr Surtees wanted to negotiate her exit.

291. The detailed notes from the Claimant's appointment with her GP on 14 June 2024 [**106**] do not demonstrate that she had decided to resign.

292. The Claimant sought a protected conversation with Mr Surtees on 26 June 2024 [**40**]. She stated she had received advice from CAB and ACAS by this time. Mr Surtees rejected her request for a protected conversation on 28 June 2024 [**41**]. The Claimant responded on 29 June 2024 [**42**] and indicated her intention to take advice on how to move forward in resolving the matter amicably. It was therefore apparent to the Claimant by that time that Mr Surtees was not willing to enter a protected conversation, albeit his response suggests this was linked to her query about her role being advertised.

293. The Claimant's GP notes from 8 July 2024 [**110 and 108**] state that she had no contact from her employer. Mr MacMillan correctly submits that there had been some contact, but I find that this was not to seek to discuss what had happened on 11 June 2024, the concerns the Claimant had raised or what supportive measures might be required to allow her to return to work. The Claimant told her GP that the lack of contact was causing her anxiety, and that her job role had been advertised.

294. The Claimant states that she decided to resign on 9 July 2024. I accept that this date is likely to be accurate.

295. I find that the trust and confidence which the Claimant held in the Respondent had been seriously damaged on 11 June 2025.

296. The Claimant had not decided to resign at this point, but expected her employment to terminate on agreed terms.

297. I find that the final straw which led to the Claimant's decision to resign was when her job was advertised. This was a clear indication to the Claimant only 8 days after 11 June 2024 events that there was no hope for her to be able to return to the work that she enjoyed and was good at.

298. Her decision is evidenced by her request for a protected conversation, showing that by 26 June 2024 she was not expecting to return to work and was prepared to leave. In this email she explicitly refers to the job description and duties that are advertised being the same as those in the role she was currently signed off sick from. She states "*As a result I now feel it would be untenable for me to return to my job.*"

299. The Claimant resigned on 12 July 2024 [**44-45**]. She sent a detailed resignation email to the Respondent at 2.44pm. Mrs Surtees had sent an email to her less than 2 hours earlier at 12.56 pm on 12 July 2024, inviting her to meet as part of an investigation.

300. The Claimant's resignation email makes no reference to the email invite from Mrs Surtees. This was not stated to be a matter that caused her to resign. I find that it was not an effective cause of her resignation. It may have been a matter that triggered the Claimant to action her resignation, but I find that she had made her mind up to resign at some time before this email was sent, following her job being advertised on or around 19 June 2024.

301. The Claimant's resignation letter also does not mention the failure to pay her for working an extra 15 minutes each day. Whilst this may have been a matter of frustration to the Claimant, I find that it was not in the Claimant's

resignation letter because it was not in her mind at that time. Whilst I have found that it was a breach of contract, I do not find that it was an effective cause of the Claimant's resignation.

302. The Claimant does refer in her resignation email to her issues with Mr Surtees behaviour and I find that they contributed to her decision to resign. However, she had wanted to leave previously and had not done so as she did not have alternative employment to go to. She still did not have alternative employment lined up when she resigned. I therefore conclude that the fundamental breaches of her contract which had occurred on and after 11 June 2024 were additional matters which caused her to resign when she did.

303. Applying **Kaur**, I find that the effective cause of the Claimant's resignation was the actions of the Respondent by Mr Surtees two comments on 11 June 2024 (including one which was a fundamental breach of contract), the failure to deal with the Claimant's grievances and the advertising of her job role whilst she was on sick leave.

Affirmation

304. I do not find that the Claimant affirmed the contract of employment following the final straw occurring on 19 June 2024, or even following the events on 11 June 2024.

305. She remained employed for around 1 month after 11 June 2024 before she resigned. During this time she was on sick leave with mental health and wellbeing challenges as set out in her GP records. I do not find that her remaining on sick leave during this period of time is evidence of an affirmation of her contract such as to prevent her from succeeding in her claim. Furthermore, she expected to remain on sick leave during her notice period and to not return to the workplace. The Respondent took no steps to make the changes suggested by the Claimant's GP that would have allowed her to be fit to return to work.

306. I considered whether the Claimant's request for a protected conversation could have amounted to an affirmation by her of her contract of employment. I find that it did not. The Claimant was on sick leave during this time, not attending the workplace. Her request was at least in large part her response to Mr Surtees comment "*what will it take for you to go?*" where he indicated that he wanted to negotiate her departure from the Respondent's employment. In her request for a protected conversation the Claimant made it clear that following her role being advertised she considered that it was untenable for her to return to work. She stated her objections to the breach of contract now relied upon. I therefore conclude

that this was not conduct which affirmed the contract of employment such as to prevent the Claimant from claiming constructive unfair dismissal.

307. In light of my conclusions, I find that the Claimant was constructively dismissed.

Potentially fair reason for dismissal

308. I must now consider whether the Claimant's constructive dismissal was nevertheless fair.

309. I remind myself that applying **Murphy v Epsom College**, it is first for the Respondent to prove an explicitly pleaded potentially fair reason for dismissal. If that reason is found by me not to be the actual reason, the dismissal will be unfair even where an alternative might have been argued.

310. The reason for dismissal is the reason why the employer breached the contract of employment (**Berriman v. Delabole Slate Limited**).

311. It is then necessary for me to be satisfied that in the circumstances the Respondent acted reasonably in treating the reason as a sufficient ground for dismissing the Claimant. I will not be in a position to do this if the reason in fact relied upon (or an important ground constituting that reason) is neither established in fact nor believed to be true on reasonable grounds (**Smith v City of Glasgow District Council**).

312. In summary, I must consider:
    a. What is the breach of contract I have found occurred?
    b. What was the reason why the Respondent committed this breach contract?
    c. Was this reason a potentially fair reason for dismissal relied on by the Respondent?
    d. Was the Claimant fairly dismissed for that reason?

313. In paragraph 10 of it's ET3 Grounds of Resistance [**22**] the Respondent relies on misconduct and some other substantial reason justifying dismissal ("SOSR"). At the final hearing and in written closing submissions, only the potentially fair reason of misconduct was advanced by the Respondent. This was said to be in relation to the Claimant's conduct on 11 June 2024 and/or the allegations of 'bullying' made by her colleagues.

314. Dealing with the breaches of contract I have found in order, the failure to pay the Claimant for 15 minutes worked each morning was not a reason for her resignation and does not relate to her conduct or SOSR and so is not relevant to this issue.

315. The reason why the Respondent, namely Mr Surtees, said to the Claimant "*what will it take for you to go?*" on 11 June 2024 was because he was unhappy with her responses to his question about whether there was a toxic work environment.

316. This was a matter of Mr Surtees' conduct, not the Claimant's. I have found that tempers may have been raised and frustrations expressed, and that the Claimant may have raised her voice, but she did not shout during the events of 11 June 2024.

317. I have found that this was an emotional subject raised without warning to staff and that Mr Surtees could and should have anticipated that the conversation may become difficult. Mr Surtees responded with comments that were ill-advised and inappropriate, as I have found above.

318. Even if I am wrong in finding that the breach of contract is a matter of Mr Surtees' conduct rather than the Claimant's, I am not satisfied on the evidence before me that Mr or Mrs Surtees could or did genuinely believe on reasonable grounds that the Claimant's conduct when responding on an emotive topic to answer the question raised by Mr Surtees demonstrated misconduct.

319. Furthermore, I find that a fair process was not followed which could have resulted in a fair dismissal for misconduct, including because the investigating officer may well have pre-determined the Claimant's guilt and no disciplinary invite was sent or disciplinary meeting convened.

320. As such, I do not find that there was a fair reason of conduct justifying dismissal in relation to this breach of contract of Mr Surtees commenting "*what will it take for you to go?*"

321. Whilst the Respondent did not pursue that there was a fair dismissal for some other substantial reason in the hearing of closing submissions, it remained part of their ET3 Grounds of Resistance I have therefore considered this matter.

322. It was Mr Surtees' comment that was the breach of contract. The Claimant's version of events had not been obtained by Mrs Surtees yet. I therefore do not accept that the Respondent has established that there was serious breakdown in the relationship following the 11 June 2024 incident justifying dismissal for some other substantial reason was the reason for her dismissal.

323. If I am wrong, there would still be an issue over the fairness of that dismissal where I have found that Mr Surtees comment on 11 June 2024 amounted to a breach of the implied term of mutual trust and confidence. Furthermore, there was no attempt by the Respondent to discuss matters with the Claimant following 11 June 2024 in a manner which would address her grievances, or to discuss if something supportive could be put in place to allow her return to work. I therefore cannot conclude that the Claimant was fairly dismissed for some other substantial reason.

324. The reason why the Respondent advertised the Claimant's job role was because the directors thought that the Claimant would not be returning to work. They had not been told this by the Claimant and did not discuss this with the Claimant. This is not a matter of misconduct by the Claimant or some other substantial reason justifying dismissal. The Respondent has therefore not proved that this was a fair reason for which the Claimant was dismissed.

325. The Respondent's failure to address the Claimant's grievances was only a breach of the implied term of mutual trust and confidence when read with the two standalone breaches I have addressed above. Given my findings that the circumstances of the two individual breaches were not fair reasons for dismissal, I do not need to consider the fairness of the dismissal related to the grievance issue.

326. I find that the allegations of bullying were not the reason why the employer had breached the contract, and therefore do not meet the requirements of **Delabole**. Even if I am wrong about this, the investigation was still in its early stages and I do not accept that the Respondent had dismissed the Claimant for misconduct or some other substantial reason arising from these allegations or fairly could have done at such an early stage.

327. In summary, I find that the Respondent has not shown that it dismissed the Claimant for the potentially fair reason of misconduct or some other substantial reason justifying dismissal.

ACAS Code of Practice

328. I have found that the Claimant did not unreasonably fail to follow the ACAS Code of Practice on Disciplinary and Grievance procedures and as such there is no basis for me to make a reduction in compensation on this ground.

329. Based on my findings above, I also conclude that the Respondent did not unreasonably fail to follow the ACAS Code in respect of it's investigation

into the Claimant's conduct and again, there is no no basis for me to make a reduction in compensation on this ground.

Contributory Fault

330. I must decide whether the Claimant committed culpable of blameworthy conduct which caused or contributed to her dismissal.

331. The Claimant's comments on 11 June 2024 were her answers to his questions around the reasons for Ms Kitchen leaving. It appears that staff felt a number of relationship issues existed, which there is no evidence of them being properly or effectively ventilated prior to Ms Kitchen's resignation or the 11 June 2024 meeting.

332. Staff including the Claimant were not made aware of what the meeting would be about in advance of it starting. This increased the chance of an emotional or unconsidered response.

333. The Claimant appears to have become emotional and expressed frustration when conveying her views about Mr Surtees to him. I have found that the Claimant raised her voice, but did not shout. Her comments were made in front of other staff as that is how the meeting took place. They were her genuine reactions, delivered without time to think about the subject of the meeting and how to convey her feelings in advance.

334. I have also found that the Claimant's contract did not include the required statutory reference to a grievance and she did not have access to or was not made aware of any grievance procedure in order to have raised her concerns earlier.

335. It was her manager and the owner of the business who stated "*what will it take for you to go?*" That was a key factor in the Claimant's resignation.

336. Based on my findings, I conclude that the Claimant's behaviour on 11 June 2024 was not culpable or blameworthy conduct or was conduct which caused or contributed to her dismissal.

337. Even if I am wrong about this, I am not satisfied that the Claimant's conduct in the circumstances as I have found them would make it just and equitable for her compensation to be reduced.

338. The allegations made by staff against the Claimant were not a factor in her resignation. They were not put to the Claimant and I do not know her version of events. I am not in a position to find if any of the historic conduct alleged against the Claimant occurred. I do not find that in any event that

the matters alleged against the Claimant caused or contributed to her dismissal.

339. As such, I do not make a reduction in the Basic or Compensatory Award for contributory fault.

‘Polkey’/Whether the Claimant would have been fairly dismissed in any event

340. I must now consider whether the Claimant may have been fairly dismissed on the grounds of conduct or some other substantial reason if a fair procedure had been followed.

341. I do not accept that the Claimant’s conduct on 11 June 2024 would likely justified her dismissal, even if a fair process had been followed. Based on the facts and circumstances as I have found them, her conduct was not serious enough to justify her dismissal from a job she had been in for 6 years.

342. I find, however, that even if Mr Surtees had not made his comment “*what will it take for you to go?*”, Mr and Mrs Surtees would still have taken HR advice about what had happened on that day. Staff still would likely have been spoken to, and this likely would have been about the events of 11 June 2024 and the Claimant’s behaviour in the workplace more widely. Therefore the staff summaries would likely still have been produced, and the allegations in them would still have been made by the Claimant’s colleagues.

343. Once this information was known to the Respondent, I find that it was may well have been entitled to investigate these matters with the Claimant. I say “*may well*” rather than “*would*” as I recognise there may be a question of fairness about whether the Respondent had gone looking for things to discipline the Claimant over, rather than confining itself to the events of 11 June 2024.

344. I find that if colleague complaints had been investigated with the Claimant, they could well have led to a disciplinary process for misconduct being undertaken.

345. In assessing the potential outcomes of such a process, I note that the allegations include reference to colleagues feeling as though the Claimant was bullying them and being made to cry by the Claimant’s actions, but there are few specific details provided. There is also reference to the Claimant swearing in the workplace in a hostile manner. I note many of the allegations refer back to events in 2023.

346. I also find that the events of 11 June 2024 and the comments from colleagues could have allowed the Respondent to investigate matters with the Claimant to determine whether there had been such a significant breakdown in her working relationships with colleagues that she could be fairly dismissed for some other substantial reason.

347. The Claimant has not provided her version of events in relation to historic matters prior reported by her colleagues and this was not put the Claimant in cross-examination. I therefore cannot determine what the Claimant's version of events would have been.

348. I consider, however, that on the basis of the information provided by colleagues, there was a chance that the Claimant could have been dismissed in relation to these historic allegations on the grounds of misconduct or on the grounds of some other substantial reason being a breakdown in the working relationships between the Claimant her colleagues.

349. I also find that the events of 11 June 2024 could have led to the Claimant's dismissal, following a fair process, on the grounds of some other substantial reason being a breakdown in her working relationship withMr Surtees.

350. I consider the chance of the Claimant being dismissed for either misconduct or some other substantial reason justifying dismissal was in the region of 50 per cent.

351. I reach this conclusion on misconduct as there is a lack of specific details in the allegations made against the Claimant and many of the allegations appear to date back to 2023 or earlier. They are, however, potentially serious allegations. I also do not know what the Claimant's response to these allegations would be. I therefore find that there is a possibility that even if disciplinary allegations were upheld, a lesser sanction than dismissal and/or one which may have sought to address any negative behaviours or relationship issues may have been issued following a fair process.

352. I reach this conclusion on the chance of dismissal for some other substantial reason as again, I do not know what the Claimant's response would have been to the historic allegations. Additionally, a fair process may have allowed issues that the Claimant raised on 11 June 2024 and those raised by colleagues in the historic allegations to be remedied. However, there is evidence of a potentially substantial breakdown in the working

relationship and I conclude there was a real prospect that this would not be possible to resolve in such a small workplace.

353. I consider that a fair process for misconduct or some other substantial reasons could have led to a decision to dismiss the Claimant by 23 August 2024. This is 6 weeks after the meeting invite sent by Mrs Surtees to the Claimant on 12 June 2024. I have made this finding because it took the Respondent 4 weeks to send the initial invite and have therefore found that a fair process would have allowed around 2 weeks following this invite for a fair investigation meeting to take place and a disciplinary/SOSR meeting invite to be sent to the Claimant, followed by a further 4 weeks for that meeting to take place and an outcome be delivered.

354. If the Claimant was dismissed for some other substantial reason, this would have been on 6 weeks' notice.

355. If the Claimant had been dismissed for misconduct, this likely would have been for gross misconduct, which would be without notice.

356. I did not hear evidence and submissions about whether the Claimant may have left employment in any event even if she had not been unfairly constructively dismissed. I have therefore not made a decision on this matter. The Parties may wish to address me on in evidence and submissions about this at a remedy hearing.

DISPOSAL

357. The Parties will be invited to a further hearing to deal with remedy.

358. The Claimant confirmed during the hearing on 19 February 2025 that she was only seeking compensation if her claim was successful, not reinstatement or reengagement. If her position has changed, then she must inform the Respondent as a matter of urgency in order that it can be prepared to address any issues of reinstatement or re engagement at a remedy hearing.

359. The remedy hearing may consider whether any award of compensation should be increased by 2 or 4 weeks' pay under section 38 of the Employment Act 2002 to reflect any failure by the Respondent to comply with sections 1, 3(1)(b)(ii) and 3(1)(c) of the Employment Rights Act 1996 that may have occurred. These sections of the ERA require that the written statement of initial employment particulars required under section 1 of the Employment Rights Act 1996 must specify a person to whom the worker can apply for the purpose of seeking redress of any grievance relating to his or her employment and the manner in which such an application, and

any further steps, should be made. This appeared to me during deliberations to be a potential matter which when it arises, I must address and I therefore allow the Parties the opportunity to address me on this matter at the remedy hearing.

360. The remedy hearing shall be listed initially for 1 day to take place on video. The Parties shall have the opportunity to write in with reasons explaining why the remedy hearing should be longer that 1 day or why it should take place in person, rather than on video. It is intended that this will allow sufficient time for me to deliver judgment on remedy orally on the day of the hearing.

361. Directions for the remedy hearing will be sent out with the notice of hearing. They shall include that:
    a. The Parties will be allowed 7 days to write in with alternative dates if they are unable to attend the hearing on the date set; and,
    b. The Parties should notify the Tribunal as soon as possible if a Remedy Hearing is not required.

Employment Judge Gould

5 August 2025

Notes

1. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

2. Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APPENDIX A

LIST OF ISSUES

1. Did any of the following factual matters occur?
    a. Was the Claimant required to work an additional 15 minutes unpaid each day from 8.45am to 9am?
    b. Was there constant critical harassment of the Claimant on a daily basis by Mr Surtees?
    c. On 11 June 2024 was the Claimant offered a payout to leave her employment, whilst in the same conversation being advised by Mr Surtees that he was not going to change?
    d. Was the Claimant's job advertised whilst she was on sick leave?
    e. Did the Claimant raise a grievance and did the Respondent fail to deal with this grievance?
    f. Was the Respondent's investigation into the Claimant's conduct in breach of the ACAS Code of Conduct?

2. What was the most recent act (or omission) on the part of the Respondent which the Claimant says caused, or triggered, her resignation?

3. Was there a final straw? The Claimant relies on either:
    a. On 11 June 2024 being offered a payout to leave her employment, whilst in the same conversation being advised by Mr Surtees that he was not going to change;
    b. Her job advertised whilst she was on sick leave.

4. If any of the factual matters did occur, did they individually or cumulatively amount to a breach either of the following implied terms of the Claimant's contract of employment by the Respondent?
    a. The implied term of mutual trust and confidence;
    b. The implied term that the employer would look after the health and safety of an employee at work.

5. If yes, the Claimant resign in response to any alleged breach of contract found to have occurred?

6. If yes, did the Claimant affirm her contract of employment following any alleged breach, such that she lost the ability to claim constructive unfair dismissal?

7. If no, was any constructive dismissal that occurred unfair?

8. Did the Respondent dismiss the Claimant for either of the potentially fair reasons?

a. Conduct
b. Some other substantial reason justifying dismissal?

9. If no, did either party act in breach of the ACAS Code of Practice for Disciplinary and Grievance Procedures, and;
    a. If so, what if any reduction or increase in compensation up to a maximum of 25% should be made?

10. Did the Claimant commit culpable or blameworthy conduct which caused or contributed to her dismissal?
    a. If so, what if any reduction in compensation should be made?

11. If the Claimant had been unfairly dismissed, what is the chance that the Claimant would have been fairly dismissed if a fair process had taken place?