# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs L Paisley**

**Respondent:** **Blue Tiger Coffee Ltd**

**Heard at:** **London South Employment Tribunal by video (CVP)**

**On:** **18 November 2025 and 19 November 2025**

**Before:** **Employment Judge Macey**

**Representation**
Claimant: In person
Respondent: Mr Large, Counsel

# JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's application to amend her claim to add further factual allegations is granted.

2. The respondent's application to amend its response to add further factual allegations is granted.

3. The claimant's complaint of unfair dismissal is well-founded. This means that the respondent unfairly dismissed the claimant.

4. A 60% reduction in the compensatory award for unfair dismissal will be made under the principles in **Polkey -v- A E Dayton Services Limited [1988] ICR 142**.

5. The Tribunal will decide the remedy to unfair dismissal at a further hearing.

# REASONS

**CLAIMS AND ISSUES**

1. The claimant has brought a claim for unfair dismissal.

2. The issues that were agreed on the first day of the final hearing are as follows:

2.1 What was the claimant's effective date of termination (*the claimant says 25.9.24 but the Respondent says 1.10.24*)?

2.2 Was the claimant dismissed or was the contract brought to an end by mutual agreement? In determining this question, the Tribunal will assess the application of section 111A of the Employment Rights Act 1996 (ERA) and the accompanying ACAS Code of Practice on Settlement Agreements to decide what evidence it can take into account.

2.3 If the claimant was dismissed, what was the reason or principal reason for dismissal? The respondent relies upon a substantial reason capable of justifying a dismissal namely a business restructure. The claimant says the reason for her dismissal was redundancy.

2.4 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

2.4.1 The respondent adequately warned and consulted the claimant;
2.4.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;
2.4.3 The respondent took reasonable steps to find the claimant suitable alternative employment;
2.4.4 Dismissal was within the range of reasonable responses.

2.5 If the reason was a substantial reason capable of justifying the dismissal did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

2.6 If dismissed for a potentially fair reason, was the dismissal fair in all the circumstances having regard to the size and business resources of the Respondent and the equity and merits of the case (s.98(4) ERA), including assessment as to whether the dismissal and procedure were within the *band of reasonable responses* (*for which the Tribunal may consider aspects of the procedure of the dismissal to which the ET1 asserts:*

2.6.1 a lack of warning;
2.6.2 a lack of "help";

2.6.3 a lack of notice;
2.6.4 failure to provide a written reason for dismissal;
2.6.5 being told not to speak to anyone; and/ or
2.6.6 not having an "advocate".

2.7 If unfairly dismissed, what should the claimant receive –

2.8 The claimant does not seek a basic award, having offset some of the pay received from the respondent which the latter says was in compromise of her employment;

2.9 What are the claimant's financial losses (s.123(1) ERA)?

2.10 Should any loss sustained by the claimant be offset by the balance of the monies paid by the respondent (if any) (s.123(1) ERA)?

2.11 What sums has the claimant earned in mitigation and by how much should the award be reduced to reflect this (s.123(1) ERA)?

2.12 Did the claimant fail to mitigate her loss and, if so, how much should any award be reduced to reflect such failures (s.123(4) ERA)?

2.13 Should any award be reduced to reflect the prospect that, but for the dismissal, the claimant would have been dismissed in any event (s.123(1) ERA; *Polkey v A E Dayton Services Ltd* [1987] UKHL 8?

2.14 Does the ACAS Code of Practice 1 apply to this case and, if so, what are the alleged breaches of the code and how should they be applied to uplift the award (s.207A Trade Union & Labour Relations (Consolidation) Act 1992; *Pheonix House v Stockman* [2017] ICR 84) (*the claimant seeks a 10% uplift*);

2.15 Is this a case to which contributory conduct applies and, if so, was the dismissal caused or contributed to by the claimant's conduct? Was that conduct culpable or blameworthy? Is it just and equitable to reduce the award and, if so, how much of a reduction is appropriate (s.122(2) & 123(6) ERA; *Nelson v BBC (No2)* [1980] ICR 110)?

**PROCEDURE, DOCUMENTS AND EVIDENCE HEARD**

3. The form of this hearing was a remote hearing by video (CVP).

4. Both the claimant and the respondent had included more factual allegations and information in their respective witness statements than had been included in the ET1 and the ET3. The claimant applied to amend her claim to add in the factual allegations at paragraph 22 of her witness statement. The respondent did not oppose this application to amend.

5. The respondent applied to amend its response to include the claimant's dislike of her catering manager role, the claimant's job searches, errors identified in the food standards inspector's report, the claimant's breach of confidentiality about being offered an alternative role, the claimant criticising Mr Marek and Mrs Marek and the claimant's negativity. The claimant did not oppose this application to amend.

6. I allowed the claimant's application to amend her claim and I allowed the respondent's application to amend its response.

7. There were written witness statements. The claimant and Miss Gayadeen gave evidence for the claimant. Mr Marek (chief executive officer of the respondent) and Mrs Marek (managing partner of the respondent), gave evidence for the respondent.

8. There was an agreed bundle of documents of 85 pages and a separate agreed remedies bundle of documents of 71 pages. The claimant and respondent agreed that page 71 of the remedies bundle (a schedule of payments to the claimant) could be added to the remedies bundle of documents.

9. The parties consented on the second day of the hearing for the food standards inspector's report to be placed before the Tribunal to consider as part of the documentary evidence.

**FACTS**

10. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I have indicated how I have done so, at the material point. References to page numbers are to the agreed bundle of documents and the agreed remedy bundle of documents ("RB").

11. The claimant was employed in various roles at the respondent from 1 May 2018, an office services company which specialises in creating bespoke food

and beverage programs for offices. The claimant was initially in accounts working part-time, then some HR functions and other functions were added to her role (she remained part-time). When changes were made to her roles the offers were made orally. From approximately February 2023 the claimant was a catering manager at the respondent. The respondent had created the role of catering manager for the claimant as an alternative to redundancy when the bookkeeping function of her role at that time was outsourced. The claimant was offered the catering manager role orally not in writing but was later given a statement of main terms and conditions (see below).

12. Mrs Marek became the claimant's line manager from February 2023.

13. The claimant says her employment ended on 25 September 2024. The respondent says the claimant's employment ended on 1 October 2024.

14. There is a statement of terms and conditions of employment for the claimant's employment as catering manager [42-45]. This was signed by the respondent on 1 November 2023. The working hours for this role per week were 24 hours. The annual salary was £38,000 (Pro-Rata) per annum. The claimant's notice under the terms and conditions of employment was the same as statutory minimum notice.

15. There is no clause about the duties of the catering manager. There was no job description for the role of catering manager as of February 2023 in the bundle. Mr Marek in cross-examination said that the claimant was responsible for food preparation, menu innovation and product ordering. Mr Marek also said in cross-examination that he also expected that the claimant should have maintained health and safety standards. Miss Gayadeen in cross-examination did confirm that completion of cleaning schedules in the actual catering area was the responsibility of the catering department. Further, that temperature checks until the food left the kitchen was the responsibility of the catering department.

16. When the claimant commenced working as catering manager she managed Miss Gayadeen who had started working at the respondent in July 2022 and who later left the respondent in October 2024. Miss Gayadeen described the

claimant as being an incredibly considerate manager who made herself available to Miss Gayadeen.

17. The respondent says the claimant was unhappy in the catering manager role. The claimant says she did hate the role when she first started the new role but that she did grow to like the role and that everyone hates their jobs at certain points or another. The claimant also said in cross-examination that there were aspects of the catering manager role that she was unhappy with, but that she would never ever have chosen to leave "it" (her catering manager role) ever.

18. The claimant did email her son on 18 April 2023 [46] stating:

"*I've been moved into a new role at work that I hate! (But that's another story) and I need to do a PDF for it…"*

19. This email was written near the beginning of the claimant working in the catering role so it supports the fact that she did hate the new role when she first started it.

20. On 2 February 2024 the claimant forwarded from her work email address to her personal email address details of a job alert from Indeed dated 1 February 2024 that had the title "*Whitehouse Surgery is hiring for a Part-time Receptionist + 22 new part-time jobs in Beckenham*" [47-54]. The claimant says that her son set up the job alerts for the claimant and she did not look at the jobs in the email nor apply for any of those jobs.

21. I do not accept that simply forwarding a job alert to a personal email address supports the notion that the claimant had continued to be unhappy in her role as catering manager. I accept the claimant's evidence that she did not look at these opportunities (and did not apply for another job in or around February 2024).

22. Miss Gayadeen's evidence confirmed that the claimant had made it clear to the management at the respondent and to Miss Gayadeen that the claimant would prefer a role outside of the catering department. In cross-examination Miss Gayadeen said that the claimant was not always unhappy and did not express her unhappiness to Miss Gayadeen at the start of Miss Gayadeen working with the claimant or constantly. Miss Gayadeen also confirmed that the claimant

would express unhappiness on particular days when something had "*gone wrong*" but that this was not continuous or daily.

23. I find that the claimant had made it clear to the management at the respondent and to Miss Gayadeen that she would prefer a role outside of the catering department. I also find that from time to time there would be occasions when the claimant would express unhappiness to Miss Gayadeen but that this was not on a daily basis or continuous.

24. On 28 February 2024 Mrs Marek emailed the claimant [55] to inform her that the food standards inspector for the council had dropped in on that day and that the inspector wanted to look at the whole operation and the paperwork. Mrs Marek also informed the claimant that she had told the inspector that it would make more sense to come on a day when the claimant was working and that, "*so heads up that she will be back sometime in the next few weeks – either on a Tuesday or a Friday.*"

25. The claimant replied to Mrs Marek on 28 February 2024 [55], this email states:

*"… we have a cleaning book and I'll get Kayla to fill the hand wash sink we've got a bit lapse at that."*

26. The respondent says that the food standards inspector attended again in March 2024 and following this inspection that the respondent's food rating dropped from a four to a three. The respondent says that this was because of poor-record keeping and necessary paperwork not being completed.

27. The claimant says she was never shown the report. The report was not disclosed by the respondent prior to the final hearing. The claimant says that following the report she was told to complete temperature checks and cleaning checks.

28. A copy of the report by the food standards inspector was provided to the Tribunal on the second day of the hearing. The report identified that there were no food safety procedures in place and that there must be evidence of how the cold chain is maintained and any cooking operations. Secondly, that with the kitchen being in an open plan area this meant it was not suitable to permit good hygiene practices. Thirdly, that there must be a separate sink with hot water for

food handling staff to wash their hands and that must not be used for food production or by other staff. Finally, in respect of catering specifically it stated that allergen identification needed to be on menus and on the labels of the food pots. Other health and safety issues were identified in the warehouse.

29. In cross-examination Mr Marek explained the kitchen was in an open plan area. He also stated that had been mentioned as being problematic in a previous report when the respondent was reduced from a five to four rating.

30. I find that there were more issues than simply poor-record keeping and paperwork not being completed, but that poor-record keeping and paperwork had been part of the report and part of the reason for the downgrading from a four to a three.

31. The respondent says that following the report it hired a catering consultant, Mr Keane to help the respondent on next steps and how to progress the department. The claimant says she was never introduced to Mr Keane and did not know why he came to the respondent.

32. On 1 April 2024 the claimant messaged a WhatsApp group chat (whose members were herself, Ms Huffer and Ms Mbambe) stating, "*hi sorry to bother you both but yesterdays ocado payment failed."* [56]. Ms Huffer replied, "*Are you using Soldo"* and then, *"Hi both I think Paul had closed Soldo so Mary do you have your Revolut card? X."* [56]. The claimant replied, "*I can't submit the Sainsbury's order Either it's on soldo."* [56].

33. Later in the chat on 1 April 2024 Ms Mbambe stated, "*Sorry Lisa I had the same problem yesterday while I was trying to check, I wa about to message Paul and thought to try the Revolut and it worked"* [57]. The claimant replied, "*I didn't know he'd changed it but then why would he bother telling me."* [57].

34. In cross-examination the claimant explained that she had said this in the message because Mr Marek never spoke to her and that in 2024 they had had no conversations other than saying hello.

35. In June 2024 the claimant told Mrs Marek that Miss Gayadeen was looking for another job. Mrs Marek asked the claimant in an ideal world what would the claimant do in the catering department? The claimant suggested that the

catering manager's role and Miss Gayadeen's role could be amalgamated. The claimant had no idea why Mrs Marek had asked her that.

*36.* Following this conversation Mrs Marek sent an email dated 18 June 2024 from to Mr Marek and Mr Keane [62]. This states:

*"Hi both*

*Just a quick heads up - I had my catch up with Lisa this morning and she let me know Kayla is looking for another job. Lisa suggested that Blue Tiger could look for 1 person who could do her job and Kayla's - mull that over.*

*Best,"*

37. On 28 June 2024 Ms Bossoletti emailed the claimant regarding a fruit platter that had been supplied to one of the respondent's clients. This states:

*"…On Thursday, Yotpo received their standing order for a fruit platter. Unfortunately, instead of the expected assortment of sliced and ready-to-eat fruits, the platter contained whole oranges. This was quite inconvenient for the office team as whole oranges are difficult to manage and eat in a formal setting. Additionally, they already receive a separate delivery of whole fruits (apples, oranges, and bananas).*

*As a result, we had to refund the platter to the client. Please ensure that this does not happen again in future orders..."*

38. On 1 July 2024 the claimant replied "*ok*". The claimant says that the platter had mini easy peel satsumas on it, not whole oranges.

39. The respondent says in or around August/ September 2024 Mr Marek and Mrs Marek carried out a review of the business in light of its expansion and growth. The claimant conceded in cross-examination that in 2024 the number of food pots the respondent had orders for did increase.

40. Further the respondent says that it had tried to make the role of catering manager work on a part-time basis but that it did really require someone to work full-time.

41. Mrs Marek had taken on some of the responsibilities of catering manager to compensate for the claimant not working full-time. Mrs Marek would visit client

sites to set up catering offerings, manage client quotes and communications, as well as invoicing. This was not sustainable for Mrs Marek as she had other duties and responsibilities. It also meant that there was a lack of continuity in the delivery of the catering function. The respondent needed a catering manager who would get to know the respondent's clients and their requirements.

42. On or around late August / early September 2024 the respondent decided that the role of catering manager needed to expand and evolve. That the respondent needed the role to be a full-time position and that additional responsibilities would be added to the role in addition to what the claimant had been doing. These included scheduling, client interactions, setting up and overseeing catering at the respondent's client's sites and growing the respondent's catering services.

43. The role would also have a new requirement for weekend working. Previously food for a Monday event would be prepared on a Friday morning, but the respondent wanted to change the preparation to be carried out on Sunday (for the client to receive fresh food).

44. The job description [32-34] for catering operations coordinator was put together by Mr Keane and was finalised in late August 2024/ early September 2024. This job description confirms that it would be a full-time role and that the days of work would be from Sunday to Thursday. It also required that the candidate must have a Level 2 Hazard Analysis Critical Control Point (HACCP) certification or above.

45. On 6 September 2024 the claimant was called into a meeting with Mr Marek and Mrs Marek. There are no minutes of this meeting. When questioned Mr Marek could not be specific about the exact words he had used during this meeting.

46. The claimant says that Mrs Marek explained that the claimant's role in catering was being changed and the department was being restructured. Further the claimant says that Mrs Marek told the claimant that the respondent had provisionally started looking for someone else and that they hoped to have

someone in place within the month and that the claimant would no longer be needed by around 1 October 2024.

47. The respondent says that Mr Marek informed the claimant that the catering manager role was not feasible as a part-time position and that the role had grown considerably in terms of expectations, duties, responsibilities and requirements. Further that Mr Marek explained that the role would be advertised as a full-time position.

48. The claimant when giving evidence to the Tribunal was more certain about what had been said in the meeting on 6 September 2024 than Mr Marek and Mrs Marek and there are no minutes to provide supporting documentary evidence. I accept the claimant's evidence of what was said at the meeting in paragraph 46 above.

49. The claimant further says the respondent had asked another member of staff to take on the role and that this process had started earlier in June 2024.

*50.* The only reference to a discussion in June 2024 about the catering manager role is the conversation between the claimant and Mrs Marek and the email dated 18 June 2024 from Mrs Marek to Mr Marek and Mr Keane [62].

51. This prior conversation and email do not support the claimant's assertion that another member of staff already had been asked to take on the new catering manager role and that the process had started in June 2024. It is simply reporting that Miss Gayadeen was looking for another job and the claimant had suggested that the respondent could look for one person to do the claimant's and Miss Gayadeen's jobs. Mrs Marek's last phrase "mull that over" does not on the balance of probabilities indicate that a job was being offered or that a process had been started in respect finding someone to fill the new catering manager role.

52. The claimant says that she was not given the opportunity to take the full-time role and the respondent did not even ask if she was interested in it. The claimant conceded in cross-examination that she did not ask to be considered for the expanded role either.

53. The respondent says the claimant was not able or willing to take on a full-time position with additional duties and responsibilities from a working time

perspective. The claimant disputes this and says that she was never asked whether she would be interested in working full-time. In cross-examination the claimant stated that the could have worked full-time but she was not asked and that she had never said that she could not work on Sundays.

54. The claimant also did not have a Level 2 HAACP qualification which was a requirement for the new catering manager role. The respondent never asked the claimant to complete the Level 2 HAACP qualification nor did they offer to assist her to gain that qualification.

55. The claimant says during the meeting on 6 September 2024 Mr Marek offered the claimant a role back in the accounts department (two days/ 16 hours per week). The claimant says that she was verbally offered the role and that most of the other roles she had been offered and had taken at the respondent had been offered verbally.

56. The respondent says that Mr Marek and Mrs Marek advised the claimant of a possible part-time role (of 16 hours per week) in the accounts team. Further that the claimant was informed that the role would be for shorter hours (than she currently worked) if created and formally offered and that the respondent would continue to pay the claimant for 24 hours per week until she found alternative employment to replace the eight-hour reduction. The respondent says that it did not formally offer the job role to the claimant nor did it confirm that it would be available or suitable. In cross-examination Mr Marek said the general gist in the meeting about the accounts role was that there was a potential for the claimant to step away from catering and he did not use language that formally offered the role to the claimant.

57. The claimant conceded in cross-examination that this role in the accounts team would be a newly-created role and that there was not an existing vacancy to fill within the accounts team when this new role was discussed.

58. The claimant was asked to consider the role over the weekend. The claimant agreed that she would think about the new role and that she would respond to Mr Marek before she went on holiday (14 September 2024).

59. The respondent says that the claimant was instructed to keep the discussion confidential. The claimant accepted in cross-examination that she had been told to keep the discussion confidential.

60. When the claimant came out of the meeting on 6 September 2024 and walked back to her desk Ms Huffer (accounts coordinator) said to the claimant, "*so are you happy with Paul's offer?"*. The claimant says she said, "*yes, but he told me to keep it confidential*". The claimant says Ms Huffer replied, "*it's ok to talk with me about it I've discussed it with him, we agreed I would need you for 2 days a week."*

61. I find that the claimant was offered the part-time accounts role of 16 hours per week. Firstly, because as I have mentioned above the claimant in evidence was more certain about what had been said in the meeting on 6 September 2024 than Mr Marek or Mrs Marek. Secondly, there are no minutes of the meeting to provide supporting documentary evidence for the respondent's version. Thirdly, I noted in re-examination that Mrs Marek used the phrase "offer it" in answer to one of the questions about the part-time accounts role. Finally, the contemporaneous discussion between the claimant and Ms Huffer when Ms Huffer asked the claimant, "*so are you happy with Paul's offer?*" further supports the claimant's case that an offer was made to her on 6 September 2024.

62. On or around 10 September 2024 the claimant spoke with HR about the situation and Mr Marek's offer to her. HR suggested that the claimant email Mr Marek, as he was not at work, so the claimant wrote an email and showed it to HR who thought it was fair and that the claimant should send it.

*63.* On 10 September 2024 the claimant emailed Mr Marek and Mrs Marek [64]. It states:

"*Further to our chat last week about a new role for me I just wanted to put something forward. I would like to go back into the accounts department and work with Carmel. That would be great. I do however feel a bit disappointed and well to be honest a bit upset that you are not able to offer me my current hours. I appreciate the business is moving forward and evolving but sad that as a loyal employee who has been here for nearly 8 years and has been super*

*flexible, even in difficult times, is treated like this when so many others have been hired and the employee base is growing constantly. Is there any way we could meet in the middle and I could work (once you have someone for my current role) 20 hours instead of the 16 you are offering me? This works out for Blue Tiger roughly £72 before taxes per week. This too gives me a bit more flexibility to deal with issues or urgent matters that could arise…"*

64. The claimant forwarded a copy of the email Ms Huffer [64] at 15.05 on 10 September 2024. The claimant admits that she also copied in HR to the email. The claimant also conceded in cross-examination that she had discussed the potential new role in the accounts team with Ms Mbambe (inventory manager at the respondent).

65. The respondent says that Ms Gosai (HR manager) had told Mr Marek and Mrs Marek sometime on or after 9 September 2024 (but before 22 September 2024) that the claimant had been speaking negatively to colleagues (at a company barbeque on 6 September 2024 and in an open workspace within the office on 9 September 2024) about how Mr Marek and Mrs Marek were "*treating a loyal employee by just cutting her hours*" and that she (the claimant) wished that she had been brave enough to go on holiday and not return.

66. Ms Gosai also reported to Mrs Marek that the claimant had been making telephone calls to ACAS during working hours.

67. As of 6 September 2024, Ms Gosai had only worked for the respondent for approximately two weeks.

68. At some point between 6 September 2024 and 23 September 2024 Mr Marek decided that the role in the accounts team would no longer be structured as two days per week. Instead that the accounts work would be completed over five days and the 16 hours would be spread out over the five days. That the person undertaking the role would also carry out administrative duties (building maintenance, insuring the respondent's vans and invoicing). This would mean that the combined role would be a full-time position. In re-examination Mrs Marek stated that this combined role had always been a possibility but that the 2-day week purely accounts team role was a possible alternative option for the

claimant on 6 September 2024, though the respondent has not included this fact in either of their written witness statements.

69. The claimant was not offered the opportunity to carry out this combined full-time role in accounts and administration.

70. The claimant was on annual leave from 13 September 2024 to 21 September 2024. The claimant checked her emails on Sunday 22 September 2024 and saw that there was an email from Mr Marek [65]. This states:

*"I hope you have had a nice time away.*

*I appreciate it's not a normal working day but would you be available to come into the office on Monday afternoon to have a meeting? I am available anytime from 12-4pm so let me know a time that works best if you are able to make it in.*

*Thanks!"*

71. The claimant did not work usually work on Mondays but she agreed to attend the meeting.

72. The claimant and Mr Marek had the meeting on 23 September 2024. There are no minutes of this meeting. When I asked Mr Marek for the exact words he had used during this meeting Mr Marek was vague.

73. The claimant says that Mr Marek looked upset, that he was breathing deeply and kept putting his head in his hands. Further that Mr Marek told the claimant he was upset by the claimant's email response to Mr Marek's offer of a two days' a week job and that the claimant should have spoken with him and not emailed him (even though he was not at the office on the relevant date). Further that Mr Marek said he had asked the claimant to keep it confidential and he was upset that she had not, so, he was "*letting me go*".

74. Further the claimant says that Mr Marek said he had heard the claimant had been unhappy but he did not explain to the claimant the things he had heard. Mr Marek said the offer of the two day a week job was off the table and if the claimant had not emailed him, he probably would have let the claimant have the role with the extra four hours. The claimant says that Mr Marek did not tell the claimant in the meeting on 23 September 2024 that the role in the accounts

team would now be a full-time position. The claimant says Mr Marek told the claimant this at a different time but not on 23 September 2024. The claimant's version is supported by the email Mr Marek sent to the claimant on 1 October 2024 [74] in paragraph 97 below. I accept the claimant's version that she was not told during the meeting on 23 September 2024 that the accounts role would now be full-time.

75. Further the claimant says that during the meeting Mr Marek told the claimant to keep it confidential and not to tell anyone at the respondent and that her last working day would be payday Monday 30th September. The claimant says that she was not given a right to appeal the decision.

76. The respondent says that Mr Marek began the meeting by saying that for years he had been trying to ensure the claimant had job security, despite roles being made redundant as the business changed, that Mr Marek had always tried to find the claimant alternative things to do and had created new roles for her. Further that Mr Marek said that despite this the claimant was always negative and that this was causing a toxic working environment. That Mr Marek said, "it was like pushing a boulder up a mountain".

77. The respondent further says the claimant stated that she felt that she was not actually needed and that Mr Marek was just "creating working for her". Further that the claimant apologised for making things so difficult. Further that Mr Marek explained that he was not willing to put up with the negativity anymore.

78. The respondent says that Mr Marek explained to the claimant after reassessing everything, the business really needed a full-time person to cover administrative and overflow accounts work and that Mr Marek would no longer be pursuing the part-time role previously proposed. Further that Mr Marek offered the claimant the option of a £6,000 settlement to leave her employment at the respondent and he asked for her response by Wednesday. Further that at the end of the meeting Mr Marek told the claimant not to come back into the office until this option had been explored and that this information was to be kept confidential.

79. The respondent says that Mr Marek did not say he was "letting her go" and that he did not mention redundancy. Further that Mr Marek offered the option of an

agreed parting of the ways as the claimant and Mr Marek were both unhappy with the employment relationship. In cross-examination the claimant said that she certainly did not agree to leave and that the offer of £6,000 was not a mutual parting of the ways and that the claimant assumed that Mr Marek had just worked out her redundancy.

80. I do find that Mr Marek did offer the claimant £6,000 in the meeting on 23 September 2024. This is supported by the email dated 23 September 2024 sent by Mr Marek to the claimant [70] (see paragraph 81 below). In respect of the remainder of the meeting I find that the claimant's version is the true version. Firstly, because in evidence the claimant was more certain in her evidence about what was said during the meeting, in particular, that Mr Marek had said he was "*letting me go*". Secondly, there are no minutes of the meeting to provide supporting documentary evidence for the respondent's version.

81. Mr Marek emailed the claimant at 13.51 on 23 September 2024 [70]. This email had the subject title: "*re: settlement offer*" and stated:

*"Further to our conversation today I wanted to confirm our offer of £6,000 as settlement to end your employment at Blue Tiger as of September 30th.*

*Please confirm if you agree with this offer and let me know if you have any questions before Wednesday 25th of September. In the meantime, we think it would be better that you did not come to the office and that you take until the end of the month as paid leave. I would again like to highlight that our conversation today and this offer are strictly confidential and that it should not be discussed with anyone else.*

*Once this has all been agreed. and if you would like, then we would like to welcome you back to the office to say farewell to the team and to recognize your contribution over the past several years."*

82. The claimant replied to Mr Marek at 16.35 on 23 September 2024 [69-70] she stated:

*"Thanks for your email. Could you please let me know if the breakdown of the £6,000 is it the total you are offering me or is it in addition to statutory redundancy, September's pay etc...?*

*Many Thanks"*

83. Mr Marek responded at 17.11 on 23 September 2024 [69], he stated:

*"The settlement offer is for a total of £6,000 which would be added on top of your usual pay for September + any holiday you are owed.*

*Let me know if you have any other questions.*

*Thanks!"*

84. The claimant provided a full response at 8.36 on 24 September 2024 [68 -69], this stated:

*"Thank you for your email and the offer.*

*I have no desire to be difficult but I have checked the government website for redundancy and believe the following to be correct...*

*Redundancy payment is 1.5 weeks for each year of service (1 May 2018 to 30 September 2024 - 6 years) so 9 weeks*

*As I have worked 6 years it will be statutory 6 weeks notice.*

*24 hours of holiday pay.*

*September's Pay.*

*So I make my final pay as follows:-*

*9 weeks redundancy £3,946.14 Tax Free Payment*

*6 weeks statutory notice £2,630.76 Can be Tax Free*

*4.5 Hours of Holiday accrued in the notice period £82.17 (But not on Bright HR). 19.5 hours holiday £356.25 (On Bright HR)*

*Just over £7000.* ***So I would accept £7,000 tax free as well as September's Pay £1.900****.*

*I am also thinking that in our meeting yesterday you said that the offer you made me two weeks ago working 2 days in the accounts department is now off the table as I had upset you with the wording in my email sent on the 10th of September. As I said I am really sorry that my honesty upset you and I again apologise for that. No matter what you have heard or been told I am and have always been grateful to you for keeping me at Blue Tiger. I'm sorry that you*

*listened to others instead of coming to me. I have seen and heard many things said about you and Angie (especially in the Della period) but I have always tried to be loyal and truthful. I think there have been many misunderstandings. For the record 99% of the time my unhappiness is because of the situation with my only child, nothing to do with Blue Tiger but I dont expect anyone else to understand what I feel inside.*

*In my email I stated that it would be great to work with Carmel and I am still willing to take on that role.*

*You said in our meeting yesterday that I should have kept the first meeting we had on the 10th private as it was between us, I didnt ask you this, but have just thought if you were upset I copied in HR I apologise for that I had no idea that you wouldn't want me to do that I honestly thought I should copy in the new HR person…"*

85. Mr Marek responded at 10.16 on 24 September 2024 [67], this stated:

*"Thank you for the email. I am also sorry that it ended this way and for any misunderstandings that may have happened in the past.*

*Sorry, I had not actually included the statutory notice as a part of my initial offer which was my mistake. I am happy to agree to your offer of £7,000 + your September pay.*

*I will speak with Sabria later today so that we can get everything sorted ahead of payroll later this week.*

*Please do let me know if you would like to come in to say farewell to the team. We would like to celebrate your time at Blue Tiger and for this to end on a happy note but I also understand if you would prefer not to so just let me know…"*

86. The claimant responded at 10.47 on 24 September 2024 [67], this stated:

*"Thanks, Paul.*

*I agree I don't want any bad feelings and I'll think about coming in to say goodbye.*

*Take care x"*

87. The claimant emailed Mr Marek at 10.19 on 27 September 2024 [66-67], this stated:

*"Is it possible for me to please pop to the warehouse over the weekend to pick up some bits i have there? I need my wooden slope to work on and some shoes and clothes I have left there.*

*I also have my keys and my Revolut card. Can you confirm if you want me to leave these somewhere safe or give them to Carmel as she lives near me?*

*I know people now know I have left as a couple have called me. I haven't really said much though as I wanted to wait for you to let me have my official email of redundancy."*

88. Mr Marek responded at 13.19 on 27 September 2024 [66], this stated:

*"Yes, of course. Pop by any time.*

*I'm not there today but I believe Sabria will send over the final paperwork today.*

*I'm sorry if word has gotten out. I mentioned that you were no longer working at Blue Tiger during the managers meeting on Tuesday following our emails. We were planning to send out a message to the whole company later today and to recognize your years of service.*

*Let me know if you need anything."*

89. HR at the respondent sent the claimant a settlement agreement [83] to sign on 27 September 2024 [80]. This settlement agreement [83] referred to a payment of £7,000 being made to the claimant. The claimant responded asking for a breakdown of the £7,000 [80]. HR responded [80] as follows:

*"The 7000 is the settlement amount; only as it is under 30k it is not taxable. You will be paid September wages and any holiday owed as agreed by Paul but no notice pay as I see from his email."*

90. The claimant replied at 15.28 on 27 September 2024 [79], this stated:

*"Thank you for the email with the Agreement attached. This is something I am not going to sign.*

*Under the employment Rights Act 1986 statutory redundancy is mandatory. It has to be paid. Therefore I don't need a settlement agreement.*

*I am not in dispute about my redundancy. I wasn't aware Blue Tiger was either.*

*I am owed by law 6 weeks notice £2,630.70 (could be tax free)*

*9 weeks redundancy £3,946.14 Is Tax Free*

*1 weeks holiday £438.46*

*TOTAL £7,015.36*

*Plus September's Pay £1,900*

*I want to settle this amicably."*

91. HR sent an email to Mr Marek on 27 September 2024 [79] stating:

"*Redundancy isn't mandatory – we didn't follow any process.*

*The dispute was the role being offered was not accepted.*

*She agreed no notice – which is always entitled to tax*

*She is not owed anything by law.*

*The redundancy is higher and notice too."*

92. A second settlement agreement was sent to the claimant at 16.19 on 27 September 2024 [84]. This second settlement agreement is at [85]. This second settlement agreement [85] stated that the termination date was 25 September 2024.

93. This second settlement agreement [85] also included a breakdown of what the respondent would pay the claimant as follows:

"*Notice £2,630.70*

*Redundancy £3,946.14*

*Holiday £438.46*

*September's Pay £1,900"*

94. The claimant did not sign the second settlement agreement.

95. The claimant received her Form P45 on Monday 30 September 2024. The leave date on the Form P45 was 25 September 2024. The claimant was paid up to 30 September 2024 [71 RB].

96. On 1 October 2024 the claimant emailed Mr Marek and suggested that she work as a contractor at home for two days a week to do the accounts work [74]. The claimant also confirmed that she would love to move forwards without the agreement and just receive the statutory redundancy payment.

97. On 1 October 2024 Mr Marek replied to the claimant's email [74]. This states:

"*Ok let's move forward with that. I will speak with Sabrina and Jennifer today and get your payslip + payment processed this week (aiming for Wednesday).*

*At the moment we are looking to pivot slightly and are now looking for someone to be full time in the office. We will combine the accounts work with extra administrative/secretarial work to support the different departments. But I will keep my ears open for any opportunities that might come up and let you know. Also, if you need any referrals we are more than happy to support…"*

98. On 4 October 2024 the respondent paid the claimant £7,000 gross which was taxed. The net payment was £6,239.81 [71 RB].

99. The claimant says that for the record she liked Mr Marek very much, but that he is just weak and therefore lets his wife (i.e., Mrs Marek) pull his strings. The claimant also says that most of the respondent's employees did make negative comments about the management because it is so poor. In cross-examination the claimant said in respect of the "pull his strings" comment and "management being so poor" that other employees at the respondent said both comments openly and that both comments were known at the respondent.

100. The respondent says that if the claimant had not left it would have invited the claimant to a formal meeting to discuss allegations regarding her conduct and whether her employment could continue. Also, the respondent says that there was the secondary issue that there was no suitable role for the claimant.

101. ACAS Early Conciliation commenced on 21 October 2024 and ended on 15 November 2024.

102. The claimant presented her claim for unfair dismissal to the Tribunal on 20 November 2024.

**LAW**

103. Section 97 of the Employment Rights Act 1996 (ERA) states:

*"(1) Subject to the following provisions of this section, in this Part "the effective date of termination" —*

*(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,*

*(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and*

*(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect."*

104. The expression Effective Date of Termination ("EDT") is a statutory construct. This means that the date that is stated on a P45 form is not determinative.

105. Section 111A of the ERA states:

*"(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).*

*(2) In subsection (1) "pre-termination negotiations" means 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.*

*(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.*

*(4) 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.*

*(5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved."*

106. There is an ACAS Code of Practice, Code of Practice 4 Settlement Agreements (under section 111A of the Employment Rights Act 1996) ("Code of Practice 4") which is designed to help employers, employees and their representatives understand the law relating to the negotiation of settlement agreements as set out in section 111A of the ERA.

107. In **Faithorn Farrell Timms LLP v Bailey [2016] I.C.R. 1054** the Employment Appeal Tribunal ("EAT") held that in any event, without prejudice privilege could be waived with the agreement of both sides, and, while the tribunal had failed to address that issue, the fact that the claimant had openly referred to the material in question in her claim to the employment tribunal, as had the respondent in the response, without either party objecting, clearly demonstrated that the parties had agreed that any privilege should be waived.

108. The EAT further held that section 111A(1) and (2) of the Employment Rights Act 1996 rendered inadmissible, on a claim of unfair dismissal, evidence of any offer made, or discussions held, with a view to terminating the employment on agreed terms, and that extended to the fact of the discussions not simply their content

109. The EAT also held that section 111A could not be read so as to permit agreement to the admission of evidence otherwise rendered inadmissible.

110. The EAT also held that the phrase "improper behaviour" in section 111A(4) allowed a potentially broader approach than the exception of "unambiguous impropriety" in the common law without prejudice principle; that in approaching section 111A(4) the tribunal had first to consider whether there was improper behaviour by either party during the settlement negotiations and, if so, then to decide the extent to which confidentiality should be preserved

111. Code of Practice 4 contains a non-exhaustive list of what would be considered improper behaviour, this includes:

111.1 harassment, bullying and intimidation, including the use of offensive words or aggressive behaviour;

111.2 criminal behaviour, such as the threat of physical assault;

111.3 victimisation;

111.4 discrimination because of age, sex, race, disability, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity, and marriage or civil partnership; and

111.5 putting undue pressure on a party — see paragraph 18 of Code of Practice 4.

112. In terms of putting undue pressure on a party, Code of Practice 4 explains that this may include not giving an employee a reasonable period of time to consider any proposed settlement offer, an employer saying before any form of disciplinary process has been commenced that the employee will be dismissed if he or she rejects a settlement proposal, or an employee threatening to undermine an organisation's public reputation if the organisation does not sign a settlement agreement (unless the provisions of the Public Interest Disclosure Act 1998 apply).

113. Paragraph 12 of Code of Practice 4 states: '*What constitutes a reasonable period of time will depend on the circumstances of the case. As a general rule, a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise*.'

114. Code of Practice 4 explains that, while the test of 'improper behaviour' in section 111A(4) of the ERA is not intended to interfere with existing and acceptable negotiating practices, employers should consider whether their presentation of an offer could be perceived by a tribunal to fall within that category.

115. Where a Tribunal decides that settlement negotiations should be disclosed as a result of the employer's improper behaviour, this does not necessarily mean that it will go on to find the employee's dismissal unfair. The test is still whether, taking into account all the circumstances, the employer's decision to dismiss fell within the range of reasonable responses.

116. Section 95 of the ERA defines dismissal for the purposes of the ERA and an unfair dismissal complaint as follows:

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

*(a)the contract under which he is employed is terminated by the employer (whether with or without notice),*

*(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*

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

*(2)An employee shall be taken to be dismissed by his employer for the purposes of this Part if—*

*(a)the employer gives notice to the employee to terminate his contract of employment, and*

*(b)at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;*

*and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."*

117. In **Birch and Another v University of Liverpool [1985] I.C.R. 470** the Court of Appeal held that "dismissal" is the unilateral termination of a contact of employment by the employer, with or without the employee's consent, and it did not include in that definition a termination of the contract of employment by the mutual agreement of both parties. Further it held that in considering whether there had been such a dismissal, the court should look at the substance rather than the form of the transactions between the parties but it should ignore the separate and subsequent issue whether, if there had been such a dismissal, it should be taken to have been "by reason of redundancy".

118. Slade LJ stated at page 483 of the Judgment the following:

*"Since the employees' case is based on section 83(2)(a) of the Act of 1978, it may perhaps be worth making one observation as to the construction of the relevant wording of that subsection, which reads:*

*"(2) An employee shall be treated as dismissed by his employer if, but only if, —*

> *(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice …"*

*In my opinion this subsection, on its true construction, is directed to the case where, on a proper analysis of the facts, the contract of employment is terminated by the employer alone. It is not apt to cover the case where, on such an analysis, the contract of employment has been terminated by the employee, or by the mutual, freely given, consents of the employer and the employee. In a case where it has been terminated by such mutual agreement, it may properly be said that the contract has been terminated by both the employer and the employee jointly, but it cannot, in my view, be said that it has been terminated by the employer alone.*

*The authorities, I think, require one to look at the realities of the facts, rather than the form of the relevant transactions, in deciding whether the contract has been "terminated by the employer" within the meaning of the subsection. As Sir John Donaldson M.R. put it in Martin v. Glynwed Distribution Ltd. [1983] I.C.R. 511 , 519:*

> *"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who really terminated the contract of employment?'"*

119. In **Optare Group Ltd v Transport and General Workers Union 2007 WL 1942870 EAT** The Honourable Mr Justice Wilkie stated at paragraph 26 of his Judgment:

"*The question of causation, the union argues, can properly be expressed as being "who really terminated the employment" or "who was responsible for instigating the process resulting in the termination of employment". The ET addressed this in paragraph 5.1. It pointed out that the three men had not volunteered prior to the redundancy selection exercise occurring but had*

*volunteered because invited to do so when the respondent sought volunteers to mitigate the impact of the redundancies. The union argues that it would be wrong, where such facts have been established, to go further and to investigate of each individual who has volunteered pursuant to that process their individual psychological process and/or motives for volunteering. If it is clear, as it was here, that the employer in an existing redundancy situation has issued an invitation to employees to volunteer for redundancy, that certain of them did so and that, as a result, their employments terminated then that is enough, having regard to the guidance in Peck approved in Birch , to enable the tribunal properly to conclude that the cause of the termination was their volunteering to be dismissed. This is not identifying and applying a rule of law but is a common sense application of the principle of causation to factual situations which arise repeatedly in industry and are well understood to have that effect. It may, of course, be that there are situations, even within a redundancy situation, where there are additional facts which point the other way but that was not the case here."*

120. In **Riley (appellant) v Direct Line Insurance Group plc (respondent) [2023] EAT 118** The claimant was employed by Direct Line as an insurance claims advisor. He was disabled by reason of autistic spectrum disorder ('ASD'), anxiety and depression. He was enrolled on Direct Line's private health insurance scheme, provided by 'UNUM'. He went on sick-leave for around three years: for much of that period he was paid the majority of his normal salary under the UNUM scheme. Around a year after a staged return to work, he went off sick again. Direct Line informed him that UNUM did a 'pay direct' scheme: he would cease employment with Direct Line and UNUM would 'pick up the payments'. Mr Riley raised concerns about whether for example his pay would continue in a seamless way when his employment contract ended. In correspondence and meetings, his concerns were addressed and finally he stated, 'I understand and agree with it all, so that's fine'. He was informed by letter that he was dismissed on grounds of capability due to ill health.

121. The EAT held that the employment tribunal had not erred in finding that the termination came about my mutual consent. The EAT also held that the Tribunal in that case was clear…he was not tricked or coerced in any way and that he participated in the discussions, was given time and fully understood what he was doing.

122. At paragraph 23 HHJ Shanks stated that the authorities established the following propositions of law:

"

*(1) Whatever the respective actions of the employer and employee at the time when the contract is terminated, at the end of the day the question always remains the same: 'Who really terminated the contract?' (see: Sir John Donaldson MR in Martin v MBS Fastenings (Glynwed) Distribution Ltd [1983] IRLR 198, [1983] ICR 511).The issue is one of causation.*

*(2) Termination of the contract of employment by the freely given mutual consent of both the employer and the employee is not a dismissal under s 95(1)(a) (see: Birch v University of Liverpool [1985] IRLR 165,[1985] ICR 470).*

*(3) The question how the contract was terminated is ultimately one of fact and degree and the tribunal must look at the realities rather than the form of the relevant transactions.*

*(4) Because of the consequences for the employee that flow from a finding of consensual termination the tribunal must be astute to find clear evidence that a termination was indeed free and consensual. Such a conclusion cannot apply if there is deceit, coercion or undue pressure, in particular if the employee is under direct threat of dismissal by the employer. Conversely, where there has been negotiation and discussion and an opportunity for the employee to seek legal advice, a consensual termination may properly be inferred.*

*(5) There is a distinction between an employee consenting to the termination of his employment and consenting to being dismissed by his employer. The latter analysis has often been considered appropriate in cases where employees volunteer for redundancy (probably as a matter of fairness because entitlement to a statutory redundancy payment itself requires a 'dismissal') but the existence or non-existence of a redundancy situation is not determinative."*

123. At paragraph 27 HHJ Shanks stated:

*"Although it is right to say that in the Optare case (Optare Group Ltd v Transport and General Workers' Union (2007) UKEAT/0143/07, [2007] IRLR 931) the Union (who were the successful party) argued that the causation question could properly be expressed as being 'Who was responsible for instigating the process resulting in the termination of the employment?' we do not consider that the fact that it was the employer*

*who called the meeting of 31 August 2018 was of itself determinative of the issue against them: the tribunal rightly considered the whole context and the actions of the parties thereafter in deciding that the termination was mutually agreed."*

124. Section 94 of the ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The claimant must show that he was dismissed by the respondent under section 95.

125. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

126. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

127. The Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer.

128. To be a genuine redundancy situation a dismissal must meet the definition in section 139(1) of the ERA which states:

*"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —*

*(a)the fact that his employer has ceased or intends to cease —*
*(i)to carry on the business for the purposes of which the employee was employed by him, or*
*(ii)to carry on that business in the place where the employee was so employed, or*

*(b)the fact that the requirements of that business —*

*(i)for employees to carry out work of a particular kind, or*

*(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."*

129. If an employer relies on some other substantial reason, first, the employer carries the burden of proof in showing that some other substantial reason is the sole or principal reason for the dismissal. To satisfy this stage, the employer needs only to establish some other substantial reason for the dismissal which could justify the dismissal of an employee holding the job in question: it is not necessary to show that it actually did justify the dismissal.

130. At this first stage, the Tribunal must not consider the justification, reasonableness or fairness of dismissing for some other substantial reason.

131. In cases where there is a restructure which does not give rise to a redundancy situation within the meaning of section 139 of ERA 1996 (such as where the need for employees to do work of a particular kind does not cease or diminish, merely it has been reorganised into new, different roles) redundancy cannot be relied on as the potentially fair reason for dismissal, but some other substantial reason can be.

132. A Tribunal must not substitute its own view about what it would have done in a restructure but should look for sound good business reasons (**Hollister -v- NFU [1979] ICR 542.**

133. The employer must provide evidence to demonstrate the business reasons for the change and must show that they were not trivial. This is not an onerous requirement. However, if an employer produces no evidence at all as to why there was any benefit in making a job full-time and failed to demonstrate any advantages created by such a change there can be no finding of some other substantial reason and the dismissal will be unfair at the first stage.

134. Secondly, the Tribunal will also need to consider whether it was reasonable to dismiss the employee because of the business reorganisation. The business reorganisation cannot be a pretext to dismiss the employee (**Labour Party -v- Oakley [1988] I.C.R. 403**).

135. The fairness of some other substantial reason dismissals under section 98(4) requires a balancing exercise between the needs of the employer and the detriment to the employee. A fair procedure must be followed.

136. In a business reorganisation dismissal an assessment of fairness will usually take into account similar considerations to what is relevant for a redundancy dismissal. An employer acting reasonably will give as much warning as possible of the impending reorganisation, it will consult with the employee about the decision, the process and alternatives to termination of employment, and the employer will take reasonable steps to find alternatives such as redeployment to a different job.

137. As explained above a fair procedure for some other substantial reason dismissals may also encompass the need to consider suitable alternative employment before dismissing the employee. The duty, if engaged, will usually require the employer to take proactive steps to assist the employee.

138. The employer is not obliged to create alternative employment for the employee where none already exists. However, they should make sure that they undertake a sufficiently thorough search for alternative employment and that their search is documented.

139. In a case about the imposition of new terms and conditions on employees (**St John of God (Care Services) Ltd -v- Brooke [1992] IRLR 546** relevant factors to assess fairness included:

139.1 The reason for the proposed changes;
139.2 The effect of a pay cut on the claimant;
139.3 What is the balance of advantages and disadvantages to both parties;
139.4 Whether the employer consulted with the claimant, and any representatives;
139.5 Whether the employer considered alternative courses of action;
139.6 Whether the changes were those that a reasonable employer would offer; and
139.7 Whether the majority of employees have accepted the change.

140. It is not incumbent on an employer to consult with an employee over the business decision but there is a requirement to consult adequately and properly at an individual level as to how that decision will impact on the employee's position.

141. Lady Smith at paragraph 31 in **Taskforce (Finishing and Handling) Ltd -v- Love 2005 WL 1410012 EAT (Scotland)** said:

> "… *Nor is there any rule that a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one…*
> *… Further, even in redundancy cases, the absence of appeal or review procedure does not of itself make a dismissal unfair; it is just one of the many factors to be considered in determining fairness*…"

142. Section 10 Employment Relations Act 1999 states:

> "*10.— Right to be accompanied*
> *(1) This section applies where a worker—*
> *(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and*
> *(b) reasonably requests to be accompanied at the hearing."*

143. Section 13 of the Employment Relations Act 1999 states:

> "*13.— Interpretation*
> *…*
> *(4) For the purposes of section 10 a disciplinary hearing is a hearing which could result in—*
> *(a) the administration of a formal warning to a worker by his employer,*
> *(b) the taking of some other action in respect of a worker by his employer, or*
> *(c) the confirmation of a warning issued or some other action taken."*

144. The phrase 'some other action' in section 13(4) of the Employment Relations Act 1999 must be construed as any other disciplinary action.

*Applicability of ACAS Code of Practice on Disciplinary and Grievance Procedures ("the Code") to SOSR dismissals*

145. The Code states that it applies to disciplinary issues relating to 'misconduct' and 'poor performance' (paragraph 1 of the Code), meaning that conduct and capability dismissals are expressly covered. It then goes on to make clear that it does not extend to redundancy dismissals or dismissals on the non-renewal of a limited-term contract.

146. In the absence of clear wording in the Code sanctions (i.e. increasing compensation) should not be applied against an employer for failure to comply with the letter of the Code by an employer in some other substantial reason dismissals.

147. That does not mean the employer should ignore the Code, as there are parts of it that are capable of being applied in some other substantial reason dismissals and that are a matter of common sense in ensuring fairness in a procedure. For example, ordinary commonsense fairness requires that matters that were not fully ventilated between employer and employee should not be taken into account when deciding whether to dismiss.

148. I confirmed with the parties that if I concluded that the claimant had been unfairly dismissed I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1988] AC 344**. The burden of proof is on the respondent.

149. There are three possible outcomes: first, I may find that the claimant would clearly have been retained if proper procedures had been adopted, in which case no reduction ought to be made. Second, I may conclude that the dismissal would have occurred in any event, with a possible delay to allow for a fair procedure. This may result in a limited compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedure been adopted. Third, it may be impossible to say what would have happened, and I should make a percentage assessment of the likelihood that the employee would have been retained.

150. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24.**

*Written reasons for dismissal*

151. Section 92 (1) to (4) of the ERA states:

> *"(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal—*
>
> *(a) if the employee is given by the employer notice of termination of his contract of employment,*

> *(b) if the employee's contract of employment is terminated by the employer without notice, or*
> *(c) if the employee is employed under a limited-term contract and the contract terminates by virtue of the limiting event without being renewed under the same contract.*
>
> *(2) Subject to [subsections (4) and (4A)] , an employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request.*
> *(3) Subject to [subsections (4) and (4A)] , an employee is not entitled to a written statement under this section unless on the effective date of termination he has been, or will have been, continuously employed for a period of not less than [two years] ending with that date."*

152. An employee's request for written reasons may be made either orally or in writing at any time after dismissal, or within the notice period if the employer dismisses with notice.

**CONCLUSIONS**

*Effective date of termination*

153. The claimant submitted that the EDT was 25 September 2024. The claimant relies on her Form P45 stating that the last day of her employment was 25 September 2024 and that the second unsigned settlement agreement [85] also specified that her employment ended on 25 September 2024.

154. The respondent submitted that the effective date of termination must be 30 September 2024 whether or not termination was by mutual agreement or whether the claimant was dismissed. The claimant was paid up to and including 30 September 2024.

155. Under section 97 of the ERA the first question is whether the termination of employment was given with or without notice or whether it was the expiry of a limited-term contract.

156. I conclude in this case that the termination of employment (whether by mutual agreement or dismissal) was given without notice. The claimant was not given notice under her contract of employment by the respondent.

157. Section 97(1)(b) of the ERA makes it clear that where termination is without notice the EDT is the date on which the termination takes effect.

158. The claimant was told by Mr Marek in the meeting on 23 September 2024 that he was letting her go. Mr Marek further said in the meeting on 23 September 2024 that the claimant's last working day would be payday 30 September 2024.

159. This was further confirmed by Mr Marek's email to the claimant at 13.51 on 23 September 2024 [70] in which he said "…*In the meantime we think it would be better that you did not come into the office and that you take until the end of the month as paid leave…".*

160. The claimant was in fact paid until 30 September 2024 [71 RB].

161. I conclude that termination took effect on 30 September 2024 due to it being made clear to the claimant by Mr Marek that her last working day would be 30 September 2024 and her in fact being paid up to and including 30 September 2024.

162. The Form P45 is not determinative and the second unsigned settlement agreement [85] (which specified 25 September 2024 as the claimant's last day of employment) was not signed by the claimant or the respondent. This means it is also not relevant to determining the EDT.

163. I conclude that the claimant's EDT was 30 September 2024.

*Pre-termination negotiations*

164. The ET1, ET3, the claimant's witness statement, Mr Marek's witness statement and email correspondence in the bundle all refer to negotiations relating to settlement starting in the meeting on 23 September 2024 and culminating with the respondent sending the second unsigned settlement agreement [85] to the claimant on 27 September 2024 [84].

165. The ET1, the ET3 and the evidence that details the settlement negotiations places in front of the Tribunal without prejudice material. The content of the ET1, the ET3, the evidence in the witness statements and email correspondence up to and including 27 September 2024 that details the settlement negotiations are the inclusion of pre-termination negotiations and I conclude that these fall under section 111A(1) of the ERA. This means that unless section 111A(3) or section 111A(4) of the ERA applies the evidence is inadmissible in respect of a complaint of unfair dismissal under section 111 of the ERA.

166. In respect of the inclusion of without prejudice material (of the settlement offer in the meeting on 23 September 2024 and the correspondence up to 27 September 2024 about settlement) I conclude that both the parties have waived without prejudice privilege by including reference to the settlement and the settlement negotiations in the ET1, ET3, the witness statement of the claimant, the witness statement of Mr Marek and the inclusion of the email correspondence about the settlement negotiations in the bundle.

167. Parties cannot waive the requirement of section 111A(1) of the ERA (**Faithorn Farrell Timms LLP -v- Bailey)**.

168. Mr Large submitted on behalf of the respondent that section 111A(4) of the ERA is applicable on the facts of the case. Mr Large also drew my attention to Code of Practice 4, in particular paragraphs 12 and 18. Mr Large submitted that the respondent relies upon the improper behaviour of the respondent being undue pressure on a party (Code of Practice 4). More particularly paragraph 18 (e)(i), not giving reasonable time for consideration of a settlement agreement as set in paragraph 12 of the Code of Practice.

169. Mr Large referenced the respondent only giving the claimant two days to consider its settlement offer.

170. The claimant did not make any submissions on whether section 111A(4) applied.

171. I did find above that in the meeting on 23 September 2024 Mr Marek offered the claimant £6,000 and asked for her response by Wednesday. This is further confirmed in Mr Marek's email dated 23 September 2024 [70] which stated "*… and let me know if you have any questions before Wednesday 25th of September."* I conclude that the respondent did only give the claimant two days to consider its settlement offer.

172. Paragraph 12 of Code of Practice 4 refers to the settlement agreement. That parties should be given a reasonable time to consider the proposed settlement agreement and that as general rule a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement. The claimant was not sent the first settlement agreement [80] until 27 September 2024. The claimant was sent the second unsigned settlement agreement [85] later in the day on 27 September 2024 [84]. The claimant did not to sign the second unsigned settlement [85].

173. There is potentially a difference between placing a short deadline on a settlement offer compared with a deadline for agreeing a settlement agreement. On these facts the short deadline of two days was in respect of the offer.

174. In any event, I conclude that there is another element of undue pressure on the claimant. I found above that in the meeting on 23 September 2024 Mr Marek told the claimant that he was letting her go. This was in the same meeting in which he later made the settlement offer of £6,000.

175. An example of undue pressure provided in paragraph 18 of Code of Practice 4 is an employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed.

176. The claimant had already been told that the respondent was letting her go prior to being offered the £6,000 by Mr Marek. I also found above that the respondent, if the claimant had not left, would have invited the claimant to a formal meeting to discuss allegations regarding the claimant's conduct and whether her employment could continue.

177. I conclude, taking into account both of these facts, (in paragraph 176 above) and the short deadline of two days to consider the settlement offer that undue pressure was placed on the claimant in the meeting on 23 September 2024.

178. This means in relation to anything said or done which in the Tribunal's opinion was improper, or was connected with improper behaviour, section 111A(1) of the ERA applies only to the extent that the Tribunal considers just.

179. Mr Large submitted that it would be just to consider all the evidence that had been put forward about the pre-termination negotiations to the extent that it was relevant. That both parties had spent time on the pre-termination negotiations in the ET1, the ET3, in contents of the Bundle (that had been jointly agreed) and witness statements, and it would be unjust to limit the Tribunal's focus and this would be tunnel vision.

180. The claimant did not make submissions about what would be just to admit as evidence to the Tribunal.

181. Both parties rely upon the pre-termination negotiations to demonstrate their respective cases on whether the claimant's employment was terminated by mutual agreement or whether the claimant was dismissed. The claimant

also relies upon the content of the meeting on 23 September 2023 to demonstrate that her dismissal was unfair.

182. Taking into account the extent to which both parties rely on the evidence and contents of the Bundle about the pre-termination negotiations to demonstrate their respective cases I conclude that it is just to admit all the evidence and documentary evidence about the pre-termination negotiations to the extent that they are relevant.

*Was the claimant dismissed by the respondent*

183. The respondent's case is that the claimant's employment was terminated by mutual agreement. The claimant's case is that she did not agree to end her employment with the respondent and that she was dismissed.

184. Mr Large in his written submissions said that the evidence was clear that the parties, having negotiated freely over a payment to the claimant with a view to agreed termination of her employment, compromised on the following terms:

184.1 The respondent would pay the claimant £7,000 plus her pay due for the period of September 2024;
184.2 In consideration for the promise, the claimant's employment would terminate after 30 September 2024.

185. In written submissions Mr Large drew my attention to the following phrases in the email correspondence:

185.1 Mr Marek on 23 September 2024 [70] : "…*I wanted to confirm our offer of £6,000 as settlement to end your employment at Blue Tiger as of September 30th.*";
185.2 The claimant on 24 September 2024 [68-69]: "*I would accept £7,000 tax-free as well as September's pay £1.900.";* and
185.3 Mr Marek on 24 September 2024 [67]:"*I am happy to agree your offer of £7,000 + your September pay."*

186. In oral submissions Mr Large submitted that it was self-evident that the documents all point to a mutual parting of the ways. Mr Large highlighted that the email string starting with Mr Marek's email to the claimant on 23 September 2024 [70] and ending with Mr Marek's email to the claimant dated 27 September 2024 at 13.19 [66] all had the subject title re: settlement offer. He also submitted that this subject title would be seen in the claimant's inbox in her list of emails. Further that over and above that, "the offer" was the language used in these emails between Mr Marek and the claimant.

187. Mr Large in his oral submissions acknowledged that there was passing reference to "redundancy" in the emails but that this was merely a rationale to explain how the compensation was calculated and it was quite common in employment tribunal settlements. Mr Large also drew my attention to the fact that the claimant after setting out her calculations in her email dated 24 September 2024 [68-69] did not request the exact sum of her calculations (which was just over £7,000). Instead, the claimant said she would be willing to accept £7,000 and that this was a counter-offer.

188. In respect of **Riley** Mr Large submitted that the claimant had time to reflect, she felt in a position to ask for breakdowns (in the settlement agreement), she felt confident enough to do research and made a counter-offer. Further, that there was no threat of dismissal. That the undue pressure under Code of Practice 4 did not go to the extent of their being coercion (as identified in **Riley** as being a reason for there to be no mutual agreement of termination).

189. Mr Large also referred me to LJ Slade's judgment in **Birch** that every contract results from offer and acceptance. There cannot be a one-sided contract. It is a joint effort.

190. In respect of **Optare** Mr Large submitted that this case was in the context of collective consultation under the Trade Union Labour Relations (Consolidation) Act 1992 ("TULRCA") and that the definition of dismissal is wider under TULRCA than the definition of dismissal in the ERA. Also, that **Riley** later stated that the fact the employer called the meeting in the first place was not determinative.

191. The claimant in her submissions highlighted that throughout the email correspondence between [66] to [70] she mentioned redundancy a number of times and that the respondent never corrected her. The claimant stated she honestly believed that she was being made redundant. The claimant also pointed out that she had been the sole earner (in her household) for the last 10 years and had experienced severe financial hardship. Finally, she submitted that she would not have left a good paying role voluntarily.

192. Firstly, the emails between Mr Marek and the claimant [66-70] must be viewed in the context of what I found above about the content of the meeting on 23 September 2024. I accepted the claimant's version that Mr Marek had told the claimant during that meeting that he was letting her go.

193. I conclude that this goes further than a threat of dismissal. Mr Marek informed the claimant that she was being dismissed when he said he was letting

her go. Mr Marek then afterwards offered the £6,000 as settlement. I also note that in evidence that the claimant said that there were aspects of the catering manager role that she was unhappy with, but that she would never ever have chosen to leave "it" (her catering manager role) ever.

194. I conclude that as the claimant had been told the respondent was letting her go (and she would never have chosen to leave) she was not acting freely when she was negotiating the settlement offer. I conclude that she was acting under coercion. Following **Riley** where there is coercion, there can be no mutually agreed termination.

195. This finding of fact also goes to causation. The mere fact the respondent called the meeting in the first place is not determinative as to causation and the question "who really terminated the contract" (**Riley**). I conclude, however, that the fact Mr Marek told the claimant that he was letting her go does go to causation and is determinative. It was the respondent who terminated the contract of employment and then the parties were negotiating about a settlement offer in respect of that dismissal.

196. Secondarily, the claimant mentions a number of times "redundancy" throughout the email correspondence. For example:

196.1 "*Could you please let me know the breakdown of the £6,000 is it the total you are offering me or is it in addition to statutory redundancy…"* [69]

196.2 "*I have no desire to be difficult but I have checked the government website for redundancy and believe the following to be correct…"* [68-69];

196.3 "*…I wanted to wait for you to let me have my official email of redundancy…"* [66-67]; and

196.4 "*Under the employment Rights Act 1996 statutory redundancy is mandatory. It has to be paid. Therefore I don't need a settlement agreement."*

197. I conclude from the above that the claimant believed that she was being made redundant. The respondent did not correct the claimant when she referred to redundancy. The respondent simply ignored her references to redundancy and the fact that she had stated she was waiting for her official email of redundancy.

198. Consent to mutual termination cannot be freely given when one party is working under the assumption that they have been made redundant. If, as Mr Large submits, the reference to the statutory redundancy payment was a

rationale for the calculation of the settlement offer then why did the respondent not explain this to the claimant and make it clear that in their view that this was a termination by mutual agreement and not a redundancy? I do not accept that the claimant was using the statutory redundancy payment as a rationale for calculating the settlement offer. The respondent did not correct the claimant at any point prior to her leaving on 30 September 2024. Though as noted above this is a secondary conclusion.

199. I conclude that the claimant was dismissed under section 95 (1)(a) of the ERA.

*Reason for the dismissal*

200. The claimant's case is that her dismissal was by reason of redundancy and the respondent's case is the claimant's dismissal was for some other substantial reason capable of justifying a dismissal namely a business restructure.

201. Mr Large in his written submissions referred to section 139 of the ERA and that the dismissal can only be by reason of redundancy if it falls within the definition of redundancy. The claimant did not make submissions on this issue other than that she honestly believed that she had been made redundant.

202. The respondent was not closing its business nor was it closing the claimant's place of work. This means that only section 139 (1)(b)(i) could potentially be relevant on the facts. The relevant question is whether the dismissal was wholly or mainly attributable to the fact that the requirements for the business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish.

203. On the facts, the orders the catering department had been fulfilling for the respondent had expanded throughout 2024. The requirement for employees to carry out the work of the catering department had not ceased or diminished. On the contrary, the requirement had increased due to the expanding orders.

204. The respondent decided to make the role of catering manager full-time with additional responsibilities partly due to the increasing orders and because the respondent would be losing its catering assistant. The work of the catering department was still required by the respondent and had not diminished or ceased.

205. The claimant dismissal was not by reason of redundancy.

206. I conclude that under section 98(2) of the ERA some other substantial reason capable of justifying a dismissal namely a business restructure is a potentially fair reason. I conclude that expanding the role of catering manager to be a full-time role, with additional responsibilities [32-34], was a substantial reason capable of justifying the claimant's dismissal and that this was the true reason for the claimant's dismissal.

207. I also conclude that the respondent has satisfied the requirements of section 98(2) of the ERA.

*Reasonableness*

208. In respect of reasonableness, I conclude that there were sound good business reasons to change the catering manager to a full-time role where the individual would work from Sunday to Thursday.

209. Firstly, Mrs Marek had been taking on some of the responsibilities of the catering manager and due to the expansion of the respondent during 2024 and Mrs Marek's other responsibilities she could no longer cover that part of the work in the catering department.

210. I conclude that the respondent needed the catering manager to undertake what Mrs Marek had previously been doing, which was visiting client sites to set up catering offerings and managing client quotes and communications (including invoicing).

211. Secondly, the respondent also needed the catering manager to be fully conversant with the health and safety requirements and procedures relating to the preparation of food safely. This was clearly a need that had been identified in the report prepared by the food standards inspector. The respondent did have a sound good business reason to include a requirement that the catering manager should have a level 2 in HACCP.

212. In respect of requiring that the catering manager work from Sunday to Thursday I conclude that there was a sound good business reason for this too. The respondent provided food pots to offices working from Monday to Friday. If food is prepared on a Friday for the following Monday it will not be fresh. The respondent wanted to ensure that its clients received fresh food and therefore it makes sense that it is preferable to prepare the food on Sunday for the Monday.

213. I conclude that the respondent acted within the range of reasonable responses when it decided to make the catering manager role full-time, in its decisions about the additional responsibilities for the catering manager role and the requirement for the individual to have a level 2 in HACCP.

214. I also conclude for all the reasons given above that the creation of the full-time catering manager role was not a pretext to dismiss the claimant.

*Fairness of the procedure*

215. The process followed by the respondent must also be fair.

216. I will deal with the issues raised by the claimant in her ET1 first.

217. The first of these is that the claimant was not adequately warned or given notice about her dismissal. The respondent did hold two meetings with the claimant. The first meeting on 6 September 2024 and the second meeting on 23 September 2024 in which Mr Marek dismissed (with effect from 30 September 2024) the claimant by telling her that he was letting her go.

218. The question is whether the claimant had been adequately warned in the first meeting on 6 September 2024 that she was at risk of her employment terminating.

219. In the first meeting on 6 October 2024 the claimant was informed by Mrs Marek that the catering manager role was being made full-time and that the respondent was looking to fill the role by 1 October 2024, at which point the claimant would no longer be needed. Mr Marek, however, then went on to offer the claimant the part-time role in accounts for the claimant to consider.

220. I conclude that although it was implicit that as the respondent was searching for someone to fill the full-time catering manager role and once the position was filled the claimant would not continue in her part-time catering manager role it was not expressly stated that the claimant's employment was at risk of being terminated if an alternative role was not found.

221. I conclude that it was not made sufficiently clear to the claimant in the meeting on 6 September 2024 that her employment with the respondent was at risk of termination.

222. This meant that the claimant being told by Mr Marek in the meeting on 23 September 2024 that he was letting her go was without prior warning.

223. I conclude that this makes the dismissal procedurally unfair.

224. The claimant in her ET1 also referred to a “lack of help” but when she was cross-examined the claimant could not remember why she had included that in her ET1.

225. The claimant referred to not having an advocate. There is no right to have an advocate present during meetings about a business restructure that places an employee’s employment at risk of termination for some other substantial reason.

226. The right to be accompanied under section 10 of the Employment Relations Act 1999 is not applicable where the reason for dismissal is some other substantial reason being a business restructure. No disciplinary action was being taken against the claimant in either the meeting on 6 September 2024 or in the meeting on 23 September 2024.

227. The claimant also raised in her ET1 that she had being told not to speak to anyone. It was not clear whether this was referring to her being told not to tell anyone about the content of the meeting on 6 September 2024 or whether the claimant was alleging that she had been told to keep the termination of her employment confidential.

228. The claimant was told in the meeting on 6 September 2024 to keep what she had been told during that meeting confidential. In this meeting she had been told that the catering manager role was being changed to a full-time position and she was offered the part-time role in the accounts team. I do not consider that asking the claimant to keep these facts confidential renders the dismissal procedurally unfair.

229. The claimant was told to keep the content of the meeting on 23 September 2024 confidential. This included the fact that Mr Marek had said he was letting the claimant go. Following this meeting, however, Mr Marek on 24 September 2024 in an email to the claimant invited the claimant to come in and say farewell to team [67]. I conclude it was therefore clear that the claimant did not need to keep the termination of employment confidential following Mr Marek’s email on 24 September 2024.

230. The claimant also stated she had not been given written reasons for her dismissal. An employer is obliged to provide written reasons for a dismissal if an employee requests written reasons following their dismissal or within the notice period if the employee is dismissed with notice. I concluded above that

the claimant's dismissal was without notice and that the EDT was 30 September 2024.

231. There is no request for written reasons for dismissal by the claimant after 30 September 2024. I conclude that there was no obligation on the respondent to provide written reasons for dismissal to the claimant.

232. It is clear from case authority that in a some other substantial reason for dismissal due to a business restructure the respondent should consult with the claimant about the changes. The requirement to consult did not require the respondent to consult with the claimant over the business decision but it did require the respondent to consult adequately and properly at an individual level as to how that decision impacted on the claimant's position.

233. I already concluded above that in the first meeting on 6 September 2024 Mr Marek and Mrs Marek did not make it sufficiently clear to the claimant that her employment was at risk of being terminated due to the changes to the catering manager role.

234. In addition, in the second meeting on 23 September 2024 Mr Marek did not explain to the claimant that the accounts role was going to be combined with some administrative functions, and that the combined role would be a full-time position. Mr Marek simply informed the claimant that the part-time accounts role was no longer available and that if the claimant had not emailed him (referring to the claimant's email dated 10 September 2024 [64]) he probably would have let the claimant have the role with the extra four hours. This failure to explain the full situation to the claimant about what the respondent had decided to do with the accounts role renders the dismissal procedurally unfair.

235. I conclude that as the dismissal was for some other substantial reason by reason of a business restructure the duty to take reasonable steps to find the claimant alternative employment was engaged.

236. The respondent on 6 September 2024 did offer the claimant a part-time role in accounts. This role had eight fewer hours per week than the claimant's part-time catering managing role. The claimant did not accept the position as offered and requested that the part-time accounts role be for 20 hours per week instead of 16 hours per week [64]. I conclude that the claimant in her email on 10 September 2024 [64] made a counter-offer which the respondent did not accept.

237. The claimant raised for the first time in the final hearing that she would have been prepared to work full-time. The claimant also raised that the respondent had never asked the claimant to complete the Level 2 HACCP course. I note that these arguments were not mentioned in her claim form and the latter point was not mentioned in her written witness statement either.

238. On the facts the respondent did not even ask the claimant if she was interested in applying for the full-time catering manager role. The claimant did not have a Level 2 in HACCP but this was not a reason to not invite the claimant to apply. The respondent could have taken this into account in the application process and considered whether it would allow the claimant a certain period of time to complete the Level 2 HACCP course if she was successful with her application for the role.

239. The fact that the respondent did not even enquire whether the claimant was interested in applying for the full-time catering role makes the dismissal procedurally unfair.

240. On the facts the respondent also did not ask whether the claimant would be interested in applying for the combined accounts and administrative full-time role. This makes the dismissal procedurally unfair.

241. I conclude that the respondent unfairly dismissed the claimant.

242. The claimant did not make any oral submissions about **Polkey**. Paragraph 30 of the claimant's witness statement however states in relation to **Polkey**, "*I argue this does not apply because I was not offered my original role in the changed format it was being recruited for, before they had the meeting with me. If I was there would have been no dismissal necessary.*"

243. Mr Large submitted that there should be a **Polkey** reduction on the basis that the claimant's dismissal would have occurred in any event with a delay of one month to allow for a fair procedure. This is on the basis firstly, that the respondent would have investigated the events that took place between 6 September 2024 and 23 September 2024 regarding the claimant breaching confidentiality about the content of the 6 September 2024 meeting (by informing HR, Ms Huffer and Ms Mbambe), and allegedly bad-mouthing Mr Marek and Mrs Marek (as reported to them by Ms Gosai).

244. Mr Large submitted secondly that the respondent had other concerns due to the downgrading of the food rating of the respondent, the fact that the claimant was not good at receiving criticism and the claimant's declining attitude towards the respondent.

245. Thirdly, Mr Large submitted that the claimant was unhappy and was vocal about it, and that she was looking for other work and so she would have left the respondent in any event.

246. Mr Large also submitted that the claimant's assertion that she would have worked full-time was not consistent with the contemporaneous email from Mrs Marek to Mr Keane and Mr Marek on 18 June 2024 [62]. This email repeats what the claimant had said to Mrs Marek about combining the claimant's role and Ms Gayadeen's role. Mrs Marek said that the claimant used the phrase "*Blue Tiger could look for 1 person who could do her job and Kayla's"*.

247. Mr Large also submitted that it was not consistent with the job alert that the claimant received from Indeed that was titled, "*Whitehouse Surgery is hiring for a Part-time Receptionist + 22 new part-time jobs in Beckenham*" on 1 February 2024 [47-54]. Mr Large pointed out that the job alert was for a part-time receptionist and 22 other part-time roles.

248. On the balance of probabilities, I conclude that the claimant would not have accepted the full-time catering manager role even if she had been offered the role by the respondent. Firstly, because there were clearly occasions when she was not happy in the role (which she vocalised to Miss Gayadeen) and it is very unlikely that she would have wanted to work in a catering role full-time when she was on occasion not happy. Secondly, the claimant had made it clear to management and Miss Gayadeen that she would prefer to have a role outside of catering. Finally, the claimant at no time before she left the respondent, requested that she be considered for the full-time catering manager role.

249. On the balance of probabilities, I conclude that she would have accepted the combined accounts and administrative role if this had been offered to her. Firstly, the claimant had expressed how she would like to go back to working in accounts (and that it would be great) in her email dated 10 September 2024 [64] and secondly, in her evidence she expressed that she would not have voluntarily left a paying role ever. Even though her preference may have been to work part-time as evidenced by the job alerts from Indeed I conclude that she would have prioritised having a paying job over working part-time.

250. In respect of the respondent conducting an investigation and a disciplinary process it is impossible to say what would have happened. The claimant did breach confidentiality by forwarding her email dated 10 September 2024 [64] to Ms Huffer and by discussing the offer of the part-time accounts role with HR and Ms Mbambe. It is, however, not certain what the respondent would

have found in its investigation relating to the alleged bad-mouthing. Ms Gosai was not present as witness at the Tribunal hearing and she had only been at the respondent approximately two weeks when she made the allegations about the claimant. It also not clear from the evidence that the respondent would have dismissed the claimant for the breach of confidentiality alone.

251. The claimant also clearly had some issues with Mrs Marek at the very least. This is evident from her comment in her witness statement that Mrs Marek pulled Mr Marek's strings. It also clear that the claimant considered the management (which was Mr Marek and Mrs Marek) of the respondent to be poor.

252. The respondent also relies on the claimant stating in a WhatsApp chat to Ms Huffer and Ms Mbambe in relation to Mr Marek "*I didn't know he'd changed it but then why would he bother telling me."* [57]. I conclude that this is not sufficient to reach the conclusion that the claimant had a bad attitude towards Mr Marek.

253. It is again not certain what the outcome of any investigation about the claimant's attitude would have been. The argument of a breakdown in trust and confidence should not be used a panacea for not conducting a proper investigation into why a breakdown in a relationship has occurred and what (or who) has caused that breakdown.

254. In respect of the other allegations referred to by Mr Large in his submission, these are in my conclusion too speculative. Firstly, in respect of the failure to complete food safety paperwork and information about allergens, the claimant was not given a job description when she started the catering manager role. It also appears from the report by the food standards inspector that the appropriate systems were not in place in the first place in respect of food safety procedures. Without a job description or being expressly told what was expected of her the claimant cannot be held accountable for the lapses in paperwork or for the lack of a system.

255. Secondly, in respect of the claimant not being good at receiving criticism, the respondent relies upon her response to the email about a client being refunded for a fruit platter that contained easy peel satsumas [65]. The claimant's response was "ok" [65]. I am not able to conclude from her response that the claimant was not good at receiving criticism.

256. In respect of Mr Large's submission that the claimant would have left the respondent in any event (referring to her being unhappy and being vocal about it) I found above that the claimant was not continually unhappy. I found that

while she was working in the catering manager role there were occasions when she was unhappy (and she did express this to Miss Gayadeen). I also accepted the claimant's evidence that she did not look at the job alerts from Indeed. There is not enough evidence to reach the conclusion that the claimant would have found another job and left the respondent in any event.

257. Taking into account the allegations against the claimant, some of which did occur (breach of confidentiality) and some that it is speculative what would have been found by the respondent during a fair investigation (the bad mouthing and the claimant's attitude) I consider that there is a 60% chance the claimant still would have been dismissed and provided that any investigation and disciplinary process was conducted fairly, the dismissal would have been within the range of reasonable responses.

258. As I did not conclude above that the claimant's dismissal did in fact involve conduct I have not considered whether any deductions under section 122(2) of the ERA or section 123(6) of the ERA should be made to the claimant's award for unfair dismissal.

Approved by:

**Employment Judge Macey**

**28th November 2025**

Judgment sent to parties
9th January 2026

For the Tribunal Office

**Notes**

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

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