EMPLOYMENT TRIBUNALS

Claimant: Mrs Sharon Millard

Respondent: Swindon Borough Council

Heard at: Bristol (by video) **On:** 10, 11 & 12 June 2026

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: Mr S Millard – Claimant's husband
For the Respondent: Mr S Bidnell-Edwards - Counsel

JUDGMENT

The Claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

(Having been requested subject to Rule 60(4) of the Employment Tribunal's Rules of Procedure 2024)

Background and Issues

1. The Claimant was employed by the Respondent for approximately nineteen years, latterly as an HR administrator, until her resignation, with immediate effect, on 21 May 2025. As a consequence, she brings a claim of constructive unfair dismissal.

2. The issues in this claim were agreed between the parties, as confirmed at the outset of the Hearing (with the allegations being reordered, chronologically, as per Counsel's skeleton argument) and are as follows:

    a. It is not in dispute that the Claimant resigned.

    b. The Claimant relies on alleged breaches of the implied term of trust and confidence.

c. Specifically, did the following occur? (The Respondent agreed that some of the events had taken place as described and which I detail below, but not that they, or any disputed events constituted fundamental breaches of contract.)

   i. "Act A" – Ms Zoe Harman (the Claimant's line manager) allegedly threatened the Claimant with formal disciplinary action as a first resort on two occasions – First, it is accepted by the Respondent that on 20 September 2023 that Ms Harman threatened the Claimant in an e-mail, in which she stated there would be "further action", when the Claimant refused to change her working days. Second, it is also accepted that on 19 June 2024 Ms Harman e-mailed to the Claimant when she worked from home stating, "*Office working is office working, I shouldn't have to spell it out"*;

   ii. "Act B" – the alleged actions of Ms Harman and the failure of the Council to implement and adhere to its own policies which made the Claimant dread going into the office – on, or about 17 July 2024 the Claimant alleges that Ms Harman had inappropriately recorded part of the time when she was signed off work between 20 June and 12 July 2024 as holiday i.e. the dates between 2 and 11 July 2024, because the Claimant was abroad. Again, the factual allegation as to the events of 17 July 2024 is accepted by the Respondent.

   iii. "Act C" – Ms Harman allegedly failed to follow a recommendation – In 2024 the Claimant alleges Ms Harman was provided with a recommendation at the conclusion of a disciplinary investigation in 2024 such that Ms Harman "*may want to take up an offer of the Learning & Development Management Training Programme and a Conflict Management course*", but this recommendation was not followed by Ms Harman. This allegation is denied.

   iv. "Act D" – Mr Luke McDonald allegedly blocked the Claimant from taking her chosen companion to the 2024 investigation - On 25 July 2024 the Claimant alleges she was "blocked by Mr McDonald from taking her chosen companion, Mrs Sarah Lovegrove, to the 2024 Investigation". This allegation is denied.

   v. "Act E" - In July 2024 Ms Meena Chesterman (Ms Harman's line manager) allegedly informed the Claimant she would not accept her grievance application – On 26 July 2024 in a Teams call the Claimant alleges Ms Chesterman informed the Claimant that the Council "would not accept [her] grievance application" which was submitted on 23 July 2024 by e-mail. This allegation is accepted.

   vi. "Act F" – On 16 May 2025 the Claimant allegedly received an inappropriate Written Warning – On 16 May 2025 the Claimant alleges that in relation to a disciplinary investigation in 2025, the Investigating Officer, Mr Richard Kemp, found that there was "no suggestion or evidence" to support the allegation against the Claimant of inappropriate behaviour, but the Deciding Officer, Mrs Elaine Simmons, issued the Claimant with a First Written Warning regardless. The Respondent accepts that a written warning was issued but maintains that it was appropriate in the circumstances.

d. Do any of the alleged breaches above, either admitted, or found to have occurred amount to a fundamental breach of trust and confidence applying the *Malik* test i.e. assessed objectively, did the Respondent act in a manner without reasonable and proper cause either intended, or likely to destroy or seriously to undermine trust and confidence between employer and employee?

e. Did the Claimant waive any breaches in that she has by words, or conduct acted in a manner to affirm the contract prior to resigning on 21 May 2025?

f. If so, did the Claimant resign, at least in part, in response to any breaches which were not waived?

g. If the Claimant was dismissed, the Respondent concedes it did not then have a potentially fair reason for dismissal, and dismissal would not have been fair in accordance with Section 98, 4 ERA 1996.

<u>The Law</u>

3. Counsel referred me to the well-known cases of **<u>Western Excavating (ECC) Ltd v Sharp</u> [1978] ICR 221 EWCA** and **<u>Malik v BCCI International</u> [1997] UKHL ICR 606**, in respect of the principles that apply in a case of constructive unfair dismissal (and as set out in paragraph 2 above). He emphasised that the burden of proof is on the Claimant and that the tests as to 'reasonable and proper cause' and of 'conduct calculated or likely to destroy trust and confidence' are objective ones.

<u>The Facts</u>

4. I heard evidence from the Claimant and on behalf of the Respondent from Mrs Meena Chesterman, the HR Business Partner, who managed the Claimant's line manager; Mrs Sarah Lovegrove, a former colleague of the Claimant who had discussed with the Claimant a request from her to be her companion in disciplinary proceedings; Ms Zoe Harman, the Claimant's line manager; Mr Richard Kemp, who investigated the 2025 disciplinary charges and Mrs Elaine Simmons, who conducted the 2025 disciplinary proceedings which resulted in the Claimant being given a first written warning. I was also provided with statements from a Mr Huw Grove and a Ms Amanda Brown, but who did not attend to give evidence. The Parties agreed that their evidence was uncontentious and I don't therefore consider it further.

5. I heard and read closing submissions from both parties, of which I take account in my findings below.

6. Chronology. The chronology is as set out in the list of alleged breaches of the implied term of trust and confidence, as set out above.

7. Evidence. I summarise the Parties' evidence in respect of the above allegations below.

8. While, at the outset of her statement, the Claimant made various comments as to being overworked and unsupported, none of these issues formed part of her claim and she accepted that by the latter part of her employment, they were effectively resolved and I don't therefore consider them further.

9. Claimant's Evidence Act A. On 20 September 2023, Ms Harman instructed the Claimant to change her planned working days to assist with a payroll deadline, as the team was short-staffed. The Claimant said that she was unable to do so, due to a planned holiday and a weekend away with her mother. Ms Harman emailed her stating that '*this is a management request and failure to comply would be considered ignoring a management instruction which would involve further action.'* [129]. This is listed above as 'Act A' and described as '*threaten*(ing) *the Claimant with formal disciplinary action as a first resort…'*. In cross-examination, the Claimant said the following:

    a. She confirmed that Ms Harman had line managed her since July 2022, until her resignation on 21 May 2025.

    b. On being asked whether she accepted that Ms Harman was senior to her and had the authority of their employer to give her instructions, she said '*within reason – nothing dangerous'*. When it was suggested that if employees in the Council didn't follow orders or instructions that would be a breakdown in the chain of authority, she agreed, subject to being given '*reasonable instructions'*.

    c. She agreed that following the end of the Covid pandemic, the Respondent had signalled a formal return to a minimum requirement of office attendance, rather than working from home (WFH), which, by March 2024, was set at two days per week.

    d. She agreed that the Respondent's document 'Hybrid Working Guidance' [98] was just that, guidance, as opposed to being contractually binding.

    e. She denied that she had '*refused'* Ms Harman's instruction to change her planned working days, but simply that she had said that she '*was unable to do this on this occasion.'* It was put to her that 'refuse' means 'not to agree' and as she didn't agree to do so, she was refusing, which she accepted. She also agreed that unless the normal management structure was to break down, an employee was required to agree to instructions from their manager.

    f. When it was suggested to her that that was why Ms Harman had stated that '*this is a management request and failure to comply would be considered ignoring a management instruction which would involve* *further action.'* and that she was not saying this as a colleague, looking for a favour, but as a formal instruction from her, as a manager, the Claimant said '*no, there had to be some consideration as to my availability*'. On it being suggested that therefore it was entirely appropriate for Ms Harman to remind her of the requirement to comply with management requests and the possible consequences of not doing so, the Claimant said that '*she can make the request, but I was unable to attend on days that I don't normally work.'* She said that she had been working a particular pattern of days for ten years and '*it was a routine I sometimes could change but sometimes couldn't and she can't force me if I'm unavailable.'*

g. When it was pointed out to the Claimant that her contractual obligation was to work 21 hours a week, over three days, but that those days were not fixed and that she had, in the past, worked other days, she agreed but reiterated that she'd been working this pattern for ten years. She disagreed that she was refusing to obey a management instruction and that Ms Harman, by referring to 'further action' was going '*a step too far, at this stage'* and should, she suggested, as an alternative, have cancelled the leave of two other staff.

h. On it being suggested that this was 'an isolated event' that she had 'moved on from', as in an email of 22 September 2023 [128] she said that '*I carefully considered your request (not instruction) …*(but that) '*on reflection I am more than happy to work Tuesday instead of Friday that week to support with payroll cut-off'*, she agreed, but only because she'd been threatened with disciplinary action.

i. As part of 'Act A', it was agreed evidence that on 19 June 2024 Ms Harman e-mailed to the Claimant [181] when she worked from home, stating "*Office working is office working, I shouldn't have to spell it out"*. The Claimant said that on 14 June, she had chosen to WFH for a half-day, on 19 June, having booked leave for the afternoon, and would be taking a train later that day. She said that she had no reason to consider that this would be a problem. Ms Harman telephoned her on 19 June, instructing her to attend at the office and when the Claimant stated her reason for not being in the office, would not accept it, hence the subsequent email. The Claimant considered that WFH arrangements were not being applied consistently or fairly. The Claimant said the following in cross-examination:

j. On it being put to her that Ms Harman's statement as to office working was not a threat of disciplinary action, she said that there was already a threat of such action.

k. She was asked about her response, in an on-line 'chat' [181], to Ms Harman stating that, '*the expectation is that we are in the office and present regardless of working a half or a full day. I will send a note out to the whole team making this clear so there are no misunderstandings*'. The Claimant's reply was '*Really!! Perhaps you should have made this* *clearer earlier. I have a train to catch when I finish work and don't have an hour to waste driving to and from the office'*, to which Ms Harman made the 'office working is office working' response. It was suggested to the Claimant that '*in the context of your subordinate position, was this an appropriate reply?'* and she answered, '*I was surprised by her reaction'*. When it was further suggested that her response was clearly sarcastic and therefore inappropriate, she said that '*it was not my intention for 'really!!' to be interpreted as sarcastic'*. After some questioning of this point, she eventually accepted that it was a sarcastic reply and inappropriate to send to her line manager.

l. She denied that she had a problem taking instructions from Ms Harman or recognising her authority to do so and said that '*it was not a reasonable instruction on this occasion'*.

m. She accepted that Ms Harman's 'office working is office working' comment could not be a breach of trust and confidence.

10. Respondent's Evidence on Act A. Ms Harman said that faced with the Claimant's refusal to change her workdays and subsequently to refuse to come into the office she didn't '*know what else I was supposed to do'*. In cross-examination, she said that while the Claimant frequently WFH, without the need for consideration of disciplinary action, she said that that was only '*if business needs were met'* if for example the Claimant was working on a particular task that required quiet or was specialised. She did not consider that the Claimant's explanations as to why she could not comply with her (Ms Harman's) instructions were '*valid reasons'*. She agreed that she had recorded, subsequently, in a note [146] that in a conversation with her line manager, Mrs Meena Chesterman that she '*was feeling like I was in the wrong and had made a bad decision'*, but said that that '*was the way I was made to feel, but was assured by Meena that I'd made the right decision.'* She did not agree with the conclusions of a subsequent disciplinary investigation that '*the reasonableness of the request is questionable'*. She was challenged that the WFH practices in other teams in the department (sharing the same office) was inconsistent with those of her team and she agreed and said that she had escalated her concerns about this, but, in the end those team or teams were not her team and she couldn't comment on how they were managed. She was asked about occasions that her team may not have attended for work in the office, for training and on another occasion when Mrs Chesterman had instructed them to do so and she said that she was not directly involved on either occasion and that both situations had been unclear and thus not subject to disciplinary action (and which account was supported by Mrs Chesterman's evidence).

11. Conclusions on Act A. I reach the following conclusions:

a. It is clear that the Claimant did not accept or respect Ms Harman's authority over her, seeming to consider that she could ignore 'requests' from Ms Harman, when they were, in fact, instructions.

b. The Claimant's contractual position was clear: she worked 21 hours a week, but over no fixed days and while she had a usual pattern of work that she had got used to, this did not entitle her to refuse to alter that pattern, when instructed to do so. The suggestion that rather than oblige the Claimant to change her days, two other members of staff should have had their leave cancelled indicates her blinkered approach on this matter.

c. In the circumstances, Ms Harman was perfectly entitled to refer to the possibility of disciplinary proceedings, for failure to follow a direct instruction and which reference in fact had the desired effect, with the Claimant agreeing to change her days, indicating that she knew she was in the wrong.

d. The Claimant's response to Ms Harman's 'office working is office working' comment is indicative of her disrespect for Ms Harman. It is blindingly obvious that writing '*Really!! Perhaps you should have made this clearer earlier.'* is highly sarcastic and dismissive.

e. In the circumstances where an employee is disrespectful to or refuses to comply with the instructions of a manager, then clearly, at very least, the threat of disciplinary proceedings is appropriate. The Claimant drew comparisons with other teams and their WFH practices, but she was not in those teams, and they were not managed by Ms Harman. Ms Harman was entitled to manage her team, as she saw fit, within the parameters of the policies or practices laid down by the Council, which included, in this case, working in the office two days a week. The fact that other teams may not have complied in the manner she did is not a matter for her, but for Mrs Chesterman, who, it appears, may not have been ensuring that all teams were working in a uniform way.

f. If, as is clear, the Claimant was unhappy with being managed by Ms Harman then, in common with many employees in that position, she had three options: 'put up and shut up', which she effectively did; bring a grievance if she considered that the manager's actions are unfair (which she did not, at that point), or seek employment elsewhere, either in the Council, or with another employer.

g. I conclude therefore that there was no breach of the implied term of trust and confidence in respect of Act A (the Claimant having, in any event, accepted that the 'office work is office work' comment could not have constituted any such breach).

12. <u>Claimant's Evidence Act B</u>. Act B was that on, or about 17 July 2024, the Claimant alleged that Mrs Harman had inappropriately recorded part of the time when she was signed off work between 20 June and 12 July 2024 as holiday i.e. the dates between 2 and 11 July 2024, because the Claimant was abroad. She said in cross-examination that she did not accept that Ms Harman's emails of 17 July [152 and 154] explain why she had recorded the time off in the way she did, as she provided an extract from the ACAS website and also says '*I was*

advised to enter it that way. I have sought official 'HR' clarification, and this is the response I have had.' and she quotes '*As she was abroad, she was technically on holiday. You can take holiday whilst on sick. She was unavailable for meetings whilst she was away, therefore it's holiday'*. Ms Harman ended the email by stating that she could speak to Mrs Chesterman if she needed to. The Claimant did not accept that this suggested a coherent rationale on Ms Harman's part. When it was suggested that Ms Harman was 'not going on a jaunt of her own' but simply acting as a line manager, the Claimant said that the '*information was inconsistent, but I accept that she was taking advice, but that advice was inconsistent with the Council's absence policy and training guidance.'*

13. <u>Respondent's Evidence Act B</u>. Ms Harman confirmed that she was simply acting on the advice she received at the time. She said that the reason she had said in an email to Ms Chesterman on 17 July [155] that '*I can't deal with Sharon's behaviour at the moment, I'm sorry'* was because it was a further example of the Claimant '*arguing the toss about something'*, which she said she found particularly insensitive as it was the day before her (Ms Harman's) mother's funeral, a fact of which the Claimant was aware. Ms Harman agreed that at some later point, the matter was resolved to the Claimant's satisfaction, without her further involvement. When it was put to her in cross-examination that as the query was eventually resolved, four months' later, in the Claimant's favour that the 'arguing the toss' comment was inappropriate, as the Claimant was entitled to challenge the decision, she said that the Claimant '*was never happy about anything I said. All I could do was give her the message'* and that while she had suggested the Claimant speak to Mrs Chesterman, she wouldn't.

14. <u>Conclusion on Act B</u>. I deal briefly with this allegation. It was clear from the evidence that Ms Harman was simply relaying advice she had been given on this issue and had no personal animus for her decision. The fact that the Claimant was eventually proven correct does not render Ms Harman's decision at the time a breach of trust and confidence. It goes nowhere near meeting the **<u>Malik</u>** test of 'conduct calculated or likely to destroy trust and confidence', without 'reasonable and proper cause'.

15. <u>Claimant's Evidence Act C</u>. The Claimant said that 'Act C' related to Ms Harman having been provided with a recommendation at the conclusion of a disciplinary investigation of the Claimant, in 2024, such that Ms Harman "*may want to take up an offer of the Learning & Development Management Training Programme and a Conflict Management course*", but that this recommendation was not followed by Ms Harman. She agreed that, in fact, no such recommendation had been made to Ms Harman and therefore I don't consider this matter further.

16. It was put to her, however that one of the recommendations of that process was that there should be a mediation process between her and Ms Harman. The Claimant agreed that that was the case and that Ms Harman had tried to engage in it but also agreed that she (the Claimant) had not taken the opportunity up, stating that she '*wasn't ready at the time'*. She agreed that Ms

Harman's attempt at mediation indicated that she wanted a positive working relationship with the Claimant.

17. While the Claimant did not agree that after August 2024 she and Ms Harman were working well together, she did agree that apart from the events of July 2024, there had been an extended period, until May 2025, where nothing adverse happened between them. She agreed that this showed a working relationship that she was willing to continue.

18. Claimant's Evidence Act D. The Claimant said that 'Act D' was another manager, a Mr McDonald, instructing a colleague and friend of hers, Mrs Sarah Lovegrove, in July 2024 not to act as the Claimant's companion in disciplinary proceedings related to Act A. Somewhat surprisingly, her statement made no mention of this potentially serious allegation, but she instead referred to submissions she had made in the 2025 disciplinary proceedings [276], in which she said:

    'Sarah messaged me and asked if she could phone me later on that evening. Sarah called me to say that she would not be able to be my companion as Luke McDonald had instructed her that she was not to talk to me unless it was work related and definitely not to mention their team's working patterns. I did not mention this previously as Sarah had asked me not to, but I cannot let this bullying go undisclosed any longer.'

19. The Claimant was asked to explain why, if Mr McDonald had said this, it would have prevented Mrs Lovegrove being her companion at a disciplinary hearing, but could not, stating that it was Mrs Lovegrove's '*response and the reason given'*. She did not accept that it was perhaps more likely that she had misremembered this conversation as she was only first recalling it some ten months after it occurred. When it was suggested to the Claimant that if this allegation were true, she would have raised a complaint about it at the time, she said that it was up to Mrs Lovegrove to do so.

20. Respondent's Evidence Act D. Mrs Lovegrove said that she did '*recall having a conversation with Sharon about my being her companion in a disciplinary context and although I cannot remember word or word what was said my memory is that I simply did not want to get involved in a formal meeting but I was more than happy to support her informally'.* In cross-examination, she said that she could not recall the conversation the Claimant referred to about Mr McDonald and that she had not spoken to him about being a companion to the Claimant but had had a conversation about their team's working pattern and that she shouldn't discuss that with the Claimant. She confirmed that '*nobody was stopping me from being a companion or said that I shouldn't be one'*.

21. Conclusion on Act D. My brief conclusion on Act D is that the burden of proof being on the Claimant, she has completely failed to prove this allegation.

22. Claimant's Evidence on Act E. Act E is that on 26 July 2024 in a Teams call the Claimant alleges Ms Meena Chesterman informed the Claimant that the Council "would not accept [her] grievance application" which was submitted on 23 July

2024 by e-mail. The Respondent accepts that the grievance was not processed.

23. Respondent's Evidence on Act E. Mrs Chesterman said in her statement:

'9. I was aware that the investigation of the allegations by Huw Grove was already underway when Sharon lodged the grievance which is at pages 166 to 173. The grievance was sent to Beccy Hemsley and myself on 23 July 2024. I took the view that Sharon would have the opportunity to raise all the same issues in the disciplinary process – it was effectively her defence to the disciplinary issues raised. I therefore spoke to Sharon at some point on or before 26 July 2024 (see page 183). I did not keep a note of what I said to Sharon, but I remember saying that in relation to the matters she was raising in her grievance, she would have the opportunity to raise them as part of her response in the disciplinary investigation and that if, after the disciplinary process, she felt her concerns were not considered, she could raise them as a grievance then (or words to that effect). I believe that Sharon accepted this explanation; she did not seek to pursue the grievance separately.

10. I am aware that Sharon has now said that there were "more issues than would have been covered by the disciplinary investigation that was to be carried out in August 2024" (see page 50) but I would point out that if Sharon felt that way at the time, she could have asked for the grievance to continue on those points. To the extent that I thought about it at the time, I assumed that Sharon had been happy with the disciplinary investigation outcome as, at most, the first allegation would be dealt with informally, a position which the Deciding Officer, Amanda Brown, agreed with (see pages 203 to 204).'

24. Mrs Chesterman said the following in cross-examination:

   a. She was referred to the grievance policy, as to 'overlapping grievance and disciplinary procedures' [77], which states:

      '46. If a related grievance has been raised after the Council has started a disciplinary process, then the Council reserves the right to conclude the grievance before commencing the disciplinary process.

      47. This means that the disciplinary process may be temporarily suspended in order to manage the grievance. However, depending on the complexity of the case, it may be possible to manage both issues concurrently. A representative from the HR Consultancy Team will be able to provide further advice on this.'

   b. She said that she agreed with the contents of the policy, but that she didn't stop the grievance, but stated that the Claimant could raise her issues in the disciplinary proceedings and that if she was not satisfied at that point, she could continue with the grievance, which the Claimant accepted.

c. She agreed that particularly bearing in mind her position as HR Business Partner, she should have recorded this agreement in writing.

25. Conclusion on Act E. I accept Mrs Chesterman's account of events, for the following reasons:

a. It is an entirely plausible suggestion to an employee, simultaneously involved in disciplinary proceedings and seeking to bring a related grievance.

b. I don't doubt, for a minute that had the Claimant not been content with that suggestion that she would have, at the time, escalated the alleged refusal to deal with her grievance, thus indicating, by not doing so that she was content for it to be dealt with in that manner.

c. The Claimant never thereafter referred again to her grievance, further indicating compliance with Mrs Chesterman's suggestion.

d. The grievance policy lays down no hard and fast approach to this issue, referring as it does to '*the Council reserves the right'* and use of the word '*may'*, thus allowing Mrs Chesterman discretion in this respect.

26. Having concluded that the Claimant acquiesced to Mrs Chesterman's (in the circumstances, sensible) suggestion, then that decision cannot be a breach of trust and confidence.

27. Claimant's Evidence on Act F. The allegation in this respect is that, following an incident in the office, on 5 March 2025, between the Claimant and Ms Harman, which resulted in disciplinary proceedings against the Claimant the Investigating Officer, Mr Richard Kemp, found that there was "no suggestion or evidence" to support the allegation against the Claimant of inappropriate behaviour, but the Deciding Officer, Mrs Elaine Simmons, issued the Claimant with a First Written Warning regardless. The Claimant said in her statement that:

'55. The Investigating Officer completed a report dated 28 April 2025 (C257). I noted that the report recorded that I had become emotional during the relevant events but did not conclude that I had engaged in aggressive, abusive or otherwise inappropriate behaviour. The Investigating Officer recommended mediation together with support and training for ZH (C257).

56. Following disclosure, I became aware of email correspondence between the Investigating Officer, Richard Kemp (RK), and MC concerning his disciplinary investigation report. (C248, C255). The correspondence showed that RK objected to substantial amendments proposed by MC to his report, stating that the revised version "does not represent the investigation or my views as the IO" and that the "core findings, conclusions, and recommendations" of his report had been compromised. RK further stated that he questioned "the purpose of the Investigating Officer in making a decision based on the facts and evidence of the case, if the outcome had already been decided before any investigation".

Reading this correspondence reinforced my doubts concerning the independence and fairness of the disciplinary process.

57. On 19 May 2025, I attended the disciplinary hearing. I experienced the hearing as adversarial and disciplinary in tone rather than a fair consideration of the evidence. I felt increasingly that the outcome had been predetermined. Notwithstanding the recommendations in RK's report, the outcome of the hearing was that a first written warning would be issued against me. The Investigating Officer apologised to me for the outcome. I reasonably believed the warning was unfair, inconsistent with the evidence, and applied in a manner designed to escalate matters rather than resolve them.'

28. In cross-examination, the Claimant said the following:

   a. She agreed that Mr McDonald (who was also in the office at the time of the incident and who had suggested her discussion with Ms Harman be conducted in a more private place) was a senior manager. When it was suggested to her that therefore it was inappropriate of her to tell him to 'shut up', she said those '*were not my exact words'* and '*he intervened in the conversation'*. She said that she said something on the lines of '*stay out of this, it's nothing to do with you.'*

   b. It was put to her that Ms Harman's report of the incident, as set out below [225] was more or less what happened and she said '*not exactly'*:

   'In an open office space SM displayed her dissatisfaction towards a decision I had made in an extremely unprofessional manner. She raised her voice at me across the desk in an abusive way for all to hear and this was witnessed by Luke Macdonald, Recruitment Manager who politely suggested she takes this out of the office to which she very rudely told him to shut up and stay out of it, she then continued to shout at me before walking off the office floor.

   Around 10-15 minutes later she returned, raising her voice at me again regarding the situation. I suggested we go and talk privately, but again she spoke to me in an unacceptable way, raising her voice for others to hear, she then packed her things away and informed me she would be working from home and left the office.'

   c. The Claimant agreed that this was a matter that was always going to have to be investigated and that if the allegations were correct it would be inappropriate behaviour.

   d. The Claimant was referred to the Respondent's policy on disciplinary procedures [58] and agreed that was happening in her case was 'formal action' (as opposed to 'informal action'). She agreed also that the policy allowed for the appointment of an Investigating Officer (IO) and a separate Designated Officer (DO), with the DO making the final decision.

e. She did not accept, however that accordingly her criticism was misconceived and referred to the disciplinary procedure flowchart at page 67.

f. She accepted that while the subsequent first written warning she received could be seen as her being given an opportunity to improve (as opposed to receiving a final written warning) and was the lowest possible sanction she said that '*that was not how it felt at the time'* and that she'd been upset to receive any warning.

g. She denied that by this point, she'd had enough of doing the job and wanted out anyway and that was why she decided to resign and said that she had no workload concerns after 2022.

h. She confirmed that her complaint in this respect was the conflict between the conclusions of the IO (Mr Kemp) and those of the DO (Mrs Simmons'), resulting in her decision to give her a first written warning.

29. <u>Respondent's Evidence on Act E</u>. Three Respondent witnesses had relevant evidence to give on this point: Mrs Chesterman, Mr Kemp and Mrs Simmons.

30. <u>Mrs Chesterman</u>. She said the following in her statement:

'13. The matter was then investigated by Richard Kemp who was supported by an Assistant HR Business Partner, Samuel ('Sam') Heywood. I was to be the Deciding Officer under the Council's Disciplinary Policy and Procedure. Sam approached me after being sent Richard's draft report because he was concerned that there was evidence of poor behaviour and conduct on Sharon's part, but Richard's draft position was that the matter should not go to a disciplinary hearing. I was also concerned about this and had a conversation with Richard which focused on the point that the role of the Investigating Officer is to fact find and if there is no evidence at all, the matter does not need to go to a hearing. From his report it was clear that there was witness evidence of the alleged behaviour so in my view the disciplinary report needed to reflect what that evidence was, and the case should proceed to a hearing where a Deciding Officer heard the case and made the relevant decision(s). Having now become involved to this extent, I could no longer be the Deciding Officer and also informed Richard of this – the replacement Deciding Officer would be Elaine Simmons. I offered to make changes to the report but as can be seen from the email chain at pages 248 to 252, Richard felt that my changes went beyond what we had discussed. I did not think that they did but, as I said in the final email, he was free to make whatever amendments he wanted. I had no further involvement in the case.'

31. It was suggested to her in cross-examination that Mr Kemp had found no case to answer, but that she had attempted to have the report changed significantly and was asked what she considered Mr Kemp had got wrong. She said that the evidence he had considered was not balanced. She said that she could only go on what was in the witness statements and that Mr Kemps' focus was not balanced, he was being asked to investigate the Claimant's behaviour, not

Ms Harman's management style. She said at the time to Mr Kemp that '*As explained, an investigating officer cannot be judge and jury. This is for the DO to make a decision as to whether after hearing the case whether or not a sanction should be applied*.' [249]

32. Mr Kemp. Mr Kemp said in his statement, in relation to Mrs Chesterman's involvement that he was not prepared to accept the full extent of her proposed revisions, the reasons for which he set out in an email at the time [250], extracts below:

- *Accuracy Concerns: the output of my report has changed, the core findings, conclusions, and recommendations of my original work has been compromised. This could lead to incorrect decisions or misunderstandings based on the report.*
- *Misrepresentation of my Work: The final report will no longer accurately reflect my analysis, insights, and the work I put in. This can be professionally damaging.*
- *Potential for Errors: A complete change in output suggests a fundamental difference in approach or interpretation, which could introduce errors or biases that weren't present in my original work.*
- *Loss of Ownership: I feel I have lost ownership for the actual work and conclusions derived from my analysis.*

My investigation identifies unfair and inconsistent management by Zoe, who in my opinion has failed to manage and has used the disciplinary process to deal with the outcomes due to her poor management. My honest opinion and conclusion remains that if Zoe had been fair and consistent in the management of Sharon then the issue would never have arisen in the first place. Sharon has reacted emotionally because Zoe has been unfair and inconsistent in her management and this led to the first Disciplinary finding of no case to answer.
…

I am left questioning the purpose of the Investigating Officer in making a decision based on the facts and evidence of the case, if the outcome had already been decided before any investigation.'

33. In cross and re-examination, he said the following:

    a. He considered that he had interviewed all relevant witnesses and read all relevant documents and approached the investigation objectively.

    b. He confirmed that he had concluded that there was no evidence of the Claimant shouting or using vulgar language, or that she'd been abusive, but instead was just '*being emotional'.*

    c. He was asked about the proposed amendments of Mrs Chesterman and said that he had put his concerns in writing (as set out above).

    d. He said that it was his understanding that if his report said that there was no case to answer, the case would not proceed to a disciplinary hearing.

He said, however that he had subsequently agreed, with Mrs Simmons that it should proceed to hearing and which decision was nothing to do with Mrs Chesterman, as she had withdrawn as DO by that stage. He said that he agreed with Mrs Simmons' view that she wanted to hear the Claimant's side of the story and to test the evidence. He said that he was confident that Mrs Simmons gave no indication of any pre-determination on her part. Nor he confirmed, was he under any pressure to agree with that approach.

e. He said that in his professional view the best way to resolve this matter was by mediation and rebuilding relationships.

f. He was asked if he'd read Ms Harman's report of the 5 March incident, in which she refers to the Claimant 'shouting' and her subsequent similar statement in interview [231], and he said that he could not recall doing so. He was further asked how, therefore, he could have concluded in his report [255] that '*there is no suggestion or evidence of inappropriate behaviour such as … shouting'*, when there clearly was evidence. He said that he had not just taken Ms Harman's evidence into account, but also that of other witnesses.

g. He agreed that he had not seen the disciplinary flowchart at the time.

34. Mrs Simmons. Mrs Simmons said the following in her statement:

5. 'In his witness statement Richard deals with the stages his draft report went through. I agree with what he has said in so far as it relates to me. My view is that it is the role of the Investigating Officer to establish the facts and report on them in writing and then it is for the Deciding Officer to determine what happens next. An Investigation Officer can only close down a potentially disciplinary matter or deal with it informally if there is so obviously no disciplinary allegations to answer or it is so obviously minor, meaning that it does not even get to the stage of a written report.

…

8. My decision was that the disciplinary allegation was overwhelmingly supported by the evidence of those who were present and that such behaviour was contrary to the Council's Code and Conduct and Disciplinary Policy and Procedure. These documents/relevant extract of them are at pages 82 to 91 and 57 to 68. My view, ultimately, was that some form of disciplinary sanction was warranted unless I could be satisfied that Sharon, given her evidence of the events leading up to her interactions with Zoe Harman and Luke McDonald, recognised that her behaviour was nevertheless not acceptable. I did not get that reassurance from Sharon in the hearing, and I therefore decided that a first written warning was the appropriate outcome. I informed Sharon of my decision the meeting.'

35. Mrs Simmons said the following in cross-examination:

a. She agreed that she was aware of Mr Kemps' conclusions that disciplinary action was not recommended against the Claimant and that Ms Harman be offered training and support.

b. When asked what her rationale was for nonetheless deciding to proceed, she said that while she respected Mr Kemps' views, she noted in the appendices to the report that while maybe there had been no vulgarity on the Claimant's part, a number of colleagues had reported that she had raised her voice and was confrontational and made dismissive comments to another manager and she therefore needed to hear more evidence.

c. She said that in the hearing the Claimant agreed that she had raised her voice and that she had been dismissive of a fellow manager's instruction.

d. Of particular concern for her was that when the Claimant was asked whether, in retrospect, she might have approached the situation differently, she gave no indication that she thought her behaviour inappropriate, which reinforced her decision that a first written warning was appropriate.

e. She denied that she was conjoining earlier allegations about the Claimant's behaviour and said that the simple issue was whether the Claimant had treated colleagues with respect and she hadn't. Mrs Simmons said that in fact it was the Claimant who had brought up the previous incidents.

f. She agreed that simple disagreement between a manager and one of her staff was not inappropriate, but that it depended on the manner in which such disagreement was expressed. She said that the Claimant's behaviour towards two managers had been inappropriate and that standing over a manager's desk, in an open office and raising one's voice is unacceptable and a first written warning was appropriate. She had taken into account the mitigating circumstances raised by the Claimant during the hearing, but nonetheless felt that a warning was necessary, particularly as she was concerned that the Claimant did not recognise her behaviour and she feared that without a warning, it would be repeated.

36. <u>Conclusions on Act E</u>. I remind myself that the Claimant's complaint in this respect is the disparity between Mr Kemp's conclusions and those of Mrs Simmons. I find as follows:

a. Mr Kemp had clearly misunderstood his role as IO and importantly had not even read the relevant sections of the disciplinary policy. Unless there was genuinely no evidence to support the allegations against the Claimant, it was not for him to decide whether or not a disciplinary hearing was appropriate.

b. There was evidence of the Claimant shouting (from Ms Harman) and of her 'raising her voice' from other witnesses, but he unaccountably dismissed that evidence entirely, which was not his prerogative.

c. Nor was it his prerogative to come to a view that in fact the problem was Ms Harman's management style, rather than the behaviour of the Claimant.

d. His role was to gather the evidence and as per the flow chart produce his report and pass it to the DO. He could only decide not to do so, if '*there is no allegation to answer'* (and there clearly was), or '*the allegation was so minor that it would best be dealt with informally'* (which also did not apply, as alleged disrespect, shouting or raising voices to managers in a public setting, could never be regarded as 'minor').

e. The Claimant was unaware at the time of Mrs Chesterman's involvement (and that therefore cannot have formed part of her rationale to resign), but in any event, Mrs Chesterman was essentially correct in her conclusions about Mr Kemp's handling of the investigation. She may have been overly detailed in her criticisms, stepping perhaps on Mr Kemp's toes, but she then quite correctly withdrew from the process.

f. Mr Kemp agreed that subsequently, in conversation with Mrs Simmons that a disciplinary hearing was, in fact, necessary to test the evidence, which process resulted in an entirely deserved and appropriate first written warning to the Claimant.

g. Accordingly, I find that there was no breach of the implied term of trust and confidence between the Respondent and the Claimant, by the Respondent's decision to proceed with disciplinary proceedings against the Claimant. She had clearly committed an act of misconduct for which such proceedings and sanction were appropriate.

37. Final Conclusion. I conclude finally, therefore that the Claimant has not established that there was any breach of the implied term of trust and confidence by the Respondent, either singly or cumulatively and that accordingly her claim of constructive unfair dismissal fails and is dismissed.

C H O'Rourke

Employment Judge

2 July 2026

Sent to the parties on
17 July 2026

Jade Lobb
For the Tribunal Office