



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110858/2021

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Held in Glasgow on 5 to 9 September 2022

Employment Judge Shona MacLean

10 **Miss Lorraine Currie**

**Claimant
In Person**

Cats Protection Trustee Limited

**Respondent
Represented by:
Ms N Macara -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim is dismissed.

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REASONS

Introduction

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1. The claimant sent a claim form to the Employment Tribunal on 18 August 2021 complaining of constructive unfair dismissal following the termination of her employment with the respondent on 20 May 2021. The claimant maintains that she resigned in response to a course of conduct by the respondent which taken together amounts to a breach of the implied duty of trust and confidence. The claimant asserts that the breach was sufficiently serious to constitute a repudiatory breach and by her resignation she accepted the breach. The claimant says that the termination of her employment amounted to dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (the ERA). The claimant seeks compensation.
2. In the response form the respondent denies that the claimant was constructively unfairly dismissed. The respondent says that its treatment of the claimant did not amount to a breach of contract. The respondent also denied

that the claimant resigned in response to any alleged breach of contract by the respondent.

3. The final hearing was conducted in person. It was agreed previously that two of the witnesses: Amanda (Mandy) Hill and Jill Jenkins would give evidence remotely by Cloud Video Platform.
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4. The claimant gave evidence on her own account. Ms Hill and Kate Gallagher gave evidence on her behalf. For the respondent the Tribunal heard evidence from Michael (Mike) Elliott, Ms Jenkins, David (Dave) Cottis, Sue Davis, SCD People Solutions and Susannah (Susie) Pritchard.
- 10 5. Ms Hill, Ms Gallagher, Ms Jenkins and Ms Pritchard are no longer employed by the respondent. Other witnesses have changed roles since their involvement in this case. When they were involved in this case they held the following positions.
 - 15 (a) Ms Hill - Head of Operations (North) (until 6 November 2020 following a period of annual then sick leave from 7 September 2020).
 - (b) Ms Gallagher – Branch Operations Manager Scotland.
 - (c) Mr Elliott - Head of Operations (South), Acting Director of Field Operations (from 25 August 2020), Interim Director of Operations (after October 2020).
 - 20 (d) Ms Pritchard – Acting Head of Field Operations (from around 21 September 2020).
 - (e) Mr Cottis - Senior HR Business Partner.
 - (f) Ms Jenkins - HR Business Partner.
 - (g) Ms Davis, Independent HR Consultant.
- 25 6. The witnesses were referred to documents which were part of a joint set of productions.
7. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding of important parts of the evidence. The Tribunal

carefully considered the submissions during its deliberations and has dealt with the points made in submissions while setting out the facts, law and the application of the law to those facts. It should not be taken that a point was overlooked, or facts ignored because a fact or submission is not part of the reasons in the way it was presented to the Tribunal by a party.

The Issues

8. This is a case in which it is alleged that the respondent breached the implied term of trust and confidence. During its deliberations the Tribunal's approach was to consider the following issues.
- 10 (a) Do the following incidents, so far as proven to have occurred, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent?
- 15 (i) On or around 4 December 2020 did confirmation that the claimant would return to her previous substantive post of Adoption Centre Manager represent a demotion, despite her excellent appraisal and an understanding of an assurance of the permanent Cat Welfare Manager role? (The Cat Welfare Manager Role)
- 20 (ii) On or around 11 December 2020 did the insertion of the word "grievance" in the claimant's shared diary constitute a breach of confidentiality in respect of UK GDPR and ICO guidance? (The Diary Invite).
- 25 (iii) On 18 December 2020 did the respondent accuse the claimant of "blackmailing" volunteers into praising her with a view to undermining and humiliating the claimant? (The Blackmail)
- (iv) On 29 January 2021 did the respondent's disclosure in a staff newsletter that the claimant was on long term sick

leave breach confidentiality in respect of UK GDPR and other ICO guidance? (The Newsletter)

5 (v) On 7 February 2021, was the claimant made aware of her grievance of 8 December 2020 having been disclosed to charity volunteers and was this in breach of confidentiality in respect of the UK GDPR and ICO guidance? (The Grievance Disclosure to a Volunteer).

(b) If so was there reasonable and proper cause for that conduct?

10 (c) Was the claimant entitled to treat the email from the respondent sent on 14 May 2021 as the final straw in a series of events spanning from 4 December 2020 to 14 May 2021, or a repudiatory breach in itself, such that the respondent was in effect acting in a manner calculated or likely to destroy the relationship of trust and confidence?

15 (d) If there was a fundamental breach of contract did that conduct cause the claimant's resignation? Was it so serious the claimant was entitled to treat the contract as being at an end?

(e) Did the claimant resign in response to the breach? Did the claimant affirm the contract before resigning?

20 (f) If the Tribunal finds that the dismissal of the claimant was unfair should any compensation awarded be reduced to reflect any contributory conduct by the claimant and any failure by her to mitigate losses?

The Relevant Law

9. Section 95(1)(c) of the ERA provides that there shall be a dismissal if the employee terminates the contract under which he is employed (with or without notice) in circumstances where he is entitled to terminate it without notice by reason of the employer's conduct.

10. For an employee to claim constructive unfair dismissal, there must be:

(a) A breach of contract by the employer: either an actual breach or an anticipatory breach.

- (b) That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidents which justify him leaving.
- (c) The employee must leave in response to the breach and for not some other unconnected reason.
- (d) The employee must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.
11. The leading case is *Western Excavating (ECC) Limited v Sharpe* [1978] ICR 221: the question of whether there had been a constructive dismissal should be answered according to the rules of the law of contract.
12. Normally there are implied into a contract of employment mutual rights and obligations of trust and confidence. A breach of this implied term may justify the employee in leaving and claiming that he has been constructively dismissed. A breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In such a case, the last action of an employer which leads to the employee leaving need not in itself be a breach of contract; the question is does the cumulative series of acts taken together amount to a breach of the implied test (see *Woods v WM Car Services (Peterborough) Limited* [1981] ICR 666). This is the "last straw" situation.
13. The scope of the implied term was considered in *Malik & Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 which imposed an obligation that the employer shall not: "...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee."
14. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Not every action by an employer which can probably give rise to a complaint by an employee

amounts to a breach of trust and confidence. Simply acting in an unreasonable manner is not sufficient. *Malik* (above) recognises that the conduct must be likely to destroy or seriously damage the relationship of trust and confidence.

- 5 15. The test of what is repudiatory in contract has been expressed in different words at different times. In *Woods* (above), it was “*conduct with which an employee could not be expected to put up*”. In *Tullett Prebon plc v BGC Brokers LP & others* 2011 IRLR 420 it was expressed as the employer must demonstrate objectively by its behaviour that it is abandoning and altogether
- 10 refusing to perform the contract. The Tribunal cannot go too far and apply a duty on the employer to behave reasonably towards his employees.
16. The repudiatory breach or breaches may not be the cause of the employee leaving provided they are the effective cause. There is often a course of conduct carried on over a period of time. The particular incident which causes
- 15 the employee to leave may in itself be insufficient to justify the employee taking that action but when viewed against the background of such incidents, it may be considered sufficient by the courts to warrant their treating the resignation as constructive dismissal. The question is does the cumulative series of acts taken together amount to a breach of the implied term.
- 20 17. The EAT in *Williams v Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19 distinguished the case of *Omilaju v Waltham Forest London Council* 2005 IRLR 35 “if any given case the last conduct, in point of time, relied upon as having contributed together with earlier conduct to a breach of the *Malik* term, is properly found by the Tribunal to have been
- 25 innocuous, then that would be fatal to the claim of constructive dismissal if either (a) earlier conduct relied upon crossed the *Malik* threshold but was followed by the employee affirming the contract, or (b) the earlier conduct was not by itself sufficient to cross the *Malik* threshold. However, if in the given case, the earlier conduct was (a) sufficient to cross the *Malik* threshold, (b)
- 30 was not followed by affirmation and (c) also at least materially contributed to the decision to resign, then constructive dismissal will be made out. This will

not be affected by the fact that the most recent conduct, in time, which also contributed to the decision to resign added nothing to the breach.”

18. In *Western* (above) it was held that an employee who had been subjected to a repudiatory breach must make up his mind soon after the conduct of which he complains. If he continues for any length of time he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

19. In *Buckland v Bournemouth University Higher Education Cooperation* [2010] EWCA Civ 212 suggested that Tribunal should take a reasonably robust approach to affirmation and that a wronged employee who failed to make their position clear at the outset could not expect to continue with the contract for very long without losing the option of termination, at least where the employer has offered to make suitable amends. The Tribunal should consider the facts carefully before deciding that the employee affirmed the contact. It is not simply the passage of time that is important but the conduct of the employee during the intervening period (see *Chindove v Morrison Supermarkets Plc* UKEAT/0076/17/JOJ.

Findings in Fact

Background

20. The respondent is a charity operating through a corporate trustee to help cats and kittens by taking in stray, unwanted and abandoned cats and rehoming them. The respondent has around 200 volunteer run branches and 30 adoption centres. It also provides care information, help and advice and an information line. The respondent is also involved in campaigning, help, advice, education and neutering.

21. Since 2007 the claimant has volunteered for the respondent. On 29 January 2018 the claimant left her career in marketing to work for the respondent. She was employed as an adoption centre manager based at the Forth Valley Adoption Centre on a fixed term contract terminating on 30 April 2018. On 19 May 2018 the claimant’s fixed term contract was made permanent. The claimant’s normal working hours were 35 hours per week. Parties required to

give each other contractual notice of termination of two months up until the claimant had eight years completed service and thereafter one additional week's notice for each completed year of employment up to a maximum of 12 weeks' notice.

- 5 22. The respondent has a recruitment and selection policy which applies to recruitment either on a permanent or temporary basis (the Recruitment and Selection Policy). All permanent vacancies are advertised. Some posts may be advertised internally only, and for short-term acting up or secondment opportunities there may be no advertisement if the skills and experience are already present. Where acting-up or secondment opportunities become a permanent vacancy it will be advertised internally. Some roles are fixed term because they are new, a pilot role or to cover maternity leave. Where approval is given for a fixed term role to be made a permanent post the hiring manager can decide not to advertise but appoint the current incumbent directly into post.
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- 15 Typically this would be for specialist roles where there is only one suitable candidate and would apply where the individual has been employed for nine months or longer and has achieved excellent performance during their period of fixed term employment. For fixed term roles where there was likely to be more than one potential candidate, the roles are to be advertised.
- 20 23. The respondent has a whistleblowing policy designed to support employees and volunteers who raise serious concerns and help to ensure that those who do are treated with respect, listened to and have their concerns taken seriously (the Whistleblowing Policy). The Whistleblowing Policy encourages employees and volunteers to raise concerns initially with line managers or alternatively
- 25 with the relevant department Director, Chairman of the Board of Trustees or Chairman of the Audit Committee. It states that it is necessary to provide some background and history to the concerns; an explanation for the reasons for the concerns; any relevant evidence and contact details. The Whistleblowing Policy sets out help and advice for potential whistleblowers.
- 30 24. The respondent also has a grievance policy to be used for concerns related to an employee's employment (the Grievance Policy). It envisages that most grievances will be resolved informally through discussion with line managers.

If not resolved informally the employee is encouraged to set out the grievance in writing if possible using the Grievance Form. If an investigation is necessary this will take place and a grievance meeting will be arranged at which the employee has a right to be accompanied by either a trade union representative or a fellow employee. The grievance meeting is the opportunity for the employee to explain the grievance and how they think it should be resolved and to assist in reaching a decision based on the available evidence and the representations made. There may be further investigation following the grievance meeting and the employee will be advised as soon as reasonably practicable. If the grievance is not resolved to the employee's satisfaction there is a right of appeal in writing to the next level of line management. The appeal meeting will normally be within one week of receiving the written appeal and will be dealt with impartially by a more senior manager who has not been previously involved in the case. There is a right to bring a companion to the grievance appeal meeting. The decision is final and there is no further right of appeal.

Cat Welfare Pilot Scheme

25. Around 2018 the Trustees approved a pilot to provide additional guidance and education, and support to fosterers and adoption centres. The three Heads of Operation, including Ms Hill and Mr Elliott reported to the Director of Operations, Mark Beazley. The pilot involved appointing three Cat Welfare Managers (CWM) corresponding to the geographical areas covered by each Head of Operations. Each CWM had two Cat Welfare Advisors (CWA) reporting to them. The new roles were fixed term subject to review around January 2020.
26. Claire Brown, Rachel Sutherland and Nicola White were employed on fixed term contracts as CWMs.
27. One of the Head of Operations post became vacant. The post was not filled. The responsibilities of the vacant role was split between Ms Hill and Mr Elliott. They became Head of Operations (North) and Head of Operations (South) respectively. Ms Hill had line management responsibility for Ms Sutherland and Ms White. Mr Elliott had line management responsibility for Ms Brown.

28. On 1 May 2019 the claimant was seconded to the role of CWM to cover a period of maternity leave for Ms White until 1 March 2020. The letter dated 5 April 2019 offering the secondment to the claimant stated that during the secondment her salary would be increased (the secondment letter). She was paid home and car allowances. At the end of the secondment she would return to her original position of Adoption Centre Manager and revert back to the salary of that post. All other terms and conditions of the claimant's contract remained the same.
29. Around September 2019 Ms Brown also went on maternity leave. Stephanie Osborne was seconded and given a fixed term contract until September 2020 to cover Ms Brown's maternity leave.
30. Around November 2019 there was a meeting of the Senior Operations Team (Mr Beazley, Ms Hill and Mr Elliott) to prepare a paper for the Trustees' review of the Cat Welfare Pilot in January 2020. Ms Hill felt that there was a need for additional capacity given the geographical challenge and potential changes in working patterns. Mr Beazley authorised the repurposing of unused Operations Directorate salary budget to finance the extension of the claimant's secondment on a fixed term basis until 31 December 2020. It was anticipated that in quarter 4 of 2020 the position would be reviewed as part of a wider Operations Directorate review. Any staff changes in the Operations Directorate would need to be discussed with the Executive Management Team (EMT) and how that fitted in with other departments at the end of the year.
31. Ms Hill sent an email on 5 December 2019 to Ms Sutherland and Ms Osborne and copied to the claimant advising that to ease the geographical challenges Mr Beazley had approved, *"a 4th (fixed term) CWM post for the North/Scotland region. This will mean effectively splitting Nicola/Lorraine role in two. At Mark's request the role will remain fixed term until we are in a position to review Ops more widely (unlike the other posts which will become perm on EMT approval."* Ms Hill confirmed that the claimant had agreed to this and would be discussing how to breakdown the region and the impact on CWAs.

32. Mr Elliott became aware of the email during a one to one meeting with Ms Osborne on 10 January 2020. Mr Elliott escalated this to Mr Beazley as there was concern about the language of “4th CWM”.
33. At a meeting of the EMT on 21 January 2020 the proposal to make permanent the contracts of Cat Welfare Team (three CWMs and six CWAs) was approved. An additional (seventh) CWA based in the North was confirmed as a permanent role. There was no discussion about a about a “4th CWM” role with the EMT.
34. Ms Hill shared with Mr Elliott, and copied to Mr Beazley letters that she was proposing to send to the Cat Welfare Team. Mr Elliott raised concerns about the timing given that the intentions of those in post, two of whom were on maternity leave had not been clarified. He also raised concerns about the need for consultation and the consistent reference to a “4th CWM” rather than an extension to a secondment to provide cover and have additional capacity. Mr Beazley also agreed particularly in relation to consultation and attached a draft letter. Ms Hill responded that she had already sent the letters.
35. On 22 January 2020 the claimant received an email from Ms Hill (the Good News Email) in which the claimant was advised of the approval of the permanent roles and received confirmation that her cover for Ms White’s maternity leave would be unaffected by the change.
36. The Good News Email continued:
- “I also write to outline the proposed changes to the Cat Welfare North area that we have already discussed. The reason for these proposed changes are as a result of the review of the Cat Welfare pilot where the geographical size of the North region was recognised as a challenge for one Cat Welfare Manager. The proposed changes will help to establish the resources required to support cat welfare in the region and this will be reviewed by the Senior Operations Team in quarter 4, 2020. For this reason the fourth Cat Welfare Manager role will be employed on a fixed term basis, subject to review in December 20.*
- Thank you for your careful consideration of the proposals and for working with Nicola White to produce a workable division of area. In summary, as agreed in*

principle, the proposal is to introduce a fourth CWM (on a fixed term basis, subject to review) and to base this post in the North. As you have gained significant experience and performed well in the Cat Welfare Manager role we would like to offer you the opportunity of continuing in the Cat Welfare Manager role following Nicola's return from maternity leave (date tbc). I would be grateful if you could let me know if this offer is acceptable to you. Should you wish to take up the offer the implementation of the proposed changes will be planned to coincide with Nicola's return. Please see the proposed split of branches/areas attached."

10 *Management Changes in the Operations Directorate*

37. From January 2020, Mr Elliott spent half of his time working on strategy as part of the respondent's strategy review. Ms Hill took the lead on the Cat Welfare Project. When the COVID-19 restrictions were introduced in late March 2020 Mr Elliott returned full-time to Operations.
- 15 38. On 1 April 2020 the respondent wrote to the claimant extending her secondment as a Regional Cat Welfare Manager (the extension letter). The extension letter confirmed that, "*This secondment extension is for a fixed term period until 31 December 2020, or until the post holder returns, whichever is the sooner*". The extension letter confirmed that at the end of the secondment the claimant would return to her original position of Forth Valley Adoption Centre Manager. The claimant's salary would remain on pay band 11. Her hours of work would be 35 per week. The home allowance would cease and the company car needed to be returned.
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39. Ms White returned from maternity leave on or around 25 May 2020. Following a period of annual leave she was furloughed for six weeks and returned to her role on 1 July 2020.
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40. At the end of August 2020 Ms Hill conducted a PMR update appraising the claimant's work. Ms Hill recorded that due to COVID-19 the vast majority of plans, actions and development had been placed on hold. Ms Hill gave the claimant a glowing report and told the claimant that she was an integral part of
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the Cat Welfare Team. The claimant understood that her permanent appointment within the Cat Welfare Team was being actively pursued.

- 5 41. Mr Beazley resigned around August 2020 although he remained in post as Director of Operations until 1 October 2020. Given the timing and COVID-19 restrictions the role of Director of Operations was not filled immediately. There was an internal recruitment for the post to be filled on an interim basis. Mr Elliott applied and was appointed Acting Director of Field Operations from 25 August 2020.
- 10 42. Ms Hill was on annual leave from 7 September 2020. She had an unexpected period of sick absence starting in September 2020. She did not return to work and left the organisation on 6 November 2020.
- 15 43. Ms Pritchard was appointed Acting Head of Field Operations on 21 September 2020. The structure of the Senior Operations Team was now effectively an Acting Director and an Acting Head. Mr Elliott and Ms Pritchard needed to support all line management. The ongoing COVID-19 restrictions and remote working meant that the geographical split was not a major driver.
- 20 44. Ms Brown and Ms White had returned from maternity leave to their substantive posts of CWM. Ms Osborne had returned to her original post. Ms Sutherland who also held a substantive post as a CWM had been seconded for three months had been seconded to a Branch Development Manager role for three months. The claimant remained seconded on a fixed term contract a CWM which was due to expire on 31 December 2020.
- 25 45. Mr Elliott and Ms Pritchard were keen in those circumstances to bring everyone together for consistency to the messaging and not have an administrative North and South delineation.
- 30 46. In Mr Elliott's view geography was not such a critical factor given COVID-19 restrictions and the move to promote online meetings where possible. He considered that the CWAs should be out and about in the regions more than the CWMs. There were also overall financial considerations particularly around extending fixed term contracts and recruitment. The claimant was not the only person to be considered as Ms Osborne had been returned to her substantive

role. He also considered that they were fewer cats in care. It was an operational decision for the claimant's secondment to finish at the end of the fixed term contract and for her to return to her original role.

Discussion about Ending the Secondment

5 47. Mr Elliott had a prearranged telephone conversation with the claimant on 23 September 2020 to inform her that Ms Pritchard would be taking over as her line manager. During this conversation the claimant asked about her position as CWM. Mr Elliott responded honestly that the fixed term contract would not be made permanent and the claimant would be returning to her substantive
10 role at the end of the fixed term. The three permanent CWM roles were permanently filled although Ms Sutherland was presently trialling another role which would be reviewed in December 2020.

48. The claimant sent an email on 25 September 2020 to Mr Elliott and copied to Ms Pritchard. The claimant wrote that she was shocked at being told that her
15 position was unlikely to continue after December 2020 and that it was also dependent on what would happen with Ms Sutherland. The claimant was unclear as to why this would impact her role in the future as this was not a factor when the claimant's fixed term contract was extended. The claimant said that she was told "*off the cuff*" and in an informal way. The claimant questioned
20 why Mr Elliott indicated that there was no budget for a fourth CWM particularly as her last conversation with Ms Hill had been that the claimant was an integral part of the Cat Welfare Team and Ms Hill was actively pursuing confirmation of the claimant's permanent appointment within the Cat Welfare Team. The claimant set out her achievements. She asked for a review of her role in a
25 timely manner and sought justification for the decision making process. The claimant acknowledged that the respondent was in particularly difficult and unsettling times and asked that the situation be given fair consideration. The claimant said that she needed a full explanation.

49. Ms Pritchard had a virtual meeting with the claimant on 25 September 2020.
30 Ms Pritchard's impression was that the claimant understood that she was to return to her original role but did not understand why or the rationale. The claimant expressed the personal impact of the decision.

50. Mr Elliott responded to the claimant's email apologising for any personal impact in the manner in which it was discussed. He explained that he had given an honest answer to her question. He noted that the claimant had since met virtually with Ms Pritchard who would keep the claimant updated. Mr Elliott reassured the claimant that any future decisions would be based on organisational needs and available resource at the time and was not a reflection on her performance in the role.
51. On 9 October 2020 Ms Pritchard and the claimant had a virtual meeting during which there was discussion about the head count for the "4th CWM" role and how it affected the claimant's own contract.
52. A further one to one virtual meeting between the claimant and Ms Pritchard took place on 6 November 2020 when there was reference to the claimant's fixed term contract ending, her returning to the original post and the financial and personal impact on her. Ms Pritchard directed the claimant to the employee assistance programme (EAP) and human resources.
53. The claimant sent an email to Elizabeth Hall, HR Business Partner (North) on 10 November 2020 asking for clarification about her role and how decisions would be made going forward.
54. Ms Hall replied on 13 November 2020 advising that the claimant was working on the basis of a fixed term secondment to the CWM role which had an end date of 31 December 2020 (the 13 November Email). At that point if the role was not extended further or made permanent then the claimant would move back to her substantive role of Adoption Centre Manager. This would have the same knock on effect down the chain of secondments at Forth Valley Adoption Centre. Ms Hall understood that it had been confirmed to the claimant that the CMW role would not be extended or made permanent so notice had been given to move back to the substantive role. Ms Hall advised that there were currently three permanent CWM roles and one temporary CWM role. The claimant's role was temporary and ending leaving Ms White, Ms Brown and Ms Sutherland in the substantive posts.

55. Ms Hall also explained in the 13 November Email that Ms Sutherland was temporarily working as a Branch Development Manager where she had the right to return to her permanent post in December 2020 as this was her substantive role. If through the process of the review of Ms Sutherland's circumstances she did not return to her substantive role that would leave the one of the CWM roles vacant. If she did return then CWM roles were filled on a permanent basis. If Ms Sutherland did not return the role would undergo the usual process of review and be sent for any appropriate approvals to recruit to the role. The outcome may be that in reviewing it, a decision was made not to recruit to the role so that there were only two permanent CWM roles. This would be the same process that would be followed for any leaver and recruitment approval. If the decision was to recruit the vacant CWM role then this would follow the usual recruitment process and the claimant would be eligible to apply as an internal candidate.
56. On 4 December 2020 the claimant had a one to one meeting with Ms Pritchard. The claimant felt that she was unsupported because Ms Pritchard knew she was leaving. Ms Prichard did not accept this explaining that Ms White and Ms Brown had returned from maternity leave and the claimant was more independent. Ms Pritchard was flexing between the team's needs. The claimant raised whether the Trustees were aware of the CWMs being reduced from four to two. Ms Pritchard said that there was maternity cover and there were three permanent CWM roles.
57. Following this meeting the respondent sent the claimant a letter dated 4 December 2020 confirming that she would return to her original position as Adoption Centre Manager from 1 January 2021. Her pay would be on band 9, not band 11 as erroneously stated on the extension letter. The claimant's home allowance would cease and she would need to return the company car.

Grievance Form

58. On 8 December 2020, the claimant sent a grievance form to the respondent which set out the following concerns against Mr Elliott and Ms Pritchard:

- (a) A strategic decision about the cat welfare team moving from 4 to 2 CWMs being made without any valuation of the cat welfare project (Concern 1).
- 5 (b) There has been no apparent review of the “4th CWM” role as stated and promised (Concern 2).
- (c) There has been a severe lack of transparency in the process and communications of the process (Concern 3).
- (d) There was no consultation with (the claimant) on this role and no right of reply (Concern 4).
- 10 (e) There has been a strategic decision with regard to the cat welfare team although all other major strategic decisions for operations are not being made until June 2021. (Concern 5).
- (f) The four CWM roles were only signed off by the respondent in January 2020 and are detailed as part of the 2020/2022 operations directorate plan. Why are all the overall decisions being made now and not in 15 2022? (Concern 6).
- (g) Ms White was furloughed whilst the claimant did her role (Concern 7).
- (h) The claimant was being discriminated against based on her nationality and location (Concern 8).
- 20 (i) This was a personal decision against her due to her high performance in the role over the last eighteen months in the north highlighting this positive progress in the south (Concern 9).

59. The claimant provided names and contacts details of people involved including witnesses. She also provided some documentation. The claimant indicated 25 that her requested outcome was to complete a full, just and proper evaluation into the decision making process and full consultation with the relevant employees.

60. On 15 December 2020, Mr Cottis, Senior HR Business Partner, sent a Teams Meeting diary invite to the claimant with the subject "Grievance". He created the invite as a private appointment. The claimant accepted the invitation. Shortly afterwards, the claimant contacted Mr Cottis to advise that the appointment appeared in her shared calendar that colleagues were able to access. Mr Cottis immediately contacted IT to understand if he had done anything wrong. Mr Cottis sent an email to the claimant apologising if the invite had caused any concerns and confirming that he did send and create it as a private appointment. He invited the claimant to decline the invite and he would change the title and resend. Mr Cottis also confirmed that the meeting did not form part of any formal grievance process and it was for an opportunity for them to discuss any ongoing steps.

61. The meeting took place on 15 December 2020 following which the claimant confirmed that she wished to proceed with the formal grievance.

15 *"Blackmail"*

62. On 15 December 2020, the claimant sent an email to all the branches for which she was responsible confirming that she was leaving the CWM role. In the email, the claimant noted that the respondent had decided that she was "no longer required" in the CWM role and "to say I am broken-hearted is an understatement" and "I will painfully miss working with you all". The claimant received a number of very positive responses to her email.

63. The claimant and Ms Pritchard had a remote one to one meeting on 18 December 2020. During this meeting Ms Pritchard recognised the claimant's strong relationship building with the branches and asked whether the branches would be open to receiving Ms White. The claimant indicated that she had paved the way but that it was a large area. Ms Pritchard asked about the feedback that had been sent following the claimant's email. The claimant said that some responses were overwhelmingly positive and they did not understand the decision that had been taken. Ms Pritchard enquired whether the claimant thought that the emotive language she had used had caused an emotive reaction. The claimant did not agree.

64. Ms Pritchard was aware that the claimant was very disappointed about the decision that had been taken. Ms Pritchard was focusing on the handover between the claimant and Ms White and ensuring there was a smooth transition. The claimant was upset by the comments and the lack of recognition of her contribution.

Newsletter and Grievance Investigation

65. On 5 January 2021, the claimant was absent from work due to COVID-19 related reasons. Subsequently the claimant was absent from work and provided a fit note from her doctor stating that the reason for absence was work related stress.

66. On 20 January 2021, Sue Field, Director of People and Engagement, met with the claimant in the role of investigation manager. The claimant was accompanied by her trade union representative. As part of Ms Field's investigation she then met separately with Mr Elliott, Ms Pritchard, Ms Hill and Mr Beazley. Ms Hill was the only witness listed in the Grievance Form interviewed by Ms Field.

67. On or around 29 January 2021, the Forth Valley Adoption Centre acting manager issued a newsletter in which there was reference to the claimant being off work on long term sick leave. The context was that the Forth Valley Adoption Centre was short staffed and this was part of an explanation for any delays and asking volunteers to be patient with the team.

68. On 1 February 2021, the claimant sent an email to Ms Hall commenting that she was shocked to read the newsletter and that volunteers were being told that she was on long term sick leave and that her personal circumstances were being circulated in this way. She also commented that some of her witnesses had not been spoken to as part of her grievance.

69. Ms Hall replied by email sent on 2 February 2021 apologising if the newsletter had caused stress. She explained that it was common practice for colleagues or stakeholders to be aware of someone being absent from work for a number of weeks due to sickness if this impacts on the business continuity and communication. Ms Hall had spoken to the acting adoption centre manager

who advised that they wished to convey to volunteers about who to contact in the claimant's absence as she had been absent from work for some time. Ms Hall confirmed that the reasons for any sick absence were confidential and that the reasons for absence had not been shared. The acting adoption centre manager apologised if this had caused distress as her intentions were well meaning and to provide clarity for volunteers.

70. In relation to the grievance process, Ms Hall said that it was a matter for Ms Field to determine which witnesses would be contacted as it was she who decided who was relevant during the investigation of the matters.

71. As the claimant had been absent for four to five weeks, as part of the normal sick absence procedure, the claimant was advised that another HR advisor would be in touch and make contact with her to make an occupational health referral or other adjustments of support would be helpful. In the meantime, Ms Hall confirmed that the investigation into the grievance was still ongoing.

72. On or around 7 February 2021, the claimant was contacted by a volunteer at the Forth Valley Adoption Centre. During the discussion the volunteer referred to the claimant being on long term sick absence and having submitted a grievance.

Grievance Outcome

73. On 10 February 2021, Ms Field wrote to the claimant arranging a meeting for 17 February 2021 to discuss the outcome of the grievance which was confirmed in the letter. A copy of the investigation report setting out the full reasons was also enclosed.

74. In the grievance outcome, the respondent confirmed that none of the claimant's concerns were upheld. The investigation report set out the reasons for this.

(a) Concern 1: While Ms Hill strongly hoped for a permanent fourth CWM in quarter 4 of 2020 and this was communicated to the claimant, this was intended to be part of a wider operations review that had implications beyond operations and was linked to the outcomes of the

5 planned strategy work for 2020 which was delayed due to COVID-19. The wider operations review did not happen as the respondent wide strategy work to inform it had not been completed across 2020 due to COVID-19. Budget restrictions and intra-management structures due to staff turnover meant this was amongst the many areas of the respondent's original plans for 2020 that were changed or delayed. The third CWM role would remain vacant. The structure of the Cat Welfare Team was the same at the beginning of 2021 as at the beginning of 2020. Two of the roles on the wider team were vacant at 10 time of the grievance – one for CWM in the west and the other for a CWA. A management decision was taken not to appoint to these roles at this time. This was based on there being 29 percent less cats in care at the end of 2020 in comparison to the end of 2019 with lockdown continuing to impact work on the road. There was a rationale to support the decision to leave the post vacant to manage reduced budgets for 15 2021.

(b) Concern 2: As (a) above. Budget restrictions and interim management structure due to staff turnover meant that the review of whether there should be a permanent fourth CWM was amongst the many areas of 20 the respondent's original plans for 2020 that were changed or delayed. This situation was beyond the control of Mr Elliott and Ms Pritchard.

(c) Concern 3: Ms Field considered that there was a disconnect within the former Operation Senior Team about the potential of a permanent fourth CWM role. There was a lack of continuity between the 25 messaging received from Ms Hill, Mr Elliot and Ms Pritchard which understandably had a negative impact on the claimant. However, the claimant's employment status was clear: she was on a fixed term contract that expired at the end of 2020. The claimant was informed at the end of September 2020 that there would not be a permanent fourth 30 CWM role and she would return to her substantive role which was confirmed in writing on 4 December 2020.

- (d) Concern 4: There was no obligation to consult. The claimant was returning to her substantive role.
- (e) Concern 5: As above (a) and (b) above.
- 5 (f) Concern 6: the fourth CWM role was not discussed at EMT in January 2020. The 2020/2022 Operations Directorate plan refers to the implementation of the permanent roles following the pilot.
- 10 (g) Concern 7: This decision was made while Ms White was line managed by Ms Hill. Decisions to furlough staff was based on in discussion with each person individually depending on the personal circumstances and the financial circumstances and resources of the respondent. This resulted in a significant number of individuals across the respondent being furloughed and those continuing to work supporting other areas of responsibility.
- 15 (h) Concern 8: The claimant was from Scotland. The respondent had not made any changes to provisions for Scotland from the beginning of 2020 to the beginning of 2021. In any event, Scotland was part of the north team as Scotland was not referred to as a separate region. Several key members of the operations team from the “north” left the respondent in the months prior to the claimant’s resignation. Due to
- 20 COVID-19 restrictions on travel over much recent times, the interim situation to amalgamate the team and not to refer to north and south was a pragmatic decision to manage the whole team.
- 25 (i) Concern 9: Mr Elliott and Ms Pritchard were following process to return the claimant to her substantive role. There could have been a CWM role that the claimant could have applied for on a permanent basis and an assessment of her performance on a fixed term role would have been relevant. Her performance was not relevant in the question of whether or not a fourth CWM would be created as neither a Cat Welfare Team review or a broader operations review had taken place.
- 30 Recruitment for senior operations roles was restricted, on an interim basis pending the delayed wider review. Where operations roles

remain vacant in the current circumstances the respondent elected to carry vacancies.

- 5 75. The grievance outcome letter recognised the claimant's dedication, highlighted that the respondent's priority was to support the claimant to feel able to return to her substantive role or to apply for other suitable roles within the organisation. There was a recommendation for mediation between the claimant, Mr Elliot and Ms Pritchard to repair any damage the relationships that had been damaged in the very difficult situation.
- 10 76. Although not part of the original Grievance Form, Ms Field addressed some additional concerns that had been raised. This included alleged breach of confidentiality relating to the diary invite from Mr Cottis; the diary invite to the grievance meeting and the newsletter. The invite to the Grievance Meeting was sent privately to an email address which unknown to the person sending the invitation was being redirected due to the claimant's sick absence to
15 another person covering that inbox.
77. Ms Field explained that whether the matter was a serious breach under the Data Protection legislation involved consideration as to whether the act of sharing a piece of information is likely to result in high risk to the individual's rights and freedoms.
- 20 78. In relation to the diary invites, the advice of the respondent's Information Governance Manager was sought to review the alleged data breaches and provide advice based on IOC Guidance. On receiving this advice, Ms Field concluded that the information shared was the title of the meeting stating that it related to a grievance. No other details were shared about the process or it
25 being accessible to colleagues. Although colleagues may make a perception of the nature of the meeting, having seen the invite, the title of both meetings were generic and not clear who or what was the subject of the meeting.
79. In the roles of CWM and Adoption Centre Manager the claimant was operating in the capacity of a manager. So it was possible that the claimant would have
30 been invited to discuss a grievance about one of her staff, about her or as a witness. The content of the diary invites did not contain any information to

clarify this and therefore Ms Field did not believe this constituted a serious breach of confidentiality. Nonetheless the claimant was invited to contact the Data Protection Manager if she had any further concerns.

5 80. With regards to the newsletter, Ms Field considered that it was acceptable practice to inform other colleagues and stakeholders if a member of staff is absent from work for a significant period and alternative arrangements were in place. No reasons were given for sick absence nor was the fact that the claimant had raised a grievance. Ms Field did not believe that this was a serious breach of confidentiality.

10 81. Ms Field apologised if these matters caused the claimant distress, as this was not the intention. However, the claimant was invited if she wished to discuss the matter further with the data protection team.

15 82. In addition to being advised of her right of appeal, the claimant's attention was drawn to the employee assistance programme. The outcome letter included the following:

20 *"I would like to put in writing as part of this outcome an apology on behalf of Cats Protection for the inconsistency in messaging and communications that has taken place over the course of 2020. I know you to be committed, dedicated and passionate about cats and the difference that Cats Protection can make to them. There is much that you can do within Cat Protection to help us improve outcomes for cats and I hope you will be able to work with us to take an important role in our work moving forwards. Thank you for your hard work in 2020. The review for our approach to cat welfare is still to come and as we move forwards to understand the outcomes of our strategy*
25 *research work and to formalise our plans and I hope that you will feel able to put into those learnings to shape the way forward."*

Grievance Appeal and Whistleblowing Allegations

30 83. The claimant appealed the outcome of the grievance by letter dated 24 February 2021 (the appeal letter). The basis of her appeal was lack of consultation and concerns regarding the alleged breaches of confidentiality. The claimant raised concerns about the decisions relating to the Cat Welfare

Team that highlighted that senior operations had no interest in cat welfare. The claimant said that she had raised these issues at the grievance meeting. The claimant was shocked that this was not addressed in the grievance investigation report. The claimant said that while the cats in care may have reduced the focus should be on the welfare of the cats in care.

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84. On receipt of the appeal letter, Ms Jenkins discussed with the claimant her recommendation that as part of it raised concerns regarding potential breaches of animal welfare legislation, Ms Jenkins was recommending that these elements be investigated separately under the Whistleblowing Policy. Ms Jenkins emailed the claimant to confirm her position on 1 March 2021 and provided a copy of the policy.

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85. Ms Jenkins also confirmed that the grievance procedure covers matters relating to employment relationship between employee and employer and these issues would be taken forward to the appeal meeting. Ms Jenkins copied and pasted from the claimant's appeal letter into a Word document the elements of the appeal which Ms Jenkins believed related to the Whistleblowing Policy. Ms Jenkins explained that these allegations would be taken extremely seriously and an investigating manager would be appointed and would be in touch to seek further information about the allegations. In the meantime, Ms Jenkins asked that the claimant forward to her the evidence mentioned so she could provide it to the investigating manager.

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86. The claimant replied on 8 March 2021 advising Ms Jenkins that she did not want to follow the Whistleblowing Policy at this stage. The claimant commented that if she decided to do so, she would go through the most appropriate external bodies. The claimant said she had lost trust and confidence in the whole process as the information provided in a lengthy discussion with Ms Field was clear with regards to animal welfare. The claimant said that she was being funnelled into a process that she did not consent to and her expectations were for her outcomes to be realised through the grievance process. The claimant indicated that she wished to enter into a protected conversation in order to seek a compromise agreement without prejudice.

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87. The claimant did not follow up her concerns about alleged breach of data protection with the Data Protection Manager.

Grievance Appeal Meeting

5 88. Sue Davies, an independent HR consultant, heard the grievance appeal on 11 March 2021. The claimant was accompanied by her trade union representative. Ms Jenkins provided HR support as Ms Hall was on maternity leave.

89. At the start of the grievance appeal meeting the claimant raised concerns including:

10 (a) That the Grievance Policy had not been followed as the CEO, James Yeates, had not been appointed appeal chair.

(b) The claimant had not been able to access meeting notes before the appeal meeting as she did not have the password. The password had been sent to her. The claimant had previously been provided with a copy of the Grievance Policy. The documents were already in her possession but had been numbered to make it easier to navigate at the appeal meeting.

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90. The claimant was asked if she wanted further time to prepare but she confirmed she was happy to proceed.

20 91. Ms Davis explained that she would not be dealing with the cat welfare aspect of the grievance which were not part of the employment process. The claimant would be notified separately about this.

92. Ms Davis considered the points raised by the claimant then adjourned the Grievance Appeal Meeting.

25 93. At the end of the grievance appeal meeting, the claimant asked for a without prejudice discussion with Ms Jenkins. Ms Davies was not party to those discussions. Ms Jenkins indicated that it would be of assistance for the claimant to set out her request in writing under appropriate cover.

Email Communications from Ms Jenkins to the Claimant on 17 March 2021

94. On 17 March 2021, Ms Jenkins sent to the claimant the appeal outcome which concluded that the findings of the original grievance should be upheld. A copy of Ms Davies' conclusions were set out in the grievance appeal report which was attached.
- 5 95. Ms Davis concluded that neither the process or outcome of the grievance had been seriously flawed in its findings. She considered that there had been "regrettably opaque communications" which had been difficult for the claimant to navigate for which Ms Davis apologised.
- 10 96. Ms Jenkins wrote to the claimant on 17 March 2021 noting that the claimant wishes to "*cease the whistleblowing process*". Ms Jenkins said that the Whistleblowing Policy did not replace the Grievance Policy. It was there so that employees could bring serious concerns to the respondent's attention so that they can be investigated. Again Ms Jenkins requested the claimant send her evidence so that it could be investigated.
- 15 97. In a separate email Ms Jenkins referred to the claimant's request for a protected conversation. Ms Jenkins said that the respondent was prepared to consider this and asked the claimant to set out her request in writing.

Protected Conversation

- 20 98. The claimant set out a without prejudice proposal in an email sent to Ms Jenkins on 29 March 2020 (the 29 March Email). The claimant wanted to shock the respondent into action. The 29 March Email included the claimant's concerns about some of the matters covered by the grievance as well as additional matters making further references to allegations of animal welfare breaches. The 29 March Email included the following:
- 25 "*Welfare concerns and animal welfare law breaks were included in the presentation to the trustees and EMT in 2019, so the charity have previously been made aware of the current welfare situation and I know that senior management on various teams are clearly aware of this and these situations represent themselves every day, yet nothing is done to change this. Instead,*
- 30 *the Cat Welfare Team is cut in half and one CWM post left vacant, whilst a*

vast amount of other roles are advertised for that have absolutely no cat engagement and cat welfare has not been deemed a priority.

As Europe's largest charity, this is morally indefensible. I believe that what I have detailed is all in the public interest and that if agreement cannot be made, I will have no other option than to report to external agencies including the charity's commission and other relevant public parties."

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99. The claimant then set out the financial compensation that she was seeking as part of the without prejudice discussion.

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100. The claimant concluded, *"I ask for the charity to seriously consider this agreement as a final offer to prevent any further action externally."*

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101. Ms Jenkins was shocked when she read the 29 March Email. She considered that the financial settlement sought was excessive. The comments about animal welfare were against a background of the claimant not providing detailed evidence of her animal welfare concerns through the Whistleblowing Policy but rather, in Ms Jenkin's view, threatening to tell external authorities without giving the respondent an opportunity to investigate any of these allegations.

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102. On 14 May 2021 Ms Jenkins emailed to the claimant a letter responding to the claimant's email (the 14 May Letter). Ms Jenkins sought to address each of the alleged claims made by the claimant reasoning why she did not accept the allegation.

103. In relation to the alleged breach of animal welfare law, the 14 May Letter stated:

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"As mentioned above, we have invited you to cooperate with our whistleblowing investigation which you have declined. You have no legal right in an employment tribunal to bring a claim for breaches of animal welfare law. Your threat to report the alleged breaches of animal welfare law to external agencies, including the Charity Commission, is simply that, a threat. In the event that you do so, and/or bring legal proceedings against the Charity, we

will seek to bring your letter of 29 March 202[1] to the attention of the relevant authorities.”

104. Ms Jenkins further confirmed in the 14 May Letter that:

5 *“As a result of the above, the Charity is not willing to engage in settlement discussions and will continue to manage your absence in accordance with its policies with the aim of facilitating your return to work as soon as possible (with which we encourage you to cooperate with). If you are still minded to pursue claims against the Charity, we suggest that you take legal advice before doing so, and it would be helpful if you could set out exactly the legal*
10 *basis for your potential claims and how you have quantified your losses, before you issue proceedings.”*

Resignation

105. On receipt of the 14 May Letter, the claimant replied by email that “*she was horrified by the threatening tone*” and content of the letter. The email
15 continued:

“I am shocked that the Charity that I have belonged to for the past 15 years is denying any responsibility for the massive personal impact this situation has had on me and the damage to my health.

Therefore I am writing to confirm that I will be resigning from my current role with immediate effect. As my employment contract states, I am providing 3
20 *weeks of notice. I expect all monies to be paid to me including TOIL and holiday pay.*

I have been advised to resign due to a breach of contract and believe this to be constructive dismissal. I raised a grievance about this issue in December
25 *2020, which wasn’t satisfactory or appropriate in resolving this matter.*

To remind the charity, it started with 2 senior managers being unable to give me a valid justification or reason for not placing me, the highest performing member of the team, in a vacant position identical to the role that I was asked to leave. A role that is still vacant, in cat welfare charity, which has huge cat

welfare issues, starting at the door of your chair of trustees - and readily known across your operations and veterinary team.”

Post Termination

106. At the date of termination, the claimant was 40 years of age. She had been
5 continuously employed by the respondent for three years. The claimant's net
pay in her substantive role was £441.57 at date of termination. The claimant
received eight weeks pay being pay in lieu of notice (£5,233.52).

107. The claimant started applying for new employment from June 2021. The
claimant was employed as an employment advisor for The Action Group in
10 January 2022 until 5 May 2022. The claimant set up a self-employed business
as a consultant around June 2022. The claimant was in receipt of universal
credit.

Observations on Witnesses and Conflicts of Evidence

108. The Tribunal considered that the claimant gave her evidence honestly and
15 answered questions as best as she could in cross examination. The Tribunal's
impression was that the claimant was conscientious and highly committed to
cat welfare. There was no doubt from the contemporaneous correspondence
and the evidence of the respondent's witnesses that the claimant was held in
high regard not only by her managers but by those she managed. The
20 Tribunal considered that the claimant remained aggrieved about what she
perceived as a lack of transparency about the decision making process
surrounding the vacant CWM role. The Tribunal had no doubt about the
devastating impact that the decision to terminate the secondment had on the
claimant. However, she appeared unable or unwilling to recognise the impact
25 of the COVID-19 pandemic and the departure of other managers had on the
respondent's business.

109. The Tribunal considered that Ms Hill gave her evidence candidly and was a
credible and reliable witness. Ms Hill was strongly supportive of the claimant
and believed that the claimant should be appointed as a fourth permanent
30 CWM. The Tribunal's impression was that while there was no doubt that was
what Ms Hill believed, the tone of her email of 5 December 2019 did not

appear to recognise the sensitivity of the situation in relation to other CWMs and in particular Ms Osbourne who was also covering maternity leave. This may have been due to the fact that Ms Hill was not line managing Ms Osbourne. This did however have repercussions as it was understandable that Mr Elliott was concerned at the tone of the letter that was being sent to the claimant in January 2020, especially as it went beyond what he considered was agreed at the Senior Operations Team meeting in November 2019.

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110. The Tribunal also considered that Ms Gallagher gave her evidence honestly and based on her recollection of events. Her evidence was not significantly challenged in cross-examination. The Tribunal accepted that the system of recording the number of cats in the respondent's care was reliant on the diligence of people inputting information on the system.

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111. The Tribunal considered that the respondent's witnesses gave their evidence honestly and based on their recollection of events. Their evidence was consistent with contemporaneous documents. The Tribunal felt that the witnesses held no animosity towards the claimant. If anything, the Tribunal felt that they had high regard for the claimant and were disappointed that their attempts to resolve matters were unsuccessful. All the respondent's witnesses patiently answered the claimant's questions as best they could.

112. The Tribunal considered that in relation to the material facts as found, the most significant conflicting evidence was in relation to what the claimant was told about returning to her substantive role.

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113. The area that the respondent described as "the North" was large. There was no dispute that in late November 2019 Mr Beazley agreed to a fourth CWM (fixed term post) for "the North". Ms Hill decided to offer the new fixed term post to the claimant and she accepted verbally.

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114. Given that the claimant was already based in the North covering Ms White's maternity leave the Tribunal considered that in line with the Recruitment and Selection Policy the claimant was the one potential candidate for this fixed term role which was expected to dovetail with Ms White's return from

maternity leave. The Tribunal's impression from the email sent by Ms Hill on 5 December 2019 was that that the claimant and Ms White already knew about the decision. Ms Osborne and Ms Sutherland were being informed and Ms Brown who was on maternity leave was to have the information "*passed on*" by Ms Osborne.

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115. The claimant's evidence was that she was told by Ms Hill in the "Good News Email" that there would be a review of her CWM role as part of the strategic Operations review in late 2020. Mr Elliott did not dispute that Ms Hill sent the "Good News Email" to the claimant nor that in early 2020 Ms Hill was taking the lead on the Cat Welfare Team as he was focussing on strategy. The Tribunal had no doubt that in January 2020 Ms Hill considered the Cat Welfare Team a priority and was strongly supportive of gathering evidence and making a business case for the permanent appointment of a fourth CWM. While Mr Elliott and Mr Beazley had concerns about the wording of the "Good News Email" they were aware that it was sent to the claimant and her fixed term contract was extended until 31 December 2020.

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116. The Tribunal considered that the claimant who reported to Ms Hill was highly regarded by her and was in no doubt that the claimant's expectations were raised by Ms Hill in December 2019 that she would be appointed to this role on a fixed term basis with a plan to review it in quarter 4 when an Operations staffing review was already scheduled. This was confirmed on 22 January 2020.

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117. It was not disputed that in January 2020 there was an Operations review scheduled for September 2020 or that the claimant's contractual position was that the fixed term was extended until 31 December 2020 at the end of which she would return to her substantive role.

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118. Ms Hill's evidence was that she remained committed to supporting an additional CWM role and recommended this on her departure. She accepted in cross-examination that following the COVID-19 restrictions in 2020 the respondent needed to take decisions that were sensible and reasonable. The EMT had to make key decisions in all areas about the respondent's priorities.

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119. The Tribunal considered that while Ms Hill did not leave the respondent's employment until November 2020 she ceased to be involved in the management of the Operations Directorate from early September 2020. Due to COVID-19 restrictions there had been no wider strategic review and there was unlikely to be one until mid-2022. The decision about not seeking approval for a permanent fourth CWM post was taken in late September 2020 principally by Mr Elliott in consultation with Mr Beazley and Ms Pritchard.
120. The claimant said that the letter of 4 December 2020 stating that she would return to her substantive post "*came out of the blue*" as she was still waiting to hear if her post was to be made permanent and Ms Sutherland's post was still vacant.
121. Mr Elliott and Ms Pritchard said that the claimant knew in late September 2020 that her fixed term post was not being made permanent. Mr Elliott had inadvertently told her during a telephone call on 23 September 2020 and Ms Pritchard had discussed it at a meeting on 6 November 2020.
122. The Tribunal considered that it was highly likely that around late September 2020 Mr Elliott and Ms Pritchard decided that they were not going to seek approval from the EMT for a permanent fourth CWM. The Tribunal's reasoning was that there had been no Operations Directorate or charity-wide strategic review nor was one to take place before 31 December 2020. There was no reason for the claimant not to have been informed of this. The Tribunal considered that having made this decision it was more likely than not that this was communicated to the claimant particularly given the terms of the 13 November Email.
123. The claimant also believed that her continuing in the role of CWM was related to whether Ms Sutherland remained covering a role that she was trialling for three months. Mr Elliott and Ms Pritchard said that they explained to the claimant that there was a possibility that if Ms Sutherland did not return to the substantive role there would be a vacancy but no decision was taken at that point that would be the case or what would happen to that role. Against this background the Tribunal could understand the claimant's uncertainty about

whether she was returning to her substantive post. However the Tribunal considered that the position was clarified in the 13 November Email.

124. While there was no disputed evidence about the following the Tribunal felt that it was appropriate to make observations.

5 125. The Tribunal heard evidence about other employees in particular other CWMs. Their contractual documentation was not produced. There was however no dispute that under the pilot, there were three CWM posts which were fixed term. Those posts were made permanent in January 2020. At that time, the claimant was on secondment covering the maternity leave of Ms
10 White. That secondment was extended on 1 April 2020. While the letter extending the claimant's fixed term contract appeared to be pro forma maternity cover letter referring to a fixed term or "*until the return of the postholder*", the Tribunal did not understand there to be a dispute between the parties that notwithstanding Ms White's return from maternity leave the
15 claimant's fixed term contract continued as it had been agreed in November 2019 there would be a fourth CWM on a fixed term basis until 31 December 2020 which would be subject to a broader resourcing discussion that was scheduled for around September 2020.

Submissions

20 126. Ms Macara helpfully provided written submissions. She addressed the Tribunal orally and the claimant was given time and an opportunity to respond. The Tribunal has carefully considered submissions that were made and has endeavoured to address the points raised during deliberations.

Deliberations

25 127. The Tribunal started its deliberations by referring to the statutory provisions in section 94 of the ERA. The claimant's claim, commonly known as constructive dismissal, requires the claimant to meet four conditions.

(a) There was a fundamental actual or anticipatory breach of contract by the respondent.

(b) That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of instances which justify him leaving.

(c) The claimant must leave in response to the breach and for some other connected reason.

(d) The claimant must not delay too long in terminating the contract in response to the respondent's breach otherwise she may be deemed to have waived the breach and agreed to vary the contract.

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128. The claimant's position was that she resigned following a "last straw". She relied upon a series of acts by the respondent which individually and taken together amounted to a fundamental breach of contract. The Tribunal considered that a course of conduct could cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident even though the last straw by itself did not amount to a breach of contract.

129. The claimant relied upon the implied term of mutual trust and confidence which is found in every contract of employment.

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130. The Tribunal reminded itself of the case authorities to which it had been referred. A decision whether there has a breach of contract by the respondent sufficient to constitute the claimant's constructive dismissal is one of mixed law and fact. The Tribunal noted that an employer will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. This is an objective test which the subjective perception of the employee can be relevant but is not determinative.

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131. The test is demanding. Simply acting in an unreasonable manner is not sufficient. The qualifying word "damage" is "seriously". It covers a diversity of situations in which a balance has to be struck between an employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly or improperly exploited. The test is stringent. The conduct must be such that an employee cannot be expected to put up with it. The employer

demonstrates by its behaviour that it is abandoning altogether to perform the contract. These words indicate the strength of the term. It is not a test that the employer has to behave reasonably towards his employees. It should be borne in mind that conduct however reprehensible, may not necessarily result in a fundamental breach of contract.

Cat Welfare Manager Role

132. The Tribunal considered its findings about the claimant's return to her substantive post in January 2021 and whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

133. In September 2020 the claimant had been seconded to the role of CWM until 31 December 2020. She covered the North area which she shared with Ms White on her return from maternity leave. The claimant was told that her fixed term contract would be subject to review in December 2020 which would coincide with a strategic review of the Operations Directorate. Around 23 September 2020 Mr Elliott told the claimant that the fixed term contract was not being made permanent and there may be a vacancy for one of the existing permanent CWM roles. The claimant received written confirmation on 4 December 2020 that she was returning to her substantive post as Adoption Centre Manager on 1 January 2021. The claimant became aware in December 2020 that one of the existing permanent CWM roles was to remain vacant and was not being backfilled. There had been no strategic review and this was not anticipated to take place until later in 2021.

134. The claimant submitted that in December 2020 she was treated less favourably than permanent employees. This was not the claim before the Tribunal. The claimant considered that the respondent had not shown a fair reason for not renewing her fixed term contract; there were no written reasons for that decision or consultation.

135. The Tribunal considered that in January 2020 Ms Hill raised the claimant's expectations that following a review in December 2020 her fixed term secondment contract to the role of CWM could be made permanent. The

Tribunal felt that Ms Hill was genuine in her belief at that time but was not convinced that Mr Elliott and Mr Beazley shared that optimism. This was not a reflection on the claimant but rather the uncertainty of the outcome of the strategy review, the needs of other directorates and the organisation's priorities. Notwithstanding Ms Hill's comments to the claimant the Tribunal was satisfied that there was no assurance given to the claimant that her fixed term secondment contract would be made permanent in December 2020.

136. The Operations Directorate wide strategic review did not take place in September 2020. While the Tribunal appreciated the claimant's disappointment given the impact this had on her role, it was understandable that the COVID-19 pandemic and ongoing restrictions meant that the organisation wide strategic work that was to inform the Operations Directorate wide strategic review had not taken place. Accordingly looked at objectively it was reasonable for that review to be delayed until that work had been done.

137. While a decision about the Cat Welfare Team could also have been delayed the Tribunal considered that viewed objectively the respondent had reasonable and proper cause to consider the structure of the Cat Welfare Team because of the changes in the Senior Operations Team; the return of two of the CWMs from maternity leave; the absence of another CWM on trial in another post; and the scheduled ending of the fixed term contract CWM post.

138. The Tribunal appreciated that the respondent could have extended the fixed term CWM role until the Operations Directorate wide strategic review in 2021. However in the Tribunal's view the respondent had reason to make decisions about workforce planning in 2020 as the Senior Operations Team was effectively two managers in interim posts; priorities had changed while COVID-19 restrictions were in place; and the COVID-19 restrictions looked set to continue in some form in early 2021. The Tribunal felt that Mr Elliott understood Ms Hill's desire and aspiration for the Cat Welfare Team but in September 2020 the focus was on remote working rather than face to face working and for the need to look at ways of providing front line support in different ways.

139. While the communication to the claimant was vague about what was happening in relation to the potentially vacant permanent CWM post the Tribunal considered that the respondent had reasonable and proper cause to speak to Ms Sutherland about her intention to return to her substantive role after trialling another post. The Tribunal also considered that the respondent had had reasonable and proper cause to look at whether the role of CWM made vacant by Ms Sutherland not returning to it, should be left vacant or backfilled.
140. A number of posts had been left vacant as there were various waves of recruitment freeze. While the CWM post could have been filled, Mr Elliott explained the rationale for not doing so. He considered that the focus should be on providing additional support at the level of CWA whose management did not need to be along geographical lines.
141. In any event had Mr Elliott decided that the vacant permanent CWM post should have been filled the Tribunal agreed with the respondent's submission that it was not automatic that the claimant would fill that vacancy as Ms Osbourne was also a potential candidate.
142. The claimant submitted that consultation was normally undertaken. The Tribunal noted that there did not appear to be consultation with all the CWT about the new fixed term CWM post in January 2020. In September 2020 Ms Hall was involved from HR and she made no reference to any practice of consultation. While Mr Elliott could have consulted about this the Tribunal did not considered that there was a requirement for him to do so.
143. The Tribunal also agreed with the respondent's submission that the claimant was not demoted. Her fixed term secondment, that had already been extended, came to an end. The claimant returned to her substantive post. While there was no doubt about the claimant's disappointment the Tribunal considered that there was reasonable and proper cause for the respondent to do so. Indeed this was what happened to Ms Osbourne when her fixed term secondment came to an end when Ms Brown returned from maternity leave in September 2020.

Diary Invite

144. The Tribunal turned to consider the diary invite and whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
- 5 145. The Tribunal accepted Mr Cottis' evidence that he created the invite as a private invitation. On becoming aware of the invitation appearing in a shared calendar Mr Cottis took immediate steps to contact IT, rectify the situation and apologised to the claimant. The Tribunal considered that this was a genuine error by Mr Cottis.
- 10 146. While the Tribunal did not understand the claimant to believe that this had been a deliberate act by Mr Cottis the claimant considered this to be a serious breach of her personal data and raised the matter at the Grievance Meeting. By then matters had been compounded because the diary invite for the Grievance Meeting was sent to the claimant's email address which unknown
15 to the person sending the invite had an automatic redirect on the email account because the claimant was sick absent and the Adoption Centre needed someone covering the inbox. Although the invitation was private another colleague received it.
147. The respondent took the claimant's complaint about breach of data protection
20 seriously. The concerns were discussed at the Grievance Meeting and investigated as part of that process. Advice was sought from the Information Governance Manager and the claimant was advised of this as part of the grievance outcome. Ms Field also invited the claimant to explore the concerns further with the appropriate specialists within the organisation. The claimant
25 did not pursue this.
148. While it was unfortunate and no doubt disappointing that on two occasions
30 colleagues saw the meeting invitations the Tribunal noted that the invitations were generic and there was no sensitive information shared. The Tribunal agreed with the respondent's submission that given the roles held by the claimant the information provided in the diary invitations did not necessarily relate to a grievance raised by the claimant. When viewed objectively the

Tribunal did not consider this was conduct likely to destroy or seriously damage the relationship of trust and confidence.

Alleged "Blackmail"

5 149. Next the Tribunal turned to consider whether Ms Pritchard accused the claimant of blackmailing volunteers into praising the claimant with a view to undermining and humiliating the claimant. The claimant accepted that when she sent an email to branches on 15 December 2020 confirming she that she was leaving the CWM role she had referred to being "*no longer required in the role*" and "*to say I am broken hearted is an understatement*" and "*I will painfully miss working with you all*". The claimant agreed that this was emotive language. Ms Pritchard accepted in her evidence that she asked the claimant about the email during her one to one meeting on 18 December 2020.

15 150. The claimant's position was that Ms Pritchard was suggesting that the responses gave the claimant such good feedback because she used emotive language.

20 151. The Tribunal appreciated that this was the claimant's perspective on the discussion. There was no doubt that the claimant was highly regarded by her colleagues. The Tribunal's impression was that the language used by the claimant was in keeping with her temperament, enthusiasm and passion for her job. This was apparent at the final hearing and the Tribunal felt that Ms Pritchard would also have been aware of this from the one to one meetings that she had with the claimant between September and December 2020. The Tribunal's impression was that Ms Pritchard had a much more subdued management style. She knew that the claimant's departure from the CWM role would be challenging for any replacement but particularly for someone who had been absent from the business for a significant period of time and had not built up the same rapport with colleagues that the claimant had. The Tribunal felt that it was a challenging situation for Ms Pritchard to manage. However Ms Pritchard had reasonable and proper cause to explore with the claimant how Ms White's appointment would be received by the branches particularly given the excellent relationships that the claimant had and the

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obvious disappointment that was being expressed about the claimant leaving the role.

Newsletter

- 5 152. The Tribunal turned to consider whether the acting manager of the Forth Valley Adoption Centre had reasonable and proper cause for including in a newsletter in or around 29 January 2021 information that the claimant was off work on long term sick. The Tribunal did not understand the claimant to dispute that she was on sick leave at this time but her position was that this information should not be included in the newsletter and in any event she had
10 not been absent for a long period.
153. The Tribunal considered that what amounts to long term sick absence can vary from organisation to organisation. What was not disputed was that the claimant was scheduled to return to the Adoption Centre as manager on 1 January 2021 and did not do so. This was the claimant's substantive post and
15 had been covered on a temporary basis while she was on secondment to the CWM role. The Tribunal considered that while the claimant was undoubtedly distressed reading the newsletter it was understandable viewed objectively that colleagues and others involved at the Adoption Centre needed to be aware who was managing the Adoption Centre in the claimant's absence
20 particularly as she had not been involved in the role for some time, her return had been anticipated in January 2021 and no doubt there would be a degree of unease for others who worked there as to what was happening and when.
154. There were no details given for the sickness absence, the information was given in the context of informing people who they should contact at the
25 Adoption Centre and it was not intended to cause the claimant any harm. The Acting Manager also apologised for any distress that was caused the claimant and said that their intentions were well-meaning to provide clarity for volunteers. The Tribunal considered that there was reasonable and proper cause for the information that the claimant was on sick leave to be included
30 in the newsletter.

Grievance Disclosed to Volunteers

155. As previously explained the invitation to the Grievance Meeting was sent to the email address for Forth Valley Adoption Centre Manager. This was the claimant's substantive post. The claimant was on sick absence so the invitation was received by the acting manager at the time. The claimant was contacted by a volunteer at the Forth Valley Adoption Centre who expressed concern for her. The volunteer was aware that the claimant was absent from work due to ill health and had raised a grievance. The claimant believed that her personal affairs were being discussed at the Adoption Centre

156. The Tribunal appreciated that the claimant was upset about receiving this call. The Tribunal accepted that the respondent asked the acting manager who had sight of the grievance invite to keep matters confidential. There was no information to suggest that the acting manager had breached this confidence nor had the detail and nature of the grievance been disclosed to any third party.

157. The Tribunal did not consider that viewed objectively there was any ill intent on the respondent's part. The respondent genuinely was trying to deal with this matter confidentiality at a time when due to pandemic restrictions there was limited ability to have face to face meetings with people and remote meetings were being arranged by Teams invites.

Final straw - 14 May Letter

158. The claimant initiated a grievance process. The Tribunal did not understand the claimant to be suggesting that the way in which the respondent handled the grievance process amounted to a fundamental breach of contract. While the claimant took issue with Ms Field's failure to interview all the witnesses, this was addressed during the process. The claimant raised a concern about Ms Davis conducting the Grievance Appeal Meeting. However, the claimant agreed to proceed notwithstanding this concern having been raised.

159. The Tribunal noted that the Grievance Meeting was conducted at director level and that all the witnesses who were involved in the decision making process were interviewed and their comments recorded in the Grievance

Investigation Report. The Tribunal also noted that Ms Davis although not part of the line management was independent and considered the matters raised by the claimant at the Grievance Appeal Meeting.

- 5 160. The claimant made the request to have a protected conversation. The Tribunal also noted that this request was made before the Grievance Appeal Meeting and at its conclusion before the outcome was communicated to the claimant. The claimant was also represented throughout this period by her trade union representative.
- 10 161. It was not disputed that the claimant was asked to engage in the whistleblowing process on 1 March 2020 and to provide evidence of the animal welfare concerns that she had raised in her Grievance Appeal. The claimant did not wish to engage in this process and therefore did not provide the respondent with the information requested. The claimant accepted that the grievance process was not the appropriate forum in which to discuss any
15 animal welfare concerns that she had.
- 20 162. The claimant's without prejudice proposal was intended by her to be a "*shock factor*". She hoped that this would prompt the respondent into action. Ms Jenkins was shocked not only at the amount sought by the claimant but also at the way in which the claimant inferred that if she did not reach an agreement the claimant would seek to raise her animal welfare concerns externally.
- 25 163. The Tribunal understood that having sought to provide the claimant with details and appropriate internal contacts with whom to raise her animal welfare concerns, the respondent would be concerned that the claimant did not wish to pursue the animal welfare concerns with the relevant individuals and provide the evidence in her possession. While this was entirely a matter for the claimant the Tribunal could understand the respondent's disappointment that the claimant did not wish to engage in the process which would allow the respondent to investigate and consider any evidence. The Tribunal considered that the claimant was entitled to explore the termination
30 of her employment in a protected conversation. However, the Tribunal appreciated the respondent's apprehension that during the protected conversation the claimant's position was that if the respondent did not agree

to her financial settlement she would report her animal welfare concerns to the relevant external agencies.

- 5 164. Viewed objectively the Tribunal felt that the respondent was in an untenable position. The Tribunal could therefore understand why the respondent felt that it had to respond to each of the allegations set out in the 29 March Email and clarify that if the claimant had evidence of serious breaches of animal welfare then she should present this to the respondent to allow them to investigate it properly and not to use it as part of a settlement request.
- 10 165. While the respondent was not willing to engage in a settlement discussion there was no suggestion in the 14 May Letter that the respondent did not wish to continue to employ the claimant. On the contrary in the 14 May Letter the respondent said that it wished to continue to manage the claimant's sick absence in accordance with its policy with the aim to facilitating the claimant's return to work as soon as possible.
- 15 166. While the Tribunal appreciated that the claimant was shocked at the 14 May Letter the Tribunal considered that an objective reading of the 14 May Letter was that if the claimant decided to proceed with a claim to an Employment Tribunal or to whistle blow to external authorities then the respondent would in those proceedings refer to the 29 March Email. The claimant intended that the 29 March Email shocked the respondent and that was the effect. The Tribunal felt that the 14 May Letter was a detail reply to the 29 March Email. It was not in breach of contract or in any way objectively acting in a way that showed that the respondent was abandoning or refusing to deal with any animal welfare concerns or indeed the contract of employment. The Tribunal did not consider that the 14 May Letter was in any way blameworthy or unreasonable.
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167. The Tribunal looked at the respondent's conduct as a whole in order to determine whether it was such that its effects, judged reasonably and sensibly, were such that the claimant could not be expected to put up with it.
- 30 168. In the Tribunal's view, the claimant was a senior employee who had been a valued member of the team. The claimant had a permanent position and her

fixed term secondment was to cover maternity leave and then ensuring there were sufficient resources. The claimant's expectations had raised that she would be permanently appointed in the CWM role but this was not guaranteed. Given the impact of the COVID-19 restrictions the decisions to delay strategic wide reviews were understandable and reasonable. The respondent was entitled to decide which fixed term posts were to be made permanent and whether any permanent posts should remain vacant. While the respondent's communications with the claimant were frustrating and could have been improved there was reasonable and proper cause for the conduct relied upon by the claimant. The claimant followed the grievance process. There was no evidence to suggest the respondent did not wish to deal with the issues raised by the claimant or that the respondent wanted the claimant to leave. To the contrary the Tribunal's impression was that the respondent was seeking the claimant's cooperation in relation to any animal welfare issues. She was a highly regarded employee and that they were keen to have her return to work when she was well enough to do so.

169. The Tribunal was satisfied that the respondent's conduct as a whole was not a breach of the implied term of trust and confidence entitling the claimant to resign.

170. Being satisfied that there was no fundamental breach of contract, the Tribunal did not require to consider whether the claimant had affirmed the contract following the breach.

171. The Tribunal did not need to consider the issue of remedy. The claim of constructive unfair dismissal was dismissed.

Employment Judge: S Maclean
Date of Judgment: 12 October 2022
Entered in register: 14 October 2022
and copied to parties