



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105474/2023

10

**Held in Edinburgh (in person) on 30-31 January 2024 and (by CVP) on 6
March 2024**

Employment Judge Murphy

15

Ms K Wilson

**Claimant
Represented by
Mr R Morton -
Solicitor**

20

Lucinda Ellery Ltd

**Respondent
Represented by
Ms K Duffy -
HR Manager**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30

The Judgment of the Tribunal is that the claimant was (constructively) unfairly dismissed. The respondent shall pay to the claimant FIVE THOUSAND THREE HUNDRED AND THREE POUNDS STERLING AND TWENTY-ONE PENCE (£5,303.21).

35

REASONS

Introduction

1. The first two days of this final hearing took place in person in the Edinburgh Employment Tribunal. It was agreed to reconvene for the third day of the hearing by CVP since the majority of the remaining witnesses were not expected to attend in person. There were no objections to this format.
2. The claimant resigned from her employment with the respondent with effect from 22 September 2023. She complains of (constructive) unfair dismissal. The respondent denies having (constructively) unfairly dismissed the claimant.
3. The claimant gave evidence on her own behalf. The respondent led evidence from Kerry Duffy, HR Manager, Danielle Morton, Manager of the respondent's Edinburgh Studio, Darren Morgan, Manager of the respondent's Edinburgh Studio, Julie Lang, Operations Manager based in London and Chantelle Sheehan, Regional Studio Manager. Witness names and names of others referred to in evidence are abbreviated as follows in the judgment.

The claimant	C
The respondent	R
Chantelle Sheehan	CS
Danielle Morton	DIIM
Darren Morgan	DnM
Kerry Duffy	KD
Kima Hailes	KH
Julie Lang	JL

4. Evidence was taken orally from the witnesses. A joint set of productions was lodged running to 195 pages. Oral submissions were given by Mr Morton and Ms Duffy following the conclusion of the evidence on 6 March 2024.

5 **Issues to be determined**

5. There was a preliminary discussion on 30 January 2024 to clarify the issues to be determined by the Tribunal in this case. After discussion with the representatives, these were identified as follows:

- 1) Was the claimant dismissed?

10

- i. Did the respondent do the following things:

15

1. At an investigatory meeting on 23 August 2023, did KD fail to put specific allegations to the claimant of her alleged poor performance and fail to put any allegations of client complaints against her?

20

2. Did DM and DNM fabricate allegations of complaints against the claimant by clients, AM, TK, AC and MM for the purposes of a disciplinary investigation?

3. Did R choose to pursue a disciplinary hearing in relation to allegations which ought to have been treated as a capability issue?

25

4. Did R give C less than 48 hours' notice of a disciplinary hearing to be held on 30 August 2023?

5. Did R anonymise statements provided by DIIM and DnM before providing these to C in advance of the disciplinary hearing?

6. Did R remove names of clients alleged to have complained from the document given the file name

Additional.pdf sent to C before the disciplinary hearing?

5 7. Did JL omit or decline, during the disciplinary hearing, to identify the clients alleged to have complained about C when asked?

8. Did R fail to give adequate specification of this and other allegations against C at or before the disciplinary hearing on 30 August 2023 and fail to give C an adequate opportunity to respond?

10 9. Did JL rush the disciplinary hearing on 30 August?

10. Was the outcome of the disciplinary hearing predetermined? (Did R have an agenda to demote the claimant pursued through the disciplinary process)

15 11. Did R issue a first and final written warning to C and demote her when these sanctions were unwarranted?

ii. Did those acts or omissions, or any of them, breach the implied term of trust and confidence? The Tribunal will need to decide:

20 1. Whether R behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

25 2. Whether it had reasonable and proper cause for doing so.

iii. Did C resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for C's resignation.

- iv. Did C affirm the contract before resigning? The Tribunal will need to decide whether C's words or actions showed that they chose to keep the contract alive even after the breach.
- 5 2) If C was (constructively) dismissed, R does not argue that the reason for the breach was a potentially fair reason.
- 3) If C was (constructively) unfairly dismissed, she seeks compensation only. She does not seek reinstatement or re-engagement. If there is a compensatory award, how much should it be? The Tribunal will decide:
- 10 i. What financial losses has the dismissal caused the claimant?
- ii. Has the claimant taken reasonable steps to replace their lost earnings? R does not argue that C has unreasonably failed to mitigate her losses in this case.
- 15 iii. For what period of loss should C be compensated?
- iv. R does not argue that there is a chance C would have been fairly dismissed anyway if a fair procedure had been followed.
- 20 v. Did the ACAS Code of Practice on Disciplinary and Grievance apply? (R concedes that it did in relation to the disciplinary process against C).
- 25 vi. Did R or C unreasonably fail to comply with it? C asserts that R unreasonably failed to comply with the COP in relation to various aspects of the disciplinary process. R asserts that C unreasonably failed to comply with the COP by failing to raise a grievance about her concerns before resigning.

- vii. Is it just and equitable to increase or decrease any award payable to C? If so, by what proportion, up to 25%?
- viii. If C was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? R says she did so by failing to perform to the standards required of a supervisor.
- ix. If so, would it be just and equitable to reduce C's compensatory award? By what proportion?
- x. Does the statutory cap apply?

- 4) What basic award is payable to C, if any?
- 5) Would it be just and equitable to reduce the basic award because of any conduct before the dismissal? R argues a reduction is warranted by C's failure to perform to the standards required of a supervisor. If a reduction is warranted, to what extent?

Findings in Fact

6. Having carefully considered the evidence, the following facts and any further findings in fact in the 'Discussion and decision' section were found to be proved on the balance of probabilities. The facts found are those necessary to my determination of the issues. They are not a full chronology of events.

Background

7. R is a company which specialises in providing hairdressing services for people experiencing hair loss, including the building and fitting of wigs and extensions as well as traditional hairstyling services for their clients. It has 6 branches in the UK. It employed at the material time approximately 125 people. It has an internal HR function, based at its headquarters in London,

comprising the HR Manager, Kerry Duffy (KD), and her assistant, Kima Hailes (KH).

8. The respondent has two directors. Below them in the senior management team sit KD, HR Manager, and Julie Lang (JL), Operations Manager. The senior management is based in the London HQ. R's practice is that disciplinary investigations and hearings are usually conducted and chaired not by local studio managers but, typically, by KD and JL. Chantelle Sheehan (CS) is based in London and is R's Studio Operations Manager. CS manages R's London studio and provides support and training at its other studio locations including by visiting other studios.
9. C was employed at R's Edinburgh studio. She started employment on or about 2 April 2016 as a Saturday girl. When she started, she had no prior experience in hairdressing or working in R's hair loss specialism. She was later appointed as a fulltime assistant and trained inhouse to become a Technician. A Technician refers to technical skills in the building of wigs and of adjusting (i.e. tightening) and realigning of these as well as, in C's case, applying hair extensions. In or around August 2022, C was promoted to Supervisor in the Edinburgh Studio.
10. There was some instability in the management structure at the Edinburgh studio at the time of C's promotion, and in the 12 months that followed. Darren Morgan (DnM) was a manager at the material time, but, when C was promoted, he was absent on bereavement leave. Robin Wiseman, the other manager at Edinburgh was also off (on sick leave) at the time. In the absence of these managers, senior management in London identified a promotion opportunity at the Studio in which C expressed her interest. Her promotion was confirmed during the studio managers' continuing absence so that she was, for some period the most senior member of the team attending work in the Studio.
11. Robin Wiseman left at some stage and a replacement manager, Shannon Watters (SW), was appointed. DnM returned to work after his bereavement leave so for a period, DnM and SW were managing the salon with C below

5 them as their Supervisor. Danielle Morton (DIIM) was a stylist who had been employed at R's London studio for around 7.5 years. At the end of July 2022, DIIM worked at the Edinburgh salon for a week or two to cover the annual leave of SW. She then returned to London for one week during which SW left employment with R. DIIM that same week was offered the position of Manager at the Edinburgh Studio. She accepted and began working in that capacity alongside DnM from early August 2023. Other than her brief time covering SW's annual leave, DIIM had no prior knowledge of C or her work.

10 12. At the time C had been promoted the previous year, in August 2022, she was not provided with a job description for her Supervisor role. She was not made aware one existed. She was not provided any training regarding her duties as supervisor. She was told at the time of her promotion by senior management in London that she was to do her Lead Technician duties "but also to help out with the girls" (meaning the more junior team members in the Edinburgh Studio).
15 Until the events of August 2023, C did not receive any feedback or training from the various managers who were *in situ* from time to time regarding her performance as Supervisor. C had sometimes asked DnM or SW for training on certain managerial tasks but found they were not keen to involve her. Before her departure, SW said to C on a few occasions that with herself and DnM in place as managers, there was no need for a Supervisor in the Edinburgh studio. In July 2023, when DIIM came up from London to cover SW's annual leave, she also said to C words along the lines that she didn't see the need for the Supervisor role in Edinburgh.

25 13. As at August 2023, in the Edinburgh studio, there were two managers (DIIM and DnM), a Supervisor (C), one or more Lead Technicians with Technicians below them and Assistants below the Technicians. At the material time, C was working full time for R. She had no disciplinary record. She was not subject to any performance improvement plan. No issues had previously been raised with her regarding her performance.

30 14. R published a Disciplinary Policy and Procedure at the material time. It included the following text relating to disciplinary sanctions:

Disciplinary sanctions

The level of the disciplinary sanction, if any, will be determined by the severity of the offence. The company will normally select one of the following:

5

Written warning

A written warning will usually be applied first step of corrective action following unsatisfactory performance or conduct offences.

The Company will define the unacceptable acts and explain the conduct or standards required in the future. ...

10

Final written warning

A final written warning is usually applied after a written warning has been given and performance or conduct has not improved but may be applied after a more serious first or second offence.

15

You will be advised in writing that a failure to improve the standard of conduct or meet performance results in dismissal. ...

Dismissal

Dismissal occurs when your employment is terminated either with or without notice. Dismissal without notice ...is restricted to cases of gross misconduct.

20

The company reserves the right, at its complete discretion, to impose a sanction short of dismissal if it is deemed appropriate. This may include demotion, transfer to a different post or another appropriate sanction. ...

25

Events in August 2023

- 5 15. Following her time in Edinburgh in July 2023, covering annual leave for SW, DIIM returned to London and discussed what she had observed in Edinburgh with colleagues at HQ. She felt that the work across the board in the studio was not up to London standards. She told the directors her concerns. She suggested CS visit Edinburgh to witness the work.
- 10 16. The next week, SW left and DIIM was offered a manager post in Edinburgh which she took it up in early August. CS visited the Edinburgh salon and spent a week with the team there at some point between 1 and 11 August 2023. During her visit, CS said to C words along the lines, *"I don't see the need for a Supervisor when there's two managers here already. It's such a small team; there's just no need."*
- 15 17. On the first day of her visit, CS observed the team throughout the day without intervention or feedback. On the second day, CS spoke to the team collectively in the morning in the office. She said she was disappointed that the team were not starting on time, that they were not in uniform and were not doing their preparatory work on time. She told them she was there to observe everyone. She said she wanted them to start on time and to set up efficiently. She said she would be assessing their technical work.
- 20 18. Later, on the second day of her visit, CS observed C performing a hair extension job on a client. The client had been booked in for 16 extensions. C applied 14 extensions as she believed that number sufficed for the client's needs. CS explained a better effect would be achieved by applying the full 16 extensions but making the individual extensions smaller. CS was satisfied C was capable of working in the way she requested and C indicated she was happy to do so.
- 25 19. On another occasion during the week of CS's visit, CS observed C doing a job which involved pulling strands through a mesh. CS was concerned that the connections were too large, meaning that the sections of hair being pulled
- 30

through were two big. CS showed C how to approach this better on a 'dolly head'. C was receptive to the feedback. She explained her way was just how she had been shown. She told CS she was happy to follow CS's approach in the future. CS had no other noteworthy interactions with or observations of C during the week of her visit.

20. Following her return to the London studio, CS sent an email to JL, Operations Manager, on 11 August 2023. It was headed 'Edinburgh feedback from observations'. She set out some feedback about four specific employees. For C, the feedback included criticisms. She said:

Kim

- *Needs her role established to her and asked if she feels she is doing this role now, she can't be seen to be doing less than her team members which has been noted by majority of her team and her managers.*
- *Extensions- sizes are not medis and need to be signed off by Darren and Danielle whilst we are doing quality control over the next six months.*
- *Ilace systems [i.e. wigs] are not to the highest standard they can be considering how long she has been at the company and her role. She needs to follow the guidelines and tips I gave her and send over completed pulling through on Ilace to maintain the same standard she was shown during my training week.*
- *Proactive when it is quiet time (less phones and sitting around, supporting Darren and Danielle more)*
- *Working on speed of jobs and utilising the time booked in the diary (working too quick company losing money, doing too big extensions and less than the client is booked also costing company money) we don't mind if new Ilaces are done speedy but realignments need to be given the proper time and attention offering new things when necessary if she has free time to do so. For example, if she can see*

panels thin etc make sure she is pushing for these things to be done over finishing early.

- *POSITIVES - she works very hard considering she has two small children at home and we appreciate her for that. Clients really like her. She is willing to learn and took the new tips on llace and extensions well. Her capabilities aren't the problem it's just she isn't doing them*

I think these are the only people you need to speak to individually ... there's no major problems to report with anyone else...

Overall points to cover in the overall meeting.

- *We know that there's been some inconsistencies in the team but this has come to an end now. Danielle and Darren are the management team and whilst we are working on the quality control and raising the standards, we are asking for all work to be signed off. We understand that there are senior roles these are not being taken away this is a temporary measure to ensure we are all on the same page and the changes are being followed through, we can't do that if there isn't someone in charge to make sure that's happening. To be clear- no new client should be started with Darren with Darren or Danielle to re consult and go over the process of the day, all jobs need to be checked (on new llaces once pulling through is done I would like pictures to be taken and sent to me so I can keep an eye on the training I've gone through with them to make sure they're sticking to it)*
- ...

21. *Following that visit, CS implemented a measure whereby the work of every member of the team, including C and the two managers was to be cross checked by another team member. If DnM did a job then DIIM would review it and vice versa. If C did a job it would be reviewed by either DnM or DIIM. It is this measure that CS is referring to in her email when she says "We understand that there are senior roles these are not being taken away this is a temporary measure..."*

22. JL forwarded CS's email to KD on 15 August 2023. KD decided that a disciplinary investigation should proceed against C in relation to the observations CS had made.

23. On 18 August 2023, KD sent an email to C in the following terms, so far as relevant:

I am writing to let you know that you are currently under investigation.

The investigation is regarding the following allegations:

You are failing to carry out your duties as a supervisor to a satisfactory standard.

Your performance and ability as a technician are not meeting the required standards

We shall begin the investigation process straight away and you're invited to an investigation meeting with myself on Wednesday 23rd August 2023 at 1:30 pm.

...

After a full and thorough investigation is completed, you may be subject to disciplinary action.

24. On 22 August 2023, KD had conversations with DIIM and DnM by call or Zoom. KD took notes of what they said during these calls and typed them into 'statements'. She did not send the statements to DnM or DIIM to check or sign them.

25. KD prepared a 'statement' attributed to DnM as follows, based on their call:

Kim Wilson Statement 22/08/23

I find that Kim's work ethic in [sic] below company [sic] standards, she does not communicate with management or within her supervisor role,

Kim doesn't delegate jobs to the team well, even when directed by management.

5 *Kim doesn't take directions well, I feel like her moods show a lot in the studio which in turn affects the work on clients. Not a team leader and does not give management any support within the workplace.*

During training we witnessed that she needs a lot of guidance and support on her technical side but when shown where she is going wrong she gives a 'can't be bothered' attitude.

10 *Overall her work just needs to be more consistent and slowed down when doing Adjustments and Extensions as she is missing out opportunities on elevating the clients appointment.*

15 *We have a salon camera which the team have been using to record individuals work and then used as feedback to management. This has been a very important ask in the last few weeks as we're trying to get our technical abilities better as a team, Kim does not ask management double check her work, and this ask has be ignored or forgotten numerous times.*

Darren Morgan

Edinburgh Manager

20 26. KD prepared a statement attributed to DIIM as follows, based on their call as follows:

Statement for Kim Wilson – 22/08/23

25 *Kim's work ethic can be challenging, her mood swings affect her day-to-day work within the studio. She can be very up and down and this makes managing her difficult.*

During a series of training days with all studio staff, Kim took the news about her technical ability negatively, although she showed some

improvement, it quickly reverted when senior management were no longer around. I feel like her work with clients changes daily and I often have to repeat myself of the duties that are required by her as a senior member of staff.

5 *I am overseeing most of the technical side of things as a new manager and part of this role is to give direction and feedback to the technicians, when it comes to Kim, I often find that I am met with a very unsupportive attitude, and am sceptical about reversing old habits. Her work has little to zero attention to detail, hurried and careless.*

10 *Although Kim does have a long-standing relationship with the company, she seems to be the only member of the technical side that incurs a lot of complaints about her work from clients. I also feel like the bad habits have come with comfortability which is one of the root problems. When observed she is good, but when left her own direction*
15 *I do see a lot of procrastinating i.e. hanging around the salon, taking longer on breaks and asking to take unpaid leave on a daily basis and disrupting other members of staff.*

Overall, I do enjoy working with Kim but the inconsistency of her work and attitude is a recurring issue and is not at the level that the company
20 *strives to be at.*

Danielle Morton

Edinburgh Manager

27. KD asked DIIM to write down all the clients she could think of recently who she was referring to when she mentioned customer complaints. KD had not
25 yet received this information when she held the investigatory meeting with C on 23 August 2023 at 1.15pm. The meeting was conducted by Zoom. C was unaccompanied. KD typed up notes during the meeting. KD did not share with C with C the 'statements' of DIIM or DnM before or during the meeting.

28. KD asked C about her mood being up and down. No examples were put to her. C replied it was personal but that she put it aside and always had a smile on her face and always got the job done. KD told her it could make people feel awkward and uncomfortable. C acknowledged this. KD asked C about
5 C's attitude to training. C said she had a good attitude to training. She denied making negative remarks about the training or being distracted during the training. She had done neither. No specific negative remarks or examples of being distracted were put to C. CS had found C receptive to her training.
29. KD asked whether C understood that her extensions needed to be signed off
10 by DnM or DIIM for the next 6 months and C replied she did. KD put to C that her Ilace systems were not to the highest standards. C replied "*I don't see how it's not because I do everything right, like everything I've been taught, everything that Chantelle taught me. My clients have been happy, I've never had a client say anything negative.*"
- 15 30. KD put to C that the speed of her jobs was also a concern (working too quickly). R charges its clients according to the time taken and C' speed in completing jobs was sometime causing a reduction in customer spend potential. C acknowledged KD's point about the speed of her work. KD then gave C the opportunity to add anything and C declined to say anything more.
- 20 31. After the investigatory meeting with C, KD chased DIIM for the list of client complaints. DIIM sent a document to KD by email on 25 August 2023. It was in the following terms:

Kim Wilson Statements: Additional

Recent client complaints –

- 25 [...] AM (24/O8/23) - photos taken by management during positioning of system for realignment. Photos taken and passed on to higher management. This work during this appointment was not a high standard, Kim was asked to adjust before carrying on the appointment.

[...] JH - Kim performed R/E and it was off balance, the client had to make a long journey back again a few days later as she was visibly upset, the second appointment consisted of a few hours resulting in two separate R/A.

5 [...] MM - skin weft client. [Name] ... is a new client and has very troublesome hair. Should always be booked with our senior member of staff. Kim applied skin wefts with little discussion or aftercare for this client, this is now escalated as a problem client as the methods we have had to use for this particular lady isn't the best fit, although what
10 she wants is not achievable, I believe we could of managed the clients expectations a lot better from the start.

[...] AC – [Name] expressed her concerns about Kim on her appointment when senior management was up from London. I am unsure of the nature of the complaint but I am aware that she gave the
15 company feedback which resulted in a complimentary Wash and Blow dry.

[...] CD - expressed that she no longer wants Kim for system adjustments.

[...] TK - again expressed that she no longer feels comfortable with
20 Kim's work we have offered her a trainee system as a goodwill gesture brackets (Also has affordability concerns).

32. The paper was prepared by DIIM and DnM in conjunction. It did not indicate the authors on the document's face. DIIM had worked with C for a matter of a couple of weeks at the time of preparing the document. DnM, who had worked
25 with C considerably longer, only contributed one of the names on the list (CD). CD had complained about C but had done so at least a year before the list was prepared so was not 'recent' as suggested by the heading in the document.

33. The document contained other incorrect or misleading information. Despite
30 appearing under the heading "Recent client complaints", in fact, AM had made

no complaint about C. A photograph of C's work on AM had been reviewed by a member of management who had suggested improvements to the work. C was not aware of the photograph being taken nor was the feedback passed to her. AC had made a complaint but it was not about C; it was about one of her colleagues. MM had not made a complaint about C. TK had not made a complaint about C. JH had made a complaint about C - that she was unhappy with the way her fringe was sitting on one visit. Of the 6 complaints listed, only two were genuine complaints about C's work and one of those two was very historic in nature.

5
10 34. Three of the remaining four complaints were falsified by DIIM and one (AM) was misrepresented as being a 'recent client complaint' when it was not the client but a manager who had 'complained' about C's work on viewing a photo.

15 35. Following receipt of this document from DIIM, KD decided the matter should be escalated to a disciplinary hearing. She arranged for JL to conduct the hearing. KD sent the invite letter to C by email on 29 August 2023, inviting C to attend a disciplinary hearing on 30 August 2023 at 4.15pm. The invite was attached to her email along with 5 other attachments. These were:

20 i. The document listing the client complaints reproduced at paragraph 31 above. This was an attached pdf file called Additional.

25 ii. A copy of the excerpt from CS's email to JL dated 11 August 2023 which related specifically to C (with 6 bullet points). KD had pasted this into a word document and converted it to a pdf which she named 'Kim'. It was not stated on the face of it who authored it or when.

30 iii. The statement of DIIM with her name removed by KD and the date changed by KD to 25 August 2023. This was an attached pdf file called 'statement' or 'statement 2'. It was not possible for C to be certain who the statement was attributed to. Nor did the document make clear it had been prepared by KD, not by the witness.

- 5
- iv. The statement of DnM with his name removed by KD and the date changed by KD to 25 August 2023. This was an attached pdf file called 'statement' or 'statement 2'. Again, C could not be certain who the witness was or that KD, not the witness, prepared the document.
 - v. A copy of R's Disciplinary Policy and Procedure
 - vi. A copy of the notes of the investigation meeting between C and KD on 23 August 2023

10 36. KD decided to remove the names of DnM and DIIM from their 'statements' and of CS from her email excerpt. She was not asked to do so by DIIM or by DnM. Neither manager expressed a concern about C being aware they had given the statement or that they were fearful of C. Neither did CS express to KD that she wished to remain anonymous or suggest she was fearful of repercussions from C. As there only were two managers *in situ* at the
15 Edinburgh branch at the time, it was inferable that the 'statement' and 'statement2' were given by DnM and DIIM and C did draw this inference (though didn't know which was which). C inferred from the content of the document labelled 'Kim' that it was authored by CS following her visit, though the provenance of the document was not explained.

20 37. C opened all the attachments to the email with the exception of the one called 'Additional' (the list of 'complainers') which she inadvertently missed. She had not, therefore, read this document when she attended the disciplinary hearing.

38. The disciplinary invite framed the allegations as:

25 *Failing to carry out your duties as a supervisor to a satisfactory standard*

Performance and ability as a technician are not meeting the required standards.

or words to that effect.

39. The disciplinary hearing took place via Zoom on 30 August 2023. JL joined from London along with KH who was physically beside her. C joined from the Edinburgh office. The meeting lasted around 20 minutes. C was unaccompanied though she had been informed of her right to be so.
- 5 40. Prior to the meeting, JL had been provided with copies of the 'statements' of DnM and DIIM with names included. She had been given a copy of the list of client 'complainers'. She had been provided with the notes of the investigatory meeting the previous week. She had CS's email of 11 August 2023 in its full unmanipulated form (as she was the original recipient of that email).
- 10 41. KH or JL had prepared a template document for inserting the notes of the meeting which contained typewritten pre-prepared questions. KH took handwritten notes which she typed into the document after the hearing. JL asked C if she had received all the available evidence and had had a chance to go through it. C replied that she had, although, in fact, she was unaware at
15 this stage that she had missed the document which identified the list of complainers.
42. JL put to C that she didn't take direction well, didn't communicate with management and that her personality can be very up and down. C disputed this. She said words along the lines that she did everything she was told to
20 do, that she was a professional worker and that she followed the managers above her.
43. JL put to her that she had a 'can't be bothered' attitude if shown where she was going wrong. C disputed this. She said words to the effect that she had done everything taught from training. She said she had originally been trained
25 to do the bonds bigger than Chantelle showed her but that she had changed this practice since Chantelle's training.
44. JL then said "*In one of those statements, it mentions clients who find your work unacceptable and 2 clients who don't want to use you anymore are you aware of the company's policies and procedures and how to treat clients?*". C
30 had not seen the list of alleged 'complainers' at that point. She had seen

DlIM's (anonymized) 'statement which said "*she seems to be the only member of the technical side that incurs a lot of complaints ... from clients*".

45. C replied to JL: "*Yeah I know the procedure ... but I didn't know 2 clients said that. Can I ask who they were?*" KH's notes did not record JL's answer to C's question or the exchange that followed. In fact, JL replied along the lines: "*Oh, I don't know. Do you not know?*", and C answered to the effect: "*No, it's the first I've heard of it*".
- 5
46. There was no pause to identify what documentation C had available to her and whether, in particular, she had the list of the 6 alleged complainers. C made it plain that she was unaware of which clients were alleged to have complained, and indeed that she disputed any had. Neither JL nor KH answered C's question about the identity of the two clients being referred to by JL. JL moved on to put to C that the business could not accept losing clients or dissatisfied clients. She referred to the impact on the business and asked for C's comments. C didn't believe she had been the subject of any recent client complaints. She knew she had good relationships with her clients. She answered "*...I've been doing this job for 7 years. I don't treat the clients with disrespect at all. When clients come in, they smile. I make them feel comfortable. Those 2 clients – that's not me. I wouldn't do that. I wouldn't purposely do that.*"
- 10
- 15
- 20
47. JL then went on to put to C that the speed with which she did clients could have a negative effect on the business. She asked her if she was sure she understood that and C said she did and she was working on it. She acknowledged that sometimes she 'lost herself' chatting with the client and then she looked up and would realise she had been working too quickly.
- 25
48. JL asked C at the end if there was anything she wished to add and C acknowledged where R was coming from in regard to the time taken on jobs (going too fast) and the size of her extensions but said she was working on everything she's been trained on. She said a personal thing had happened that had changed her a little but that her work hadn't changed and her clients had been happy.
- 30

49. On 31 August, JL prepared a disciplinary outcome letter which KH sent to C by email at 2.15 pm on 1 September 2023. The letter was in the following terms:

Dear Kimberley,

5 *Further to the disciplinary meeting held on Wednesday 30th August 2023 I now write to confirm the outcome. ...*

10 *The meeting was conducted as it was alleged that you are failing to carry out your duties as a supervisor to a satisfactory standard and your performance and ability as a technician are not meeting the required standards.*

You were provided with all the evidence we had gathered concerning this case which was referred to again in the letter dated 29th August 2023. I have had an opportunity to consider all the evidence disclosed to you and to listen to your position.

15 *I asked you during the meeting if you were aware of the company's policies and procedures and how to treat clients and you confirmed that you did and that you think you meet the standards required.*

In making my decision I have considered your explanation but also the fact how serious the allegations were against you.

20 *The company's mission statement is to exceed customer expectations where we expect a culture of care, respect, pride and professionalism. We cannot act in a manner that upsets and distresses clients as losing clients will have an effect on the business. I have decided it does amount to unsatisfactory conduct and as a consequence of the*
25 *outcome is a first and final written warning.*

This warning will be placed on your personal file but will be disregarded for disciplinary purposes after a period of six months provided your conduct improves.

Due to the lack of confidence the company has with you it is also decided that you will be demoted from your role as Supervisor until there is an improvement in standards. Your pay will not be affected. Your role will remain as it is.

5 *You have the right to appeal against my decision... within seven days*
...

50. The claimant was angry and hurt at this outcome but not surprised. Based on the comments previously made to her by DIIM, SW, and CS, and on concerns about the process, C believed R had an agenda to remove her Supervisor role in the Edinburgh studio. C believed that the allegations against her regarding client complaints and a poor attitude to training were falsified. C believed R had no interest in her account of the matter. She read the email and outcome letter during her break at around half past three in the afternoon, about an hour after it was emailed. The claimant decided to resign almost immediately in response to her various concerns about the process and outcome, upon reading the outcome letter.

10
15

51. C sent an email to KD at 3.52pm on 1 September 2023 as follows:

To whom this may concern, please accept this e-mail as my formal resignation. I understand I have to give seven weeks notice hence my last working day will be the 20th of October.

20

52. The claimant was mistaken in her understanding that she was obliged to give 7 weeks' notice. Under the terms of her contract, she was, in fact, obliged to give only one week's notice though she did not appreciate that at the time.

Events after C's notice of Resignation

25 53. C promptly applied for another job. The first job she applied for was a Support Worker role with Diamond Home Assist LLP. On 4 September, she was invited for an interview and was successful. She realised that she had been mistaken about the period of notice she required to give R. She emailed R on

6 September and asked to change her finish date to the earlier date of 22 September. KD replied on 9 September to agree this termination date.

54. On 7 September 2023, C emailed JL as follows:

5 *Good morning, I would like you to send me the allegations that were made about me and the complaints that were made as well as will need this for my appeal. Need this asap.*

55. JL expressed no concern that C did not appear to have these, or to have seen these. She spoke to KD who forwarded the email that had been sent by KD to C on 29 August 2023 attaching the disciplinary invite and 6 other
10 attachments. In her email forwarding this correspondence sent on 7 September 2023, KD said:

As requested to Julie you will see the allegations from clients in the second document called 'Additional'.

Thanks

15 56. At that stage, C read the pdf file called Additional which set out the list of six clients alleged to have complained about C for the first time. C knew CD had complained (although it was a long time before) and that JH had. She knew that AM had not complained and that this client preferred to be seen by C or DnM than anyone else. C knew that AC had not complained about her but
20 had complained about someone else in the team. C was very sceptical that TK would have complained as she was always very thankful and complimentary about C's work. She was also skeptical in relation to MM because she and DIIM had worked on the client together and had solved a problem to the client's satisfaction.

25 57. On 8 September C emailed an appeal against her disciplinary to M Dabadie. She stated her grounds of appeal as follows:

Following on from the meeting regarding my disciplinary. I would like to state that I asked for dates and times of the two accusations that were from clients I was told was two at the time have now turned to six

5 *which I believe some are faults as [...] AM isn't a complaint, [...] AC was complaint about the salon itself not me as manager Danielle told me, [...] MM was giving the right after treatment as I done it through the appointment and Danielle and me done it together. As for training, I've asked on numerous occasions for training which has fallen through and every bit of training that was given by Chantelle had been taken on board through put the clients that I have had since. The main thing that was brought up on which I find scandalous is the fact I am to [sic] fast on my work ... The allegations that were made about me not doing my position well isn't true as I do everything I am told without complaint.*

10

58. On 14 September 2023, an appeal hearing took place. It was conducted by M Dabadie, Director. On 15 September 2023, MD issued an appeal outcome letter. The letter included the following text, so far as relevant:

15 *... I have decided to withdraw the disciplinary action of first and final written warning and instead change it to the lesser disciplinary action of a written warning.*

The reasons for my decision are:

20 *Having reviewed the evidence provided to you where there were six clients complaints against you, I have conducted my own investigation into the complaints. The investigation concluded that [...] AC and [...] MM were not complaints and therefore I am withdrawing them from the original investigation...*

...

25 *Termination of employment and events thereafter*

59. C's employment terminated on 22 September 2023. At the time it terminated, she had seven complete years of service with the respondent and she was 27 years of age. Her gross annual salary was £26,000 per annum. Her gross weekly wage was £500 and her net weekly wage was approximately £402.57.

60. She started her new role on 25 September 2023. Her average net weekly wage in her new post as Community Support Worker was £365.64. She has not been actively seeking alternative employment on a higher salary in the period from the termination date to the hearing date.
- 5 61. On 22 September 2023, client, AM, replied to C following receiving a message from C asking her about the complaint. AM replied that she definitely did not complain and that she and C had “*had a laugh as always*” at her last appointment. At some stage after her employment ended, C also received a message from TK in response to an enquiry she sent. TK said she had never
10 made any complaints about C’s work and that she had always found C to be professional, friendly and good at her trade.

Observations on the evidence

- 15 62. Much of the evidence in the case was not in dispute. However, there were a few material conflicts.

Management comments about not needing a supervisor

- 20 63. C gave evidence that DIIM, when she came up from London to cover annual leave, said words to the effect that it was such a small team, they didn’t need a supervisor. C’s evidence was also that SW had previously said the same and that CS said similar words to her when she attended the Edinburgh studio in August 2023. DIIM said that she didn’t remember saying that. I asked CS if she told C she felt there was no need for a
25 supervisor and CS’s evidence was that she spoke to C about the structure and said that she wasn’t sure how C’s role was working based on how C was working. CS also accepted in her evidence that, she felt the structure of having two managers and a supervisor was too many senior people at the time.
- 30 64. I accepted, on balance, C’s evidence that the three individuals had at different times made comments to C to the effect they did not consider her

Supervisor role was needed. C's recollection was clear and persuasive and she referred to particular instances in July / August 2023 in relation to DIIM and CS. Her evidence was consistent. She was not challenged in cross-examination on her assertion about these comments. As a matter of undisputed fact, her Supervisor role was not backfilled following C's demotion from it which would seem consistent with a managerial view that this tier of management was considered unnecessary in the Edinburgh studio. CS accepted she commented to C on how C's role was working within the structure and, on balance, I prefer C's account that those comments were rather more direct and candid.

Anonymity requested?

65. There was a conflict between the evidence of R's witnesses about whether DIIM and DnM requested that their statements be kept anonymous and the basis on which any such request was made. In her evidence in chief, KD said they both said they had to work with C on a daily basis and didn't want to get their names involved. In cross-examination, KD said that both DnM and DIIM as well as CS said they didn't want their names in because they "felt fearful of repercussions". DIIM, in contrast, said she had no discussion about KD about removing her name from the document. She denied ever feeling fearful of C or expressing to HR any fear of C. CS gave no evidence to the effect that she had requested that her comments in her email about C should be anonymised.

25

66. DnM said he asked HR for anonymity. He denied feeling fearful of C but said he asked HR to be anonymous because he didn't want a bad atmosphere or awkwardness. I had considerable misgivings about DnM's evidence on this matter for reasons now explained.

30

67. DnM's recollection generally of the circumstances of his giving of the statement to KD was weak and unreliable. He initially said he typed the statement at the time then in response to a question very soon after, he

said that KD had actually typed it following a call with her. He often answered her couldn't recall things.

5 68. DnM denied having discussed his evidence with other witnesses before giving his evidence, but I regret to observe that there was cause for concern that this was not accurate. The January hearing diet had ended with Ms Duffy putting a question to DIIM in re-examination about the issue of anonymity. Ms Duffy sought to put a question which was highly leading in which she overtly encouraged DIIM to change the evidence she had
10 previously given that she had made no request to have her name removed. I refused to allow the question as posed. When the hearing reconvened some weeks later, DnM was called first. It was curious and noteworthy that DnM was eager to tell the Tribunal early in his evidence in chief that he had requested anonymisation, in response to a question
15 which didn't relate to that issue. None of the three respondent witnesses gave evidence which aligned with KD's evidence that they had each separately told her they were fearful of repercussions from C.

20 69. On the balance of probabilities, I found that none of them requested anonymity or alleged being fearful of C to HR. I found on balance that KD took it upon herself to anonymise / redact the material without any request.

Exchange during disciplinary hearing about client complainers

25 70. During the disciplinary hearing, C is recorded in the notes as having asked JL who the clients were who complained. No response by JL is recorded in the note of the hearing but C's evidence was that JL replied, "*I don't know, do you not know?*" to which C answered, "*no, it's the first I've heard of it*". JL's account was that she didn't remember saying this. Her evidence was also that she didn't remember why she referred to just two complaints
30 when the evidence before her suggested a list of 6 client complaints. JL also said to the Tribunal words along the lines: "*It's irrelevant the names of who complained, whether they're called Jane or John*".

71. Having carefully considered the evidence before me, I accepted C's account of this matter on the balance of probabilities. C was specific about the exchange which was also consistent with her later request by email on 7 September for details of the complainers. JL's recollection, on the other hand, was weak about this and very many other matters. The meeting note recorded C having asked who the clients were and JL's response is not recorded. I find it implausible that JL ignored the question entirely and simply carried on to her next question as the note records. C's account that JL answered in the way she did, without pause to provide the names sought is consistent with JL's admitted perception that the identities of the complainers were a complete irrelevance.

Fabrication of complaints

72. The document prepared by DIIM and DnM listing six individuals by name under the heading 'Recent client complaints -' included the names of four clients who had not, in fact, complained about C. It is C's case that these allegations were fabricated. Of the four, one (AM) was accepted by R at the Tribunal not to have been a complaint though it was listed misleadingly directly under the heading 'Recent client complaints-'. The AC and MM allegations had been withdrawn by R at the appeal stage without explanation. I further concluded based on evidence led by C at the Tribunal that TK had not complained about C. DIIM, who included TK on the list, was weak in her recollection of when the complaint was said to have been made. The complaint had not been logged and DIIM admitted in evidence that she could be mistaken.

73. Had there been an isolated anomaly of a purported complaint which had turned out to have related to someone else or the like, I may have been persuaded that its inclusion in the list arose from genuine error. However, the sheer number of wrongly made allegations and the absence of any meaningful evidence led by R about how such seriously incorrect information came to be compiled, points away from an innocent explanation. I regret to say that I concluded on balance that that deliberate fabrication or (in AM's

case) deliberate misrepresentation led to the inclusion of four of the six names in the list.

Outcome predetermined?

5 74. It is part of C's case that the outcome of her disciplinary process was predetermined. During cross examination, Mr Morton put to JL that "*You had already made the decision as a company to remove the claimant from the supervisor role before the investigation.*" JL denied this. Mr Morton relied upon part of an email sent by CS to JL on 11 August after her visit to
10 Edinburgh where she said "*We understand there are senior roles these are not being taken away this is a temporary measure to ensure we are all on the same page and the changes are being followed through, we can't do that if there isn't someone in charge to make sure that's happening.*"

15 75. Mr Morton suggested to CS during cross-examination that the temporary removal referred to the removal of C's Supervisor role. I accepted CS's evidence that it did not, and that she referred instead to the practice of having the work of all staff (including managers) signed off by a more senior or as senior member of staff. She did not wish the managers to feel their seniority was being eroded by this practice of peer-review. This was consistent with the
20 surrounding text in the paragraph CS wrote. There was no direct evidence of a management conspiracy to remove C's role through the process and I understood that Mr Morton invited me to come to such a finding based on circumstance and inference. I acknowledge the following findings might tend
25 towards a conclusion that a predetermined agenda was being pursued:

- a. that DIIM and CS had previously observed to C that they did not see the need for the Supervisor role;
- b. that the Supervisor role was ultimately removed from C;
- 30 c. that DIIM fabricated certain allegations of client complaints against C

76. The asserted inference is not without force. However, having considered the totality of the evidence before me, I am not persuaded that C has discharged the burden of proving on the balance of probabilities that JL, the decision maker, had already pre-determined her decision either on her own or alongside CS and /or DIIM and / or another member(s) of R's management to demote C before the disciplinary hearing. That is not to say I do not have significant misgivings about how JL approached her responsibilities as disciplinary manager. This is discussed further in the following section.

10 **Relevant Law**

Constructive Unfair Dismissal

77. Section 95 of ERA defines a dismissal, including what is commonly referred to as constructive dismissal in subsection (1)(c):

“95 Circumstances in which an employee is dismissed

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

.....

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

78. The onus of proving a constructive unfair dismissal lies with C. The case of **Western Excavating Ltd v Sharp** [1978] IRLR 27 sets out four conditions which must be met to succeed in such a claim:

25 6) There must be a breach of contract by the employer, actual or anticipatory;

7) That breach must be significant, going to the root of the contract, such that it is repudiatory;

8) The employee must leave in response to the breach and not for some other, unconnected reason; and

9) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may have acquiesced in the breach.

5

Implied 'trust and confidence' term

79. In every contract of employment there is an implied term, articulated in the case of **Malik v BCCI SA (in liquidation)** [1998] AC 20 as follows:

10 "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

15 80. In **Baldwin v Brighton and Hove City Council** [2007] IRLR 232, the EAT held that the use of the word "and" following "calculated" in the passage quoted from **Malik** was an erroneous transcription of previous authorities, and the formulation should be "calculated or likely" (emphasis added).

20 81. The unreasonable bringing of disciplinary proceedings, irrespective of eventual findings, is capable of constituting a breach of the **Malik** term (**Gogay v Herfordshire County Council** [2000] IRLR] 703 and **Working Men's Club and Institute Ltd v Balls** UKEAT/0119/11/LA). It has also been held that it can be a breach of contract for an employer to impose a disciplinary sanction which is out of all proportion to the offence (**BBC v Beckett** [1983] IRLR 43, EAT).

Resignation in response to breach

25 82. It is not essential that an employee when resigning, tells the employer specifically that they are resigning in response to the employer's repudiatory conduct (**Weathersfield Ltd v Sargent** ([1999] IRLR 94). The breach must be an effective cause of resignation but need not be the sole cause (**Nottinghamshire County Council v Meikle** [2004] IRLR 703).

The ACAS COP on Disciplinary and Grievance Procedures

5 83. ACAS publishes a Code of Practice (COP) on disciplinary and grievance procedures. It is designed to help employers and employees deal with disciplinary and grievance situations in the workplace. A failure to follow the COP will not, of itself, make an individual or organisation liable to proceedings, however Tribunals will take the COP into account when considering relevant cases.

10 84. Informing the employee of the basis of the problem and giving them an opportunity to put their case in response is one of the basic elements of fairness within the ACAS Code. The COP further provides that:

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

85. In para 12 of the COP, it is stated that:

25 *12 ... At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been raised. The employee should also be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given an opportunity to raise questions about any information provided by*
30 *witnesses.*

86. With respect to grievances, the COP states at para 2:

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

Compensation

10 87. An award of compensation for unfair dismissal consists of a basic award and /or a compensatory award.

15 88. The formula for calculating the basic award is prescribed by legislation. Where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, the Tribunal shall reduce that amount accordingly (s.122(2) of ERA). In contrast to the compensatory award, a basic award may be reduced for conduct which was not causative of the dismissal.

20 89. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. The compensatory award is to be assessed so as to compensate the employee, not penalise the employer and should not result in a windfall to either party (**Whelan v Richardson** [1998] IRLR 114).

25 90. In an unfair dismissal case, where it appears to the Tribunal that an employer has unreasonably failed to comply with the ACAS COP on Disciplinary and Grievance, the tribunal may, if it considers it just and equitable in all the circumstances, reduce or increase any award to the employee by up to 25%. It may likewise reduce any award where there has been an unreasonable failure to comply on the employee's part (s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA").

91. If the Tribunal finds that the employee has, by any action, caused or contributed to her dismissal, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). If the Tribunal determines that there is culpable or blameworthy conduct of the kind outlined, then it is bound to make a reduction by such amount as it considers just and equitable (which might range from 0 to 100%).

Discussion and Decision

92. The entire content of both sets of submissions has been carefully considered and taken into account in making the decisions in this Judgment. Failure to mention any part of these submissions in this judgment does not reflect their lack of consideration. The submissions are addressed in the decision section below, which sets out where the submissions were accepted, where they were not, and why.

Did KD fail to put specific allegations to C at the investigatory meeting and fail to put any allegations of client complaints against her?

93. It is not disputed by R that KD did not put the details of alleged client complaints to C during the investigation meeting on 23 August 2023. At that time, KD had not received details of the alleged complaints from DIIM. During the investigation meeting, various matters were put to C though these were generally in broad terms and specific instances were not detailed to her. There was, therefore, an omission to put specific allegations and to put client complaints.

Did DIIM and DnM fabricate allegations of complaints against C for the purposes of a disciplinary investigation?

94. I have found as a fact that deliberate fabrication by DIIM or (in the case of AM), deliberate representing the issue as a client complaint, led to the inclusion of four of the six names in the list of 'recent client complaints'.

Did R choose to pursue a disciplinary hearing in relation to allegations which ought to have been treated as a capability issue?

5 95. There was a general lack of inquiry during R's process into whether the issues raised in relation to C were down to a lack of capability or whether C was capable but unwilling to perform to a better standard. Indeed, there was also a lack of evidence before me at the Tribunal regarding specific shortcomings in C's performance. On the evidence available, it is not possible to come to a finding on the balance of probabilities that there were genuine shortcomings,
10 much less to decide whether any such shortcomings were an issue of conduct or capability.

Did R give C less than 48 hours' notice of a disciplinary hearing to be held on 30 August 2023?

96. This is not in dispute.

15 *Did R anonymise statements provided by DIIM and DnM before providing these to C in advance of the disciplinary hearing?*

97. This is not in dispute. I have found this was done in the absence of any request from the witnesses.

20 *Did R remove names of clients alleged to have complained from the document given the file name Additional.pdf sent to C before the disciplinary hearing?*

98. I have found that they did not (although the document did not contain information about who authored it or when). It was clear from the documents produced that the 29th August email with its original attachments was forwarded to C after she requested the client names. The original
25 'Additional.pdf' attachment, therefore, must have included the names as C managed to access these when that email was re-sent to her.

Did JL fail to identify the clients alleged to have complained about C when asked during the disciplinary hearing?

99. It has been found she failed to do so.

Did R fail to give adequate specification of the allegations against C at or before the disciplinary hearing and fail to give C an adequate opportunity to respond?

5 100. There was a general lack of specification in relation to almost all of the allegations. In relation to alleged client complaints, although the list was sent to C as an attachment on 29 August 2023, she did not spot it and read its contents. When it became apparent to JL she had not seen it, JL did not pause to allow C to access the document or read its contents to her or take any steps to ensure C's understanding of those particular allegations. Aside from the
10 alleged client complaints of which C had not had sight, the other allegations lacked specific examples upon which C could comment.

Did JL rush the disciplinary hearing?

15 101. The disciplinary hearing lasted around 20 minutes. In that time, JL did not ensure C understood the allegations relating to the client complaints and therefore had an adequate chance to respond to them. She did not enquire into the training C had in the role, or into what information C had been given about the nature of her duties. When, C referred at the end of the meeting to a personal issue she had experienced, JL did not explore that matter to assess what impact it may have had on C's performance or whether it may
20 be relevant mitigation. In light of the number of omissions during the disciplinary hearing I accept that the 20-minute hearing was rushed.

Was the outcome of the disciplinary hearing pre-determined? Did R pursue an agenda to demote the claimant through the disciplinary process?

102. I have found that this has not been proved.

25 *Did R issue a first and final written warning to C and demote her when these sanctions were unwarranted?*

103. It is not disputed that JL issued a first and final written warning to C and that she demoted her.

104. Given all of the circumstances of the case, both sanctions were disproportionate based on the evidence before JL. It is clear from R's disciplinary policy that demotion or other sanction short of dismissal might be conferred at R's discretion as a substitute sanction for dismissal. C had no previous disciplinary record. She was subject to no previously imposed performance improvement plan. Even taken at their highest, and assuming they were made out on the evidence before JL (which they were not), the allegations against C were not of such a serious and fundamental nature as to warrant such a significant sanction as demotion (envisaged by the Policy to be a substitute for dismissal) or indeed a final written warning.

Did those acts or omissions, or any of them, breach the implied term of trust and confidence?

105. I remind myself that the test to be applied is whether R engaged in conduct calculated or likely to destroy the relationship of confidence and trust between it and C without reasonable and proper cause. The test is not whether R's approach to the investigation was in the range of reasonable responses or whether the sanction imposed was in the range of reasonable responses. Nor is the test whether R breached the ACAS COP on Discipline and Grievance in the way it conducted the disciplinary process against C.

106. KD made a submission that R had the right to conduct an investigation based on the feedback of CS and the two managers, DIIM and DnM. I accept that this feedback gave R grounds to investigate and explore potential concerns about C's performance. This was not then investigated in a meaningful way, however.

107. KD went on to submit that the disciplinary process was fair.

108. Mr Morton said JL took the complaints at face value because they came from managers. He said she was determined to proceed and didn't take any time to take stock. He observed her notes were pre-written and the hearing was

short. He submitted that the complaints were fictional and anonymised. With respect to the falsification of complaints, Mr Morton said that behaving dishonestly or in a deceptive manner on the face of it was capable of amounting to a fundamental breach of the trust and confidence term. He also referred to what he called R's wholesale non-compliance with the ACAS Code.

5

10

109. I find that the following acts or omissions, each individually in and of themselves, were calculated or likely to destroy the relationship of trust and confidence between the parties:

15

- a. The falsification of four client complaints which had not been made for the purposes of a disciplinary investigation;
- b. The omission by JL to respond to C's query during the disciplinary hearing about the identity of the clients said to have complained about C.; and
- c. the imposition of the sanction of demotion and a final warning on C.

20

110. In relation to the falsification of the complaints, there was no reasonable or proper cause for the conduct. The four clients hadn't complained, and I have not accepted that they were said to have done so based on genuine error or any other innocent explanation. It was deceptive conduct which was calculated to destroy the relationship of trust and confidence.

25

30

111. In relation to JL's omission to explain the identities of the complainers during the meeting, this conduct was likely, if not calculated, to destroy the relationship of trust and confidence between the parties. The disciplinary hearing was a matter of considerable importance to the claimant. In declining to provide full details of the complainers when asked, and in declining to check with C what papers she had on the subject, JL deprived C of the opportunity to meaningfully answer the allegations and defend them. JL was aware that, at both the investigation meeting and disciplinary meeting, C denied being the subject of client complaints. There was no reasonable or proper cause for failing to provide this detail. No explanation was put forward for the failure by JL in her evidence, other than that she regarded it as irrelevant. She showed

a lack of interest in the claimant's position on the matter and a lack of acceptance that her role entailed an enquiry into the facts of the matter which extended to considering potential exculpatory evidence.

5 112. Following the process, the imposition of a demotion and final warning, in
circumstances where there had been no meaningful inquiry into the disputed
allegations generally and particularly in relation to the disputed client
complaints was likely, if not calculated, to destroy the relationship of trust and
confidence between the parties. JL imposed these sanctions knowing C had
10 not been afforded an adequate opportunity to defend the allegations. In giving
the outcome she gave, she relied upon the importance of "*not acting in a
manner that upsets and distresses clients as loosing [sic] clients will have an
effect on the business*". The client complaint allegations weighed heavily in
her decision-making.

15 113. There was no reasonable and proper cause for JL coming to findings that the
claimant had conducted herself in a way that risked upsetting clients. This
was not a case where a proper and thorough investigation had been held and
where a disciplinary manager might genuinely but erroneously believe one
20 witness over another. There was a lack of specification of dates or times of
the alleged complaints or to whom they were said to have been made. There
was no specification of what period they were said to have been made over.
Neither the investigator nor JL had probed this with the authors of the list. JL
knew C disputed the complaints (and most other allegations). When she
25 decided on the sanctions, JL knew C had no disciplinary record. In all of these
circumstances of the case, the imposition of disciplinary sanctions of such
severity was likely to destroy C's trust in R.

30 114. Overall, based on the foregoing breaches, I do not accept Ms Duffy's
submission that R's process was 'fair'. As set out above, that is not the test I
have applied. I have considered whether the acts of the respondent
fundamentally breached C's contract and have found that three of them did
so, as narrated above.

115. Other acts or omissions were founded upon by C, a number of which have been held established as facts, namely:

- 5 i. KD failed at the investigatory meeting to put specific allegations and to put details of the alleged client complaints;
- ii. R pursued a disciplinary process inappropriately following the investigation meeting;
- iii. R gave C less than 48 hours' notice of the disciplinary hearing and rushed the hearing;
- 10 iv. R anonymised statements without any proper cause;
- v. R failed to give adequate specification of the other allegations against C (those additional to the client complaints) at or before the disciplinary hearing;

15 116. No doubt, to varying degrees, most or all of these might be regarded as examples of poor employment relations practice. However, individually I do not find that these other matters in and of themselves each amounted to discrete breaches of the implied term of trust and confidence. Having found
20 that the three acts / omissions in paragraph **109** above each did so on an individual basis, it is unnecessary to go on to consider whether the other matters listed in the preceding paragraph, though not breaches in themselves, contributed to a cumulative fundamental breach.

Did C resign in response to the breach?

25 117. I find as a matter of fact that she did so. She did not, as Ms Duffy pointed out, specify her reasons for resigning in her notice but she sent it almost immediately on reading the disciplinary outcome letter. I have accepted, on the balance of probabilities, that the following factors were effective causes of C's resignation though they may not have been the only factors:

- 30 a. Her belief that alleged client complaints about her were not true (albeit she had not yet seen the full detail of these allegations);
- b. her concerns about JL's lack of willingness to provide her with details so she could defend the alleged complaints; and

c. her concerns about the imposition of demotion and a final written warning.

Did C affirm the contract before resigning

118. It has not been argued before me that she did so. C's resignation was extremely swift following receipt of the disciplinary outcome, which in turn came only a day or two after the breaches during the hearing. There were no words or conduct by C before she intimated notice of resignation which suggested she affirmed the contract or acquiesced in the breaches.

Compensation

Basic Award

119. The claimant had 7 complete years' service with R when her employment terminated. Two of those years were under the age of 22. Her gross weekly pay on dismissal was £500. Her basic award is £3,000 (i.e. 5 years x 1 week's pay plus 2 years x 0.5 week's pay).

120. Ms Duffy indicated she sought a reduction to the basic award for contributory fault on the basis that C failed to perform to standards required of a Supervisor. The Tribunal may reduce the basic award where there has been culpable conduct by the employee before the dismissal which need not have contributed to or caused the dismissal. Based on the evidence before the Tribunal, I have not made any finding that C had engaged in culpable or blameworthy conduct. There was not sufficient evidence before me to sustain a finding of sub-standard performance as Ms Duffy argued, much less that it was blameworthy. Therefore, I decline to reduce the basic award.

Compensatory award

121. The claimant's employment ended on 22 September 2023 and she took up alternative employment on 25 September 2023. Under the terms of her new employment, she has sustained and continued to sustain at the time of the last day of the hearing a weekly net loss of salary of £36.93 per week. The claimant sustained a reduction in employer pension contributions from her

dismissal on 22 September 2023 to the first day of the hearing on 30 January 2024 of £157.29 (approximately 13 weeks @ £11.40 per week plus 5.25 weeks @ £1.73 per week). She continues to sustain pension losses in the sum of £1.73 per week.

5

122. *Period of loss:* The claimant has settled into her new employment and has not sought to secure alternative employment on more favourable terms. Mr Morton made a submission that it would not be reasonable for the claimant to robustly seek new employment to bridge the relatively small differential in pay when she did not have 2 years' service and would not have it in any new employment secured. As I understood his submission, Mr Morton sought 12 months' future losses from the date of the hearing (or the date of the Tribunal's judgment) as well as losses from the date of termination up to the date of the hearing (or judgment). This would equate to almost 18 months' losses.

15

123. I accept there are valid reasons why C has not thus far chosen to seek another new job at this time, having started her current position in September 2023 and no doubt undergoing training in her change of role. I accept that position has been reasonable to date, having regard to the relatively small pay differential. I further understand she may be eager to build up her service and her eligibility for statutory employment rights and that too may deter a move at this time, particularly if it is for not much more money. I note that loss of statutory employment rights is, as is customary, separately compensated.

20

124. However, I conclude that awarding losses for a period of a further year after the hearing would not be just and equitable. I am not satisfied that a period of losses of that length (18 months in total) can continue to be properly attributed to the dismissal, as opposed to C's personal preference, especially as time goes on. The projected losses become unacceptably speculative over such a lengthy period. It may be likely that salary increases, or promotional opportunities arise in C's current employment or new openings arise elsewhere in that time frame as she gains experience in her new vocational role. With that said, I accept that in the period to the hearing date and for a further two months or so, no such opportunities have arisen or are likely to do

25
30

so. I find that, in the period of 6 months from C's dismissal, she has not unreasonably failed to mitigate her loss by not seeking better remunerated work elsewhere. I, therefore, award the claimant her losses to the date of the hearing plus 2 months' losses from the 6 March 2024 (when the hearing concluded).

5

125. *Calculation of C's economic losses:* C's loss of net pay to 6 March 2024 is 23.7 weeks @£36.93 per week = £875.24. The claimant's loss of salary for a further 2 months is 8.66 weeks x £36.93 = £320.04. The total loss of net salary awarded is, therefore, £1,195.28. The claimant's pension loss to the date of the hearing is £166.71 (13 weeks @ £11.40 = £148.20) + (10.7 weeks @ £1.73 = £18.51). Her pension loss for a further 2 months is £14.98 (8.66 weeks x 1.73). The claimant's total loss of earnings and total pension loss for the period of the award is, therefore, **£1,376.97**.

15

126. With respect specifically to the question of the **loss of statutory employment rights**, I award a further **£500**.

20

127. *Uplift / Reduction for breaches of COP?* R accepts the ACAS COP applied with respect to the disciplinary process. Mr Morton argues that R failed to comply with it and seeks an uplift of 25%. I accept R failed to comply with the COP. Specifically, R failed to provide C with sufficient information about the alleged misconduct or poor performance to enable C to prepare to answer the case at the disciplinary hearing. This applied generally to all allegations, but particularly to the identity of the alleged claimant complainers, when it emerged during the hearing that C had not viewed that information. R also breached the Code by failing to go through the evidence that had been gathered (particularly in relation to the alleged client complaints) and to allow C to answer the allegations.

25

30

128. These breaches of the COP were unreasonable, and no cogent explanation or mitigation was put forward for them by R during the hearing. I have found that certain of the breaches also fundamentally breached C's employment contract. KD's evidence was that she was an HR manager with a

postgraduate HR related degree and many years' experience as a senior HR professional. She also said she was aware of the COP and she and JL both gave evidence that she provided JL with a copy of it before the disciplinary hearing. Based on the evidence before me, I cannot conclude otherwise than that the COP breaches were deliberate as opposed to inadvertent.

5

129. Having found that R unreasonably breached the COP, I have the discretion to increase C's compensatory award by up to 25%. The failure by JL to go through the evidence at the hearing and allow C to answer the allegations when C requested clarification of the client complaints was an egregious instance of non-observance. The disregarded requirements in paragraph 12 of the COP enshrine fundamental principles of natural justice. In all of the circumstances, I exercise my discretion to award the maximum uplift of 25%. I therefore apply an uplift of **£426.24** ($0.25 \times \text{£}1,876.97$). Having applied a final sense-check, I am satisfied this sum of money represented by the application of the 25% uplift is not disproportionate in absolute terms.

10

15

130. Ms Duffy argues that C breached the COP by failing to raise a formal grievance with R before she resigned. Mr Morton alleges no reduction is warranted because C did raise concerns (albeit after her resignation) in the context of an appeal against the disciplinary sanctions. I accept that C did fail at the relevant time (namely prior to intimating her notice of resignation) to raise her concerns formally with R in writing. However, I do not find that, in all of the circumstances of the case, her failure was unreasonable. C had experienced during the disciplinary hearing, and in the process preceding it, R's approach to its internal processes. The relationship of trust and confidence between C and R had been destroyed by the most serious shortcomings in that process, as set out earlier in the judgment. Furthermore, the failure on C's part was mitigated by her seeking to raise her concerns through the appeal channel offered by R formally in writing within 7 days. As I have not found any breach of the COP on C's part to be unreasonable, the discretion to reduce the award does not arise.

20

25

30

131. *Contributory fault?* It is necessary to consider whether C has, by any action, caused or contributed to her dismissal for the purposes of section 123(6). As set out above in relation to the basic award, I have made no finding of blameworthy contributory conduct on the claimant's part. I therefore decline
5 to make any reduction to the compensatory award on that basis.

Conclusion

132. The Tribunal declares that C was unfairly dismissed and orders R to pay her a monetary award in the total sum of **£5,303.21** (i.e. A basic award of £3,000
10 + an (uplifted) compensatory award of £2,303.21).

15 **Employment Judge Murphy**

26 March 2024
Date of Judgment

20 **Date sent to parties**

26/03/2024
