



**THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL**

**Applicant:** Eleanore Joan **BROWNING**  
**Represented by:** In person

**Respondent:** **INVESTMENT CONSULTANTS & BROKERS LIMITED**  
**Represented by:** Mr. G. Le Tissier (Managing Director)

**Tribunal Members:** Advocate J. Hill (Chairman)  
Miss R. Coleman  
Ms A. Crosland

**Decision of the Tribunal**

The Tribunal finds that the Applicant resigned from her employment on 13 September 2022 and was not constructively dismissed. Accordingly, the claim for constructive dismissal fails and is dismissed.

The Tribunal has decided not to exercise its discretion to award costs. Accordingly, there is no order for costs.

Advocate Jason Hill  
.....  
Signature of the Chairman

05 November 2024  
.....  
Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal’s Decision (Form ET3A) are available on application to the Secretary to the Tribunal, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.  
(Telephone: 01481 220025)  
Email: [e&dt@gov.gg](mailto:e&dt@gov.gg).

The legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law, 1998, as amended ('the Law')  
 The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005  
 The Employment Protection (Recoverable Costs) Order, 2006

The authorities referred to in this document are as follows:

**Cotterill v States of Guernsey** (Guernsey Royal Court, Judgment 58/2017)  
**Reynard v Fox** [2018] EWHC 443 (Ch)  
**Western Excavating (ECC) Ltd v Sharp** [1978] QB 761  
**Spafax Ltd v Harrison** [1980] IRLR 442  
**Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462  
**British Aircraft Corp v Austin** [1978] IRLR 332  
**Palmanor Ltd v Cedron** [1978] IRLR 303  
**Omilaju v Waltham Forest London Borough Council** [2005] EWCA Civ 1493  
**Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978  
**Lewis v Motorworld Garages Ltd** [1985] IRLR 465  
**Chindove v William Morrison Supermarkets Ltd** UKEAT/0201/13 (26 June 2014, unreported)  
**G W Stephens & Son v Fish** [1989] ICR 324, EAT

## Extended Reasons

### 1.0 Introduction

- 1.1 Documents within the hearing bundle shall be referred to like this: either "[x:y]" (which means "page x, paragraph y"); or "[x]" (which means simply "page x").
- 1.2 It is agreed that the Respondent employed the Applicant from 1 February 2019 to 13 September 2022, as an 'accountant/bookkeeper'. The draft contract of employment is at [AD1-6]. The Applicant's relevant earnings are not agreed.
- 1.3 The Applicant complains that she was constructively dismissed, contrary to ss.3 and 5(2)(c) of the Law. The Respondent denies that the Applicant was dismissed and, instead, alleges that the Applicant resigned. In the circumstances, the Applicant has the initial burden of proving, on the balance of probabilities, that she was dismissed within the meaning of s.5(2)(c) of the Law. If, and only if, she proves that she was so dismissed does the burden then shift to the Respondent to prove, again on the balance of probabilities, that the reason for the dismissal (*i.e.* the conduct leading to the Applicant's resignation) was fair.
- 1.4 The Tribunal, consisting of three members, sat on 4 June and 8 October 2024 to hear and determine the Applicant's claim. The Applicant represented herself with the assistance of a "McKenzie friend"; Mr. Gregg Le Tissier, the Respondent's managing director, represented the Respondent with the assistance of a "McKenzie friend". All of the material submitted by the parties in the consolidated bundle and in their oral evidence has been taken into account by the Tribunal, whether specifically referred to in this judgment or not. In order to save hearing time, the parties agreed that their written statements would stand as their evidence-in-chief.

1.5 The Tribunal, conscious that the parties were not legally represented, was anxious that all necessary steps were taken to ensure that they both had a fair hearing. The Tribunal took account of the then Deputy Bailiff's general comments in *Cotterill v States of Guernsey* (Guernsey Royal Court, Judgment 58/2017) and, in particular, those at paragraph 45 concerning the need to give appropriate help to unrepresented parties regarding procedure and possibly also with the case that they wish to present. Accordingly, the Tribunal carefully explained the procedure to the parties throughout the hearing and explored potential arguments and lines of questioning that they could have advanced. The Tribunal was also mindful of the commentary in paragraph 44 of *Reynard v Fox* [2018] EWHC 443 (Ch) that the fact that a litigant was acting in person was not in itself a reason to disapply procedural rules, orders or directions or excuse non-compliance with them; the exception to that principle being that a special indulgence to a litigant in person might be justified where a rule was hard to find, difficult to understand or was ambiguous.

## 2.0 Background

- 2.1 The Applicant maintains that she was employed under a “flexible working contract” based upon one day of 7.5 hrs per week, although this was, in reality, frequently more during school terms and less during school holidays. The Respondent describes the arrangement as an *ad hoc* “on demand” basis with specific oral express terms as set out at [TB4:6]. A written “draft” or “template” contract of employment was submitted to the Applicant for her consideration, but was never signed (see [AD1-6]).
- 2.2 Things went wrong between the parties during 2020. The Respondent describes expressing dissatisfaction with the Applicant's work from about mid-June 2020, holding a disciplinary meeting on 26<sup>th</sup> June 2020, and issuing a formal written warning on 29<sup>th</sup> June 2020. Further matters came to the Respondent's attention and the Applicant was suspended on 9<sup>th</sup> July 2020. A second disciplinary meeting was scheduled for 3<sup>rd</sup> August 2020, but the Applicant was unavailable and so the meeting had to be rescheduled. The Respondent then investigated matters and implemented necessary remediation. This meant that by January 2021 the Applicant still had not had her disciplinary hearing, and on 23<sup>rd</sup> January 2021 Guernsey entered its second Coronavirus quarantine.
- 2.3 The Applicant's account of matters is broadly similar, but she describes a fairly tempestuous working relationship with Mr. Le Tissier, the Respondent's managing director, leading up to the events of June 2020. She describes assuming in January 2021 that she no longer worked for the Respondent, but she had not had a disciplinary hearing, been dismissed, or been paid since her suspension in July 2020.
- 2.4 The parties had no meaningful contact until 18<sup>th</sup> May 2022, when the Applicant emailed Mr. Le Tissier and asked to be able to collect her personal possessions from the office, which she did on 1<sup>st</sup> June 2022. The Respondent then sought to arrange a disciplinary hearing for 14<sup>th</sup> September 2022 and in July 2022 provided the Applicant with what it considered to be the relevant material for the hearing (see [AQ1-AQB16/2]). There was a dispute about who the Applicant would be entitled to bring with her for the disciplinary hearing and the Applicant came to the conclusion that the outcome of the hearing was a foregone

conclusion. In the circumstances, the Applicant resigned with immediate effect on 13<sup>th</sup> September 2022 (see [AR]) – the day before the scheduled disciplinary hearing.

- 2.5 The Applicant included in the hearing bundle a written opening statement ([AAA1-5]), which she read out at the beginning of the hearing.

### 3.0 Evidence Summary

#### The evidence on behalf of the Applicant

- 3.1 The Applicant gave evidence on her own behalf and confirmed her statement ([AAB1-36]); she did not call any other witnesses.

#### The Applicant

- 3.2 The Applicant's statement goes into a lot of detail about matters surrounding her employment and events that happened during her time working for the Respondent. In an attempt to focus upon the relevant matters, and bearing in mind that the Applicant's claim is for constructive dismissal, the Tribunal specifically investigated the breaches of contract alleged by the Applicant. In summary, and paraphrasing where necessary, the Applicant identified the following alleged breaches (in her evidence and her closing submissions):

- (1) On or about 25<sup>th</sup> June 2020, the Respondent initiated a disciplinary process against the Applicant without proper reasons or due process.
- (2) In respect of the disciplinary process in June 2020, the Respondent failed to follow the contractual, or a reasonable, process by:
  - (a) failing to give adequate notice to the Applicant of the process leading to or the disciplinary hearing on 26<sup>th</sup> June 2020;
  - (b) failing to allow the Applicant to be accompanied to the disciplinary hearing on 26<sup>th</sup> June 2020 by a person of her choosing; and
  - (c) failing to give the Applicant any, or any sufficient, details of the allegations against her or the material relied upon in respect of the same.
- (3) The Respondent failed to pay the Applicant during her period of suspension that started on 9<sup>th</sup> July 2020, contrary to either the express or implied terms of the contract.
- (4) The Respondent failed to continue with the second disciplinary process (initiated in August 2020) in a fair or timely manner or at all.
- (5) The Respondent resurrected, reinstated or continued with the second disciplinary process two years after it started (*i.e.* in September 2022).
- (6) By reason of the letter dated 6<sup>th</sup> September 2022 (see [AP1-2]) sent by the Respondent to the Applicant, the outcome of the second disciplinary process was a *fait accompli* and left the Applicant with no alternative but to resign.
- (7) The Respondent forced the Applicant to resign by making the second disciplinary process as difficult as possible.
- (8) The Respondent failed or refused to allow the Applicant to be

accompanied by a person from outside the Respondent's organisation, contrary to a previous agreement.

- (9) The Respondent failed, from about 24<sup>th</sup> March 2020 to mid-June 2020, to provide the Applicant with equipment that was reasonable or necessary for the completion of her work, specifically a larger screen for use with her laptop.
- (10) The Respondent did not follow its contractual obligations towards the Applicant, in particular when operating the disciplinary processes.

3.3 For the avoidance of doubt, the Tribunal emphasises that it has taken into account all of the Applicant's witness statement and the documents cross-referenced in it. We have examined with particular care, but not to the exclusion of anything else, the evidence relating to the alleged breaches of contract and reasons for any delay between the alleged breach and the Applicant's resignation. The Applicant also explained how any alleged errors with her work were either not her fault or were not significant or material, and that the Respondent could not have had any legitimate grounds for dissatisfaction. In particular, she relied upon this account to show that the Respondent's decisions to initiate disciplinary proceedings (both in June and August 2020) were wholly unjustified.

3.4 Mr. Le Tissier, on behalf of the Respondent, cross-examined the Applicant. His questions were particularly directed to the quality of the Applicant's work and attitude during her employment; although these questions gave some background to the parties' relationship, the Tribunal did not find them to be very helpful when considering the alleged breaches of contract.

#### The Respondent's evidence

3.5 The witnesses called on behalf of the Respondent were: Gregg Le Tissier (managing director) and Casey Jonkmans.

#### Gregg Le Tissier

3.6 Mr. Le Tissier confirmed his statement (see **[RAB1-11]**). The great majority of his evidence related to the conduct of the Applicant; it was only in pages **[RAB7-10]** that he addressed the disciplinary investigations. He explained that some of the delay in dealing with the August 2020 disciplinary process stemmed from the amount of work necessary to correct the Applicant's errors, the quarantine period and regulatory supervision. An intention to continue with the second disciplinary process was made clear in his letter dated 3<sup>rd</sup> February 2021 (**[AM1-2]**) to the Applicant. He regarded the Applicant as only entitled to payment for work actually completed, and so during her suspension (*i.e.* when she did no work) she was not entitled to payment. He was cross-examined by the Applicant, but he made no material concessions.

#### Casey Jonkmans

3.7 Mr. Jonkmans confirmed his statement (see **[W1-2]**) and answered some supplementary questions put to him by Mr. Le Tissier. His evidence contained a large amount of classical hearsay (*i.e.* a statement made otherwise than in the course of oral evidence before the Tribunal and relied upon to prove the truth of what is said). Although hearsay evidence is admissible, the Tribunal considers that the inability to test

such evidence by cross-examination renders it less reliable. He was cross-examined by the Applicant, but he made no material concessions. The Tribunal, whilst grateful for Mr. Jonkmans attendance to give evidence, did not think that he took matters any further; his evidence essentially related to investigations and interviews with other staff members “after the event”, and the Tribunal accordingly attached little weight to it.

#### **4.0 Summary of closing submissions**

##### On behalf of the Respondent

- 4.1 Mr. Le Tissier, acting as the Respondent’s representative, referred to the Applicant’s resignation email (see [AR]). He pointed out that the Applicant had made no comments about the draft contract when it was presented to her. He explained that the parties had agreed that the Applicant would be employed on an “ad hoc on demand” basis and that it was anticipated that she would work half-a-day per week, but not during school holidays (subject to necessary work being completed).
- 4.2 The Respondent accepted that in the early days of the disciplinary process concerning the Applicant things “could have been better”, but maintained that they had “tried their best”. The Applicant had failed to complete important pieces of work for several months, including the payroll. The work that she did do was of a very poor standard, with an “error rate” of 70-80% “One-to-one” support was given to her, but errors in her work continued.
- 4.3 The Respondent concluded that the Applicant could not complete her role to a satisfactory standard, so there was no choice but to begin a disciplinary procedure. Support from the Committee for Employment and Social Security was obtained, and warnings were given to the Applicant.
- 4.4 It was a surprise that the Applicant was traveling and not available for the first proposed disciplinary hearing, but that was rearranged to accommodate her. Delays were caused by the need to correct the Applicant’s errors. When the Applicant returned her keys, the Respondent formed the view that she never intended to return to work.
- 4.5 The Respondent engaged a human resources consultant in 2022 and felt that the disciplinary process had to be completed. The Applicant was given all relevant materials in relation to the allegations made against her. No staff members were willing to support the Applicant, so she chose a director instead.
- 4.6 The filed ET2 form (see [TB3-9]) addresses the constituent elements of constructive dismissal and the Respondent relies upon that. The Applicant was only entitled to be paid for work actually performed, so no work during her period of suspension meant that no pay was due.

##### On behalf of the Applicant

- 4.7 The Applicant submitted that there had been no warning of previous performance issues and the delays were due to further investigations into her work. She explained that she contacted the Respondent to retrieve her belongings and did so. She accepts that she made some
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mistakes in her work, but submits that they were not significant. She had not been provided with the equipment necessary to perform her job, in particular a larger screen to view documents and spreadsheets when working from home. Mr. Le Tissier did not like the report that she had drafted in connection with an IT project concerning “cloud technology” (something that Mr. Le Tissier had made widely known that he did not favour and was not worthy of further exploration by the Applicant) and it was because of that that he took against her.

- 4.8 The Applicant relied upon the change in attitude between the first disciplinary hearing and the second, in particular the refusal to permit her to be accompanied by someone from outside the organisation. She explained that there was no reason for this and that the original decision to allow someone from outside to accompany her had amounted to a variation of her contractual terms and conditions.
- 4.9 She explained that the Respondent appeared to be happy to change or breach her contract of employment at will. No grievance was raised by her because she questioned whether there would be a fair process.

## 5.0 Legal Framework

- 5.1 Since the Respondent denied that the Applicant was dismissed, it was for the Applicant to prove, on the balance of probabilities, that she had terminated her contract of employment, with or without notice, in circumstances such that she was entitled to terminate it without notice by reason of the Respondent's conduct (see section 5(2)(c) of the 1998 Law). In order for the Applicant to be able to claim constructive dismissal, four conditions must be met:
  - (1) There must be a breach of contract by the Respondent. This may be either an actual breach or an anticipatory breach.
  - (2) That breach must be sufficiently important to justify the Applicant resigning, or else it must be the last in a series of incidents which justify her leaving.
  - (3) She must leave in response to the breach and not for some other, unconnected reason.
  - (4) She 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.
- 5.2 The Tribunal is satisfied that the concept of constructive dismissal in Guernsey law is so similar to English law that English authorities may be used to guide the way through what can potentially be difficult legal questions.
- 5.3 In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 the Court of Appeal made it clear that questions of constructive dismissal should be determined according to the terms of the contractual employment relationship and not in accordance with a test of 'reasonable conduct by the employer'. The Court of Appeal has since reaffirmed that lawful conduct is not capable of constituting a repudiation even though it may be unwise or unreasonable in industrial relations terms (see *Spafax Ltd v Harrison* [1980] IRLR 442). When deciding whether there has been a breach of contract, the Tribunal must reach its own conclusion on this question. The test is not whether a reasonable employer might have concluded that there was no breach: it is whether on the evidence adduced before it the Tribunal considers that there was.

- 5.4 In ***Malik v Bank of Credit and Commerce International SA*** [1997] IRLR 462 the implied term (often referred to as 'the T&C term') to behave reasonably towards employees was held to be that 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. The T&C term is of potentially wide scope; it can extend to extremely inconsiderate or thoughtless behaviour. For example, refusing to investigate complaints promptly and reasonably is capable of falling into this category (see ***British Aircraft Corp v Austin*** [1978] IRLR 332). Unacceptable abuse may fall within its scope: ***Palmanor Ltd v Cedron*** [1978] IRLR 303, and indeed any conduct which is 'so intolerable that it amounts to a repudiation of the contract': per Phillips J in ***Austin***. However it needs to be stressed that the conduct does need to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence.
- 5.5 Some constructive dismissal cases which arise from the undermining of the T&C term involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify her taking that action, but when viewed against a background of such incidents it may be considered sufficient to warrant treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.
- 5.6 In ***Omilaju v Waltham Forest London Borough Council*** [2005] EWCA Civ 1493 the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. Although the final act may not be blameworthy or unreasonable it had to contribute *something* to the breach even if relatively insignificant. If the final act did not contribute or add anything to the earlier series of acts it is not necessary to examine the earlier history. The Court of Appeal decision in ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 contains an important discussion of the whole last straw concept. Underhill LJ set out the following passages from the judgment of Dyson LJ in ***Omilaju*** which he said sum it all up and should require no further elucidation:

"15. *The last straw principle has been explained in a number of cases, perhaps most clearly in ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:*

"(3) *The breach of this 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 particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the*

- implied term? ... This is the 'last straw' situation."*
16. *Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application...*
  19. *The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
  20. *I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*
  21. *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."*

5.7 The Applicant must have left in response to a breach committed by the Respondent. This breach may be an actual breach or an anticipatory breach. It is not enough that the Applicant merely expected the Respondent to repudiate the contract and left in anticipation; there must be a clear and unequivocal indication by the Respondent that it does not consider itself bound by or will not observe the conditions of the contract. Nor will conduct subsequent to the resignation convert that resignation into a constructive dismissal.

5.8 Although the classic formulation by Lord Denning in Western Excavating speaks of the Applicant making her mind up 'soon', there is no fixed time within which she must do so and so a delay per se will not amount to affirmation in law, albeit it will often be an important factor: Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13 (26 June 2014, unreported). A reasonable period is allowed. It depends

upon all the circumstances including the Applicant's length of service (G W Stephens & Son v Fish [1989] ICR 324, EAT, where three months was held not to be excessive), the nature of the breach, and whether the Applicant has protested. On the other hand, mere protest will not necessarily prevent an inference that the Applicant has waived the breach, although a clear reservation of right might do so.

- 5.9 Where the Applicant is faced with giving up her job and being unemployed or waiving the breach, it is not surprising that the courts are sometimes reluctant to conclude that they have lost the right to treat themselves as discharged by the employer merely by working at the job for a further period. This was accepted expressly by the EAT in Chindove and was said to be particularly so in the case of a longer-serving employee with serious financial commitments and more uncertain prospects of alternative employment.

## 6.0 Facts Found and Analysis

- 6.1 The Tribunal reminds itself that this is a claim for constructive dismissal, and the burden (at least initially) is upon the Applicant to establish the necessary breach or breaches of contract together with the other matters outlined in section 5 above. The Applicant very helpfully was able to list the breaches by the Respondent that she alleged entitled her to resign (as set out and summarised in paragraph 3.2 above). The Tribunal, being anxious to consider all possibly relevant matters, also considered the alleged breaches not just as breaches in their own right but whether individually and/or collectively they amounted to a breach of the implied contractual term of trust and confidence (as discussed above). We found that, although the draft contract ([AD1-6]) was never signed by the parties, they both conducted themselves throughout the Applicant's employment as if the provisions of it applied; we shall do the same.
- 6.2 The Tribunal has come to the following conclusions about the individual alleged breaches (using the same numbering as in paragraph 3.2):
- (1) The instigation of a disciplinary process (including an investigation) involves a very low bar. Unless there is some obviously illegitimate or ulterior reason for an employer commencing a process (whether severe enough to amount to an abuse of process or not) the Tribunal considers that an employer must have a wide discretion to decide whether to initiate a disciplinary investigation or process. In any event, having heard the evidence of the parties, the Tribunal is satisfied that it was, in fact, reasonable for the Respondent to commence a process. In particular, the Respondent had concerns about the Applicant's capability and wished to understand what was going on. Whether that process would result in any adverse finding is, of course, a separate question, but the mere act of starting the process in the circumstances that we find existed at the time was not a breach of contract.
  - (2) Having considered the evidence adduced by the parties, the Tribunal is satisfied that:
    - (a) The Applicant should have been given at least five days' written notice of the disciplinary hearing held on 25<sup>th</sup> June 2020 (see paragraph 6.3.2 of the Employee Handbook at [AE17]). The Tribunal finds that she was not given the

required notice (although short notice was given) and that this was a breach of contract by the Respondent, but the Applicant did not appeal against the finding on the ground of such a breach and did not resign until 13<sup>th</sup> September 2022. In the circumstances, we find that this was a minor breach insufficient to justify the Applicant's resignation and that it did not cause the Applicant to resign.

- (b) Although the Applicant was not explicitly reminded of the right to be accompanied at the disciplinary meeting (see paragraph 6.3.9 of the Employee Handbook at [AE19]), she did not ask for someone to accompany her and so was not refused this right. She did not raise a grievance thereafter or appeal the finding based upon a refusal to allow her to be accompanied. In those circumstances the Tribunal finds that there was no breach of contract.
  - (c) The obligation upon the Respondent to provide the Applicant with the details of the allegations against her seems to be naturally and textually linked to the requirement to give five days' written notice of the disciplinary hearing. The obligation to provide the Applicant with written statements in support of the allegations against her is a qualified obligation, and may be varied where to do so was "*not possible*"; in those circumstances a summary would be given. The Tribunal finds that a summary of the evidence was given to the Applicant and in circumstances where that was justifiable (in particular, the importance of the alleged errors and the urgency of resolving them).
- (3) The Applicant did not argue at any stage before the Tribunal that there was an express or implied contractual provision for the calculation of wages due if she did not work in any given week. The parties appear to have entirely agreed that if the Applicant did not work she was not paid. The Tribunal is not satisfied that there was any implied term or rule of custom and practice that would have entitled the Applicant to claim an "average" weekly wage for weeks when she did not, in fact, work. The Tribunal finds that there was no breach of contract.
  - (4) There is no express contractual requirement *per se* for any disciplinary procedure to be completed or conducted in a fair or reasonable time, although such a term might be implied under the requirements of natural justice. The Tribunal considers that it is highly significant that the Applicant did not complain to the Respondent (whether by way of grievance or otherwise) about the alleged delay in conducting the disciplinary procedure from August 2020. In the circumstances, the Tribunal is not satisfied that there has been a breach of contract.
  - (5) The resurrection, reinstatement or continuation of the second disciplinary hearing in September 2022 was, subject to the remaining dispute about who may accompany the Applicant that forms allegation (8), with the express acquiescence of the Applicant in July and August 2022 (see [AO1-6]). The Applicant did not raise an objection at the time. Furthermore, and in any event, this allegation is the "flipside" of allegation (4) and logically equivalent to it – if the Respondent failed to conduct the disciplinary hearing within a reasonable time, any continuation in September 2022 must be a breach and *vice versa*. The Tribunal finds that there is no breach of contract.
  - (6) The letter dated 6<sup>th</sup> September 2022 (see [AP1-2]) notifying the

Applicant of the disciplinary meeting did not present her with a *fait accompli*. That letter is very clear in setting out only what a possible outcome of the meeting might be; it would be unreasonable to interpret it as doing anything else, and it certainly did not indicate that the Respondent had already “made up its mind”.

- (7) The allegation that the Respondent had “*made the second disciplinary process as difficult as possible*” is very vague. It could, on one hand, simply be an alternative way of emphasising the Applicant’s allegations of breaches of contract by the Respondent. If it is that, then it takes the matter no further. It might, on the other hand, be a separate allegation of a breach of the term of trust and confidence. If it is that, the Tribunal is not satisfied that such was the intention of the Respondent or that it could be a reasonable inference.
- (8) The Applicant’s point, so far as the right to be accompanied by a “non-work associate” to the second disciplinary hearing is concerned, stems from the documents at [AJB1-3] and [AO4-5]. When the Respondent tried, unsuccessfully, to arrange the hearing in August 2020, they said to the Applicant (in the letter dated 24<sup>th</sup> July 2020 at [AJB1-3]), “*On this occasion, due to the small number of staff at ICB, we are prepared to allow a relevant non-work associate to accompany you subject to that person being acceptable to the ICB Board.*” When the hearing was being arranged for September 2022 there was an exchange of emails in July 2022 (see [AO4-5]) in which the Respondent reverted to the strict wording of the disciplinary procedure in the Handbook, namely for the Applicant to be accompanied by a work colleague only. The Applicant argued that this was a breach of a variation to her contract. The Tribunal does not accept that the wording of the letter dated 24<sup>th</sup> July 2020 from the Respondent amounted to a variation of the terms and conditions of the Applicant’s contract of employment. The wording clearly refers to “*on this occasion*” and the Tribunal finds that, in all the circumstances, it referred to that particular hearing as arranged for that particular date; it had no broader application or meaning. There is a contractual provision for variation of terms (clause 18, see [AD6]), but the Tribunal finds that this was not engaged by the Respondent. In any event, following the Respondent’s explanation for its reversion to the Handbook wording ([AO4]), the Applicant ostensibly accepted the position by indicating her choice in accordance with that contractual provision; she did not thereafter seek to raise a grievance or make further submissions to the Respondent objecting to that decision. The Tribunal finds that there was no breach of contract.
- (9) The Applicant’s evidence in relation to her contemporaneous complaints about the unsuitability of the computer screens appears to be a single email dated 8<sup>th</sup> April 2020 ([AQB7/1]). She says, “*I have been trying to sort this [i.e. production of a specified accounting document] but it is really hard as the screens are so small so I think it would be best if you use your Excel one for now...*”. There are circumstances, for example the provision of personal protective equipment, where an employer is expected to take a proactive role in establishing what equipment might reasonably be required by an employee; this was not one of them. At most, the Applicant’s email indicates that on a particular occasion she found working with a certain screen to be difficult, but not impossible; specifically, she did not seek to

excuse the other mistakes attributed to her by the Respondent by reference to a lack of suitable equipment. If the Applicant had made repeated express requests for reasonably necessary equipment, the Tribunal's conclusion might be different, but on the evidence before us we do not find there to have been a breach of contract.

(10) The allegation that "*the Respondent did not follow its contractual obligations towards the Applicant, in particular when operating the disciplinary processes*" is a "sweeping up" allegation and does not make any additional specific allegations of a breach of contract.

- 6.3 As explained above, the Tribunal also considered whether the Respondent's behaviour amounted, cumulatively, to a breach of the implied term of trust and confidence. This is the doctrine of the "final straw" (see the analysis in paragraph 5.6 above). In considering this point, the Tribunal re-examined the Applicant's resignation email ([AR]). The Applicant explains that her resignation is based upon: (1) the Respondent having made her situation untenable over the last two and a quarter years; (2) being prevented from bringing anyone to the disciplinary hearing who could support her; and (possibly) (3) not being paid during her period of suspension. The Tribunal must be cautious, because the Applicant did not develop, during her evidence or submissions, an argument to support a "final straw" finding.
- 6.4 The Tribunal thinks that the comments of Dyson LJ in *Omilaju* (set out in paragraph 5.6 above) are particularly relevant: "*If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.*" We are satisfied that we can rely upon those comments and find that the matters complained of in the Applicant's resignation email are either "ancient history" or, so far as the allegation of being prevented from being accompanied at the hearing is concerned, was waived by the Applicant when she apparently accepted the decision in her email dated 7<sup>th</sup> August 2022 to the Respondent (see [AO4]). In those circumstances, we find that there was no breach of the implied term of trust and confidence.
- 6.5 There is, furthermore, another important consideration in respect of some of the alleged breaches. It is an essential element of the doctrine of constructive dismissal that the Applicant should not delay too long before resigning, otherwise she risks affirming the contract and waiving the breach. The Tribunal is conscious of the difficult times the island experienced during part of 2020 when the Covid quarantine was in place and we have had regard to all of the circumstances surrounding possible sources of delay. Equally, the Tribunal is conscious that in a business situation such as that operated by the Respondent where there was evidence that many employees were capable of working from home regardless of any legal requirement to do so, and many in fact did, the

quarantine probably had less of an impact than upon businesses where the physical presence of employees was essential.

- 6.6 Where there are allegations of a continuing breach of contract it is important to have regard to when the breach started, because that is the date upon which the clock “starts running”. Even if the Tribunal’s conclusions set out in paragraph 6.2 (apart from 6.2(5) and 6.2(6) – about which, see below) are wrong, we are satisfied that the delay between the alleged breaches and the Applicant’s resignation is too great to admit of any other possible conclusion than that the Applicant affirmed the contract and waived the breach. The Tribunal is satisfied that there was no reasonable explanation or excuse for the delay of over two years between the matters complained of and the Applicant’s resignation. Even taking into account the quarantine period and other vicissitudes of everyday life, the Tribunal concludes that the delay means that the Applicant has lost the ability to link her resignation with any of those alleged breaches of contract.
- 6.7 The conclusions in paragraphs 6.2(5) and (6) require separate consideration, since they relate to alleged breaches that occurred in September 2022. As explained in paragraph 6.2(5) above, that allegation is logically equivalent to the allegation dealt with in paragraph 6.2(4) and so is subject to the same criticism of delay. Paragraph 6.2(6) is simply a question of documentary interpretation and the Applicant made no objection to the Respondent at the time; no question of delay need be considered.

## 7.0 Conclusion

- 7.1 The Tribunal finds that the Applicant resigned with immediate effect on 13<sup>th</sup> September 2022 and was not constructively dismissed. In the circumstances, we dismiss the Applicant’s claim for constructive dismissal.

## 8.0 Costs

- 8.1 The Tribunal's power to awards costs is discretionary and governed by paragraph 6 of the Schedule to *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005* and *The Employment Protection (Recoverable Costs) Order, 2006*.
- 8.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.

Advocate Jason Hill

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Signature of the Chairman

05 November 2024

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Date

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