



EMPLOYMENT TRIBUNALS

Claimant: Ms E Hare

Respondent: Arlesey Town Council

HEARD AT: Bedford

ON: 4 – 8 July 2016
11 July 2016
12 July 2016
13 – 15 March 2017

BEFORE: Employment Judge Adamson

REPRESENTATION

For the Claimant: Mr A C Hare (Claimant's Husband) (4 -12 July 2016)
Ms S Bewley (Counsel) (13 -15th March 2017)

For the Respondents: Mr A MacPhail, Counsel

JUDGMENT

1. The complaint of unauthorised deductions from wages is dismissed on withdrawal.
2. The complaint of unfair dismissal does not succeed and is dismissed.
3. The Respondent's application for a cost order is granted in part. The Claimant is Ordered to pay to the Respondent the sum of **£350**.

REASONS

Introduction and hearing issues

1. The claim as pursued at the beginning of this hearing is of constructive unfair dismissal pursuant to Sections 98 Employment Rights 1996

(ERA or the Act) relying also on Section 95 (1) (c) of that Act, and also arrears of wages (in the sum of £454/5) for untaken time off in lieu pursuant to Part II ERA. During the adjournment between July 2016 and March 2017, the Respondent paid the money outstanding. The Claimant then withdrew the wages complaint and agreed to its dismissal. Following the Claimant's resignation of her employment the Respondent underwent a procedure during which it concluded that had the Claimant not resigned it would have dismissed her in any event. The Claimant subsequently presented a further claim complaining of unfair dismissal in respect of that and other matters, which claim was subsequently withdrawn.

2. There have been preliminary hearings to identify issues and deal with case management matters in respect of the two claims. Case management orders had been made.
3. The claim presented ran to 151 pages, including attachments. Within the claim the Claimant alleged a breach of the implied contractual term of mutual trust and confidence culminating in a final straw: namely a letter from the Respondent dated 5 February 2015. Pursuant to an order made by myself at a preliminary hearing on 4th September 2015 the Claimant was required to provide a schedule of the matters she relied on to establish the alleged breach. Pursuant to that order the following was provided:
 1. **2 March 2011.** The Harris/Bowskill *inaccurate audit review*. This was fully rebutted and responded to by C –without any credit given to C. The review was brought about due to staff members filing *bullying, intimidation and inappropriate behaviour* complaints of the Chairman to the CBC Monitoring Officer in October 2010. Such review *intended to show C at fault* and sought to identify cost savings with a view to reduce staff costs *and caused stress and upset to C* and brought unwarranted and untrue newspaper publicity and triggered ATC's hugely anti Arlesey United Kingdom Facebook site "AUK" [Axiv & ETC5xiv, 10,11]
 2. **17 March (1) & 26 April 2011 (2).** The C filed 2 complaints with CBC's Monitoring Officer against (1) Cllr Harper and (2) Cllr Dalgano for conduct in breach of CBC Code of Conduct, the *undermining of C's position and eroding trust and confidence* since December 2010, and making the working environment *very stressful, and humiliating C* at Council meetings [Axv & ETC4, 5xiv]
 3. **5 September 2011.** The suspension of the Chairman, Hugh Harper, by the CBC Standards Committee, was due to long running *unacceptable conduct* towards C and 2 other staff members. He then resigned from ATC and 5 other councillors, including Cllr Dalgano, also resigned. Later the C's complaints were withdrawn due to the demise of the National Standards Board, and that Harper had resigned, and to avoid further adverse publicity to ATC. [Axv & ETC4, 5xiv, 10]
 4. **September-November 2011.** Numerous *defamatory* newspaper articles and AIK posts written/promoted by ex Councillor Geoffrey Page [friend of Harper] stating C's work quality was so poor, and the internal audit was appalling, and that C had gagged him, and that C had made illegal payments and C's theft of £1500, that he had to notify the Audit Commission; the ATC's external and internal auditors found no such faults at all. At no time did the council support C or caution/restrain Page or combat the adverse publicity and damage to C's reputation. Since repeated by Page in 2012, 2013 and 2014, and further damaging C's reputation [Aiv & ETC5i, xxii, 10, 11]

5. **July 2013.** The C had cause to reprimand and thereafter suspend a Mrs Ward. A campaign in support of Mrs Ward was begun, via AIK, and *inexplicably supported* by Cllrs Holloway, Gravett, Ward and Hazelwood and against the ATC and C to C's *embarrassment and contrary to C's employment position* [Avi & ETC5vi, 8, 10]
6. **Early March 2014.** It was reported back to C that Cllr Holloway had said, to a local pub gathering, his first business upon becoming Chairman in May 2014, when he calculated he would win, would be to *sack the staff and thereby unfairly causing stress and upset* to C [ETC5ix, 10,11]
7. **March 2014.** Further postings placed on AUK by ATC councillors [Holloway, Gravett, Ward, Hazelwood, Auburn] and a Mrs Sarll who all appeared to enjoy *humiliating and criticising C's work* and without rebuttal they condoned and joined with further untrue comments by others that ATC and the staff were *corrupt and incompetent*. The ATC did nothing to restrain such AUK participation against the C, whilst knowing it caused upset [Aiv & ETC5i, ix, 8, 10]
8. **22 March 2014.** Grievance hearing, brought by C and Mrs Rowe, due to *arrogant conduct, harassment, intimidation and bullying* by Cllrs Holloway, Gravett, Ward and Hazelwood towards C. The grievance(s) against the Cllrs went unresolved due to the panel chairman, Cllr Bains "GB" not producing the agreed reports, and despite C's continual chasing he did nothing due, it became clear to C Mrs Rowe and the ATC Chairman, to GB siding with the said complained about cllrs and unfairly causing delay and deliberately stalling the grievance procedure [Aix, xii & ETC5ix, 10, 11]
9. **1 April 2014.** At the full council meeting Cllr Gravett stated to councillors, without warning and without any foundation, and not pursuant to the agenda, that C's husband was being investigated by Bedfordshire Police CID. Such statement, made just 10 days after the grievance hearing, was *hugely embarrassing and humiliating to C, and Mr Hare*. Upon Mr Hare's request, after Gravett later repeated the lie on AUK, the Chief Constable undertook an internal inquiry to confirm no such investigation has ever been undertaken by the police and that Gravett *had lied*. [Axiii & ETC5xiii, 8, 10, 11]
10. **May 2014.** Due to GB's unacceptable delay, Mrs Rowe filed *inappropriate conduct* complaints, against Holloway and Gravett, with the CBC monitoring officer. Both were found to have *breached the ATC code of conduct* [ETC5ix(a), 10]
11. **8 May 2014.** A close friend of Cllr Holloway, a Mark Newbury, reported the C to the Comet Newspaper for reporting him to the police for *considerable harassment and defamatory comment(s)*, and that C had failed to reply to FOI requests, which was untrue. The C, and Mrs Rowe, had suspected that Holloway and others were behind the Newbury conduct, as documents indicate. [AX, xxi & ETC5x, xxi, 8, 10, 11]
12. **May 2014.** the C sent a huge quantity of tagged highly *derogatory, intimidating, untrue, harassment and discriminatory* AUK posts to the Chief Constable of Bedfordshire in an effort to stop such comments. The ATC had done nothing to stop or rebut such comments. In fact 5 councillors [Holloway, Gravett, Ward, Hazelwood & Auburn] condoned that said on AUK and including their own supporting comments. [Ai & ETC5i]
13. **14 May 2014.** The ATC AGM caused a long lasting furore by Holloway supporters due to the voting outcome for Chairman, which Holloway lost, thereby causing upset and divisions between councillors *which impacted upon C as the Council's clerk* right up until she resigned – because the Holloway supporters openly *accused C of acting against Holloway in the election – resulting in very considerable difficulties for C long thereafter**, and causing C stress and upset. [Axix, xxiii & ETC5dvi, xix(xx111), 8, 10, 11]
14. **9 June 2014.** Request by Cllr Hazelwood "DH) to include on the July agenda the Audit Commission report on Whitehill Council, which concerned serious financial irregularities

and the Clerk of that Council was sent to prison. DH failed to attend the July meeting but was thereafter responsible [together with Holloway, Ward, and Gravett who were all involved in the ongoing grievance complaint by C] for 2 newspaper articles calling for a full audit of the ATC accounts *due to irregularities* [totally untrue] and concerns as to who the council is run. *Clearly inferring C was at very serious fault* [Aiii, xxiii & ETC5iii, iv, xxiii, 8,10]

15. **June 2014.** Cllr Rencontre suggested to C that because of C's age she should retire. *Such discriminatory suggestion hugely hurt C* and was not agreed. [Axxi & ETC5xxi, 8, 11]
16. **1 July 2014.** At the full council meeting Cllr Ward [one of the 4 cllrs subject of the grievance complaint] produced, only at the agenda item and without any reference to C or the chairman, his version of the new standing orders. Inexplicably, and without any pre-reading, the council adopted Ward's version in 5 minutes. Such irresponsible decision was indicative of the control* of the council meetings enjoyed by the Holloway group. The council, after C had read and checked the new model rules, *continually ignored C's advice, in breach of MT&C, that the adopted rules needed serious amending.* [Axi, xii & ETC5xi, xii, 10]
17. **4 July 2014.** Pursuant to their protracted grievance C and Mrs Rowe sent GB their Notice of Appeal on the grounds *they had not received any written response to their grievances, no decision issued, no explanation received, and that GB, panel chairman, had become personally opposed and seriously biased against C and Mrs Rowe.* No response to the Notice was ever received until 8 December 2014 from Cllr Heyes. [Aix & ETC5ix, 8, 10, 11]
18. **September 2014.** Cllr Judy Rencontre "JR" began an inexplicable about turn campaign against C, and Chairman Daniels, *to deliberately contrive and exaggerate minor management and staff matters into gross misconduct allegations against C* [Aii, v, vii, viii, xvii, xx & ETC5, 5ii, xx, 8, 9, 10, 11]
19. **18 October 2014.** An email from Miss Clark, ex employee since late 2013, sent to all councillors, but strangely not to C or Mrs Rowe, stating her part time holiday calculations were incorrect. Miss Clark had never during the 11 months since leaving ATC brought the matter to C's attention and *which C could have dealt with.* It has long been suspected, now confirmed, JR was instrumental to get Miss Clark to write her email – *in JR's relentless intent to bring misconduct upon C.* [Aviii, xx, xxi & ETC5ii, 10, 11]
20. **21 October 2014.** At the council's environment committee meeting JR *unacceptably and aggressively and insultingly shouted at C,* in front of the public and in breach of ATC policy, and in support of her contrived allegations against C (Rospa health and safety issues) with little control/restraint from the chairman, save to tell JR her comments/conduct were a non agenda matter. [Aii, v, xvii, xx & ETC5ii, V, 10, 11]
21. **24 October 2014.** An email from JR, to all councillors, wherein JR agreed that a number of confidential issues should be discussed at an extraordinary meeting, without staff present. Such a meeting would *wholly undermine C and her employment position.* [Aii, v, viii, xvii, xx & ETC5ii, v, vii, 8, 10, 11]
22. **4 November 2014.** At the full council meeting, and before the public, JR again in support of her contrived allegations *unacceptably, aggressively and insultingly shouted at C,* in breach of ATC policy, without any restraint from the chairman. Also JR, supported by Holloway and Page, insisted Miss Clark's email, concerning confidential employee wage payment matters, be discussed in public without the facts established and against C's advice, *and thereby undermining C.* [Aii, v, viii, xvii, xx & ETC5ii, v, 8, 10, 11]

23. **17 November 2014.** Secret extraordinary council meeting called to consider suspending C, and specifically without C's attendance and *entirely in breach of C's contract*. Upon submissions entirely driven by JR and supported by the Holloway group* it was resolved to suspend C. Although secret it was, suspiciously, reported on AIK, that C had been sacked. However upon JR speaking at considerable length with CBC and BBW [ATC solicitors] lawyers, the following day, she was told by both that *such suspension was entirely inappropriate and ill advised*. Although requested no minute were ever disclosed to C, and *thereby undermining her position* [A & ETC5, 5ii, 8, 10, 11]
 24. **18 November 2014.** C received a contradictory letter from Cllr West with regard to the grievance outcome, some 8 months late. Cllr West had no authority at all to write such letter and it was unclear who put him up to signing such letter and given no mention was made of the filed July 2014 appeal. It now transpires, as suspected, Cllr West admits he was *bullied by GB into signing the letter* that GB had written. Cllr West admits he always believed *C was bullied by the said cllrs* [ETC5ix, 8, 10, 11]
 25. **2 December 2014.** A disruptive and stressful council meeting; which went into secret session until very later (12.20am). C was again barred. Council against heard unfair submissions against C from JR, and again failed to suspend C. This *caused C further stress and upset, and in breach of C's contract*, and C was not given any opportunity to rebut that said by JR. [A, Axviii & ETC5dviii, 8, 9, 10, 11]
 26. **8 December 2014.** The C had a telephone call, and email, from Cllr Heyes [new councillor and friend of Holloway] to arrange a hugely belated appeal hearing for 20.12.14 – in the unresolved grievance matter. However the secretly selected appeal panel *was deliberately and unfairly biased against C as irrefutably proven* to Cllr Heyes. He reluctantly agreed the panel membership needed to be revisited. The appeal hearing was adjourned because of C being off sick. The biased selection (particularly of Cllr Auburn) is further evidence the Holloway group controlled council decisions* and adding pressure and stress to C [Aix, xxi, & ETC4, 5ix, xvi, xxi, 8, 10, 11]
 27. **6 & 13 January, 3 February 2015.** At these meetings of the council, as reported to C, JR again, in secret session(s), tried to *affect the suspension of C in breach of C's contract* [A, A4 & ETC5, 8, 9, 10, 11]
 28. **9 February 2015.** The C received a letter dated 5 February 2015 from JR, *in breach of C's contract*, and without reference to the Chairman, or vice chairman, that she had found further issues/allegations against C that required investigation and *threatened that disciplinary action may result*. The ATC chairman had repeatedly told C not to reply to JR's letters. [A2 & ETC5, 5ii, 9, 10, 11]
- NB. The paragraph numbering is inserted by myself for ease of reference. The references at the end of each paragraph of the above are references to documents the Claimant has previously appended to her claim.
4. Case management orders had been made in the usual format for exchange of witness statements. This case was due to be heard beginning on 29 March 2016 but did not as at the time I considered that the parties were not in a position to proceed. Shortly before this hearing the Claimant sought to introduce further witness statements, beyond those which had been exchanged in accordance with case management orders, those witness statements being three from the Claimant; and statements from Edward Elliott; Christine Patterson; Linda Leslie; Yvonne Endecott; Margaret Davey; Valerie Lowe; and Molly Foster. None of those statements had been exchanged in accordance with the

case management orders and were only sent to the Respondent very shortly before the hearing. Other than the Claimant's witness statements they were largely to do with the Claimant's character and the writers of those statements experiences of the Claimant. For reasons which I gave orally at the time, those proposed new statements were not allowed to be used. The Claimant's own previously exchanged, witness statement (in two parts) was short albeit it incorporated, by reference to them, other documents. The Claimant relied on her claim with appended documents; her second claim (which had been withdrawn (case number 3401636/2015)) together with attached documents which ran to 140 pages; and her replies to the Respondent's responses in both claims, together with a number of other documents and of course the documents she referred to within her witness statement.

5. At the start of the hearing the Claimant applied to have a number of documents, being emails between Mr Hare and the Respondent, removed from the Tribunal bundle. The Claimant relied on Article 8 of the Human Rights Convention and referring to a then recent EAT Judgment *Garamukanwa v Solent NHS Trust, 0245/15/DA*. The emails were to do with the Claimant's work and largely sent to and from the Claimant's work email address. For reasons which I gave orally at the time, the application to remove those documents from the bundle was refused.
6. In addition to the above I had the benefit of both skeleton arguments from both parties' representatives at the start of the hearing together with written submissions from the Respondent's representative and oral submissions from both parties' representatives at the conclusion of the hearing. Both parties' representatives referred to a number of authorities. I was presented with a bundle of documents in three parts (with idiosyncratic pagination) which bundle was supplemented during the hearing. I had regard to all documents within the bundle to which I was referred.
7. I heard evidence on oath or affirmation from: the Claimant; David Ian West, Councillor with the Respondent; David Betham, formerly a Councillor with the Respondent for about 20 years until mid-2010; Andrew David Ward, Councillor with the Respondent between November 2013 and September 2014 and also since May 2015; Darren Hazelwood, a Councillor with the Respondent between September 2013 and September 2014; Christopher Gravett, a Councillor with the Respondent between about September 2013 and September 2014 and also since May 2015; between 2012 and 2015; Gursh Baines, a Councillor with the Respondent since 2012; Michael Holloway, a Councillor with the Respondent since May 2012; and Judith Rencontre, a Councillor with the Respondent between 2011 and May 2015. I was also presented with a witness statement from Andrew James White, a Councillor with the Respondent between about 2011 and May 2015 who did not attend the hearing in July 2016 or in March 2017 because, I was informed, of work pressures. I was not provided with any other information and gave his

statement minimal weight. I was provided with a signed statement from the late Nicholas Charles Daniels, formerly a Councillor of long standing and Chairman of the Respondent. I gave Councillor Daniels witness statement full weight as there was no suggestion that he would not have attended had he lived. Throughout these reasons I have used the title Councillor when referring to witness' who were or had been Councillors at the material time as that is the capacity they were acting, or alleged to be acting in, and for ease albeit some are no longer councillors.

8. As part of the Claimant's case the Claimant referred to a number of posts on a Facebook site known as Arlesey UK (AUK). The Claimant had referred to these as part of the reason why she resigned in her resignation letter and often in evidence, albeit less so in the schedule set out in paragraphs 3 of these reasons. After the conclusion of cross examination of her by the Respondent's Counsel, I asked the Claimant to identify from within the bundle those posts, which had been made by people who were Councillors at the time they made, upon which she relied (the vast majority of the posts being made by non-Councillors and some by people who, while they are Councillors with the Respondent now, were not at the time they made them). As this request was made around 4.45pm the Claimant was allowed time to provide the information the following day. The Claimant was provided with the usual warning that she must not discuss the case with anybody during the adjournment or until after she had concluded giving her evidence. This warning had been given by myself at each break beforehand.
9. The following morning I was presented with a schedule of page numbers of the bundle and references to posts therein. The schedule had been prepared by the Claimant's then representative. The Claimant informed that, contrary to the warning referred to above, she had spoken briefly to her husband about the matter and he had prepared the list. When I asked which of the posts on the schedule she relied on, she initially said most of them and then said all of them. It was apparent that the Claimant was unfamiliar with the detail of the schedule and an adjournment took place, being between around 10.30 until a little after lunch to enable the Claimant to identify those posts she relied on. When the hearing reconvened that afternoon the Claimant identified those posts she relied on, at least two of which were by people who were not Councillors at the time they were made, albeit the majority were.
10. On the seventh day of the hearing, Mr Hare became unwell and the case had to be postponed to 27, 28, 31 October 2016 by which time I had also become unwell and the hearing could not then resume. The hearing was eventually fixed to resume on 14th and continue, if necessary, until 16th March. In the event time was available to hear evidence on liability and on remedy which was done with both parties' agreement.
11. Shortly before the start of the resumed hearing Councillor Rencontre was reported to have a number of medical conditions and had been previously been advised that she was not well enough to attend.

Councillor Rencontre had expressed a desire to attend the hearing and would make a final decision on the morning of the resumed hearing as to whether she was feeling well enough to do so. A copy of Councillor Rencontre's previous medical certificate was attached. That certificate was redacted so that it did not provide details of any specific medical condition. At the previous hearing there had been no objection but on this occasion the Claimant, through her new representative, reserved her position.

12. Two witnesses attended on the first day of the resumed hearing for the Respondent. It was agreed that both would be heard. The Respondent was to obtain information from Councillor Rencontre before that day's lunch break as to whether she will be able to attend. In the event such information was not forthcoming. At the start of the hearing in the afternoon I was informed that Councillor Rencontre was on her way albeit there would be a need for a short adjournment, perhaps 20 minutes to allow her to arrive. I was also informed that Councillor Rencontre could not attend the following morning as she had a viewing of a retirement home, such viewings being rare and difficult to obtain.
13. The Claimant's representative informed that although she would cross examine Councillor Rencontre this afternoon if it was my decision to hear her then, she had not fully prepared to do so. I reminded myself that at the time of the first hearing (29th March 2016) Councillor Rencontre, although knowing the date of the hearing, had travelled abroad and during the earlier part of this hearing her attendance had remained uncertain. In the circumstances I determined to proceed with the second witness present that day, namely Councillor Holloway. At the conclusion of the evidence that day I allowed time for the Respondent to take instructions to contact Councillor Rencontre to ascertain whether she could attend the following morning. I was subsequently informed that Councillor Rencontre would be in attendance on the second day of the resumed hearing, ie 15th March. Councillor Rencontre attended on that day.
14. I considered the claim before me only.

The Issues and the Law

15. The issues that arose out of the claim and response are:
 - i) Whether the alleged conduct (see paragraph 3 above) took place;
 - ii) If so, whether the conduct was carried by the Respondent. In particular, if the conduct or some of it was carried out by people who were Councillors (members of the Respondent) was that conduct of the Respondent or was the Respondent otherwise liable;
 - iii) If so, whether the conduct broke the implied contractual terms of mutual trust and confidence;
 - iv) If so, whether the Claimant affirmed the contract or waived the breach? This includes consideration of:

- a) the Claimant's conduct (actions or omissions) after the alleged conduct of the Respondent on which she relies;
- b) Whether a last straw occurred as alleged;
- v) If not, was the breach of the contractual terms a reason for the Claimant's resignation;
- vi) If the Claimant was constructively dismissed by the Respondent, did it do so for a potentially fair reason (the Respondent asserting in the alternative; - the Claimant's conduct; the Claimant's capability; or some other substantial reason of a kind sufficient to justify the dismissal of the Claimant from the position she held);
- vii) Was the dismissal fair, applying the criteria in section 98(4) ERA.
- viii) If the claim succeeds, what are the Claimant's losses attributable to the dismissal?, this requires consideration of whether the Claimant's loss of earnings was attributable to the dismissal or antecedent matters;
- ix) Has the Claimant complied with the obligation to mitigate her loss;
- x) Whether the Claimant's employment would have been brought to an end in any event by either the Claimant's ordinary resignation or fair dismissal, and if so, when?;
- xi) Whether the Claimant's conduct contributed to her dismissal?;
- xii) Whether there should be a reduction to any Basic Award pursuant to section 122(2) ERA.

The Law

16.1.1 By virtue of section 95(1)(c) where an employee terminates the contract under which they are employed with or without notice (in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct), that is a dismissal within the meaning of that provision. By virtue of section 97 ERA, the effective date of termination is the date any notice given, in this case the Claimant gave notice, expires. Section 98(1) provides that a reason within or referred to in that subsection is a potentially fair reason. Subsection 2 identifies, at (a)(b), that a reason which relates to the capability of the employee for performing work of the kind which they are employed to do, or which relates to the conduct of the employee, are potentially fair reasons for dismissal. In addition to the other reasons identified in subsection 2, subsection 1(b) provides that "...some other substantial reason of the kind such as to justify the dismissal of an employee holding the position which the employee held" is a potentially fair reason.

16.1.2 Should an employer establish that there is a potentially fair reason for dismissal the issue of whether the dismissal is fair or unfair is determined in applying the criteria contained in section 98(4) of the Act which provides,

"(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is

fair or unfair (having regard to the reason shown by the employer) —

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case."

16.2 Should the claim succeed, consideration turns to remedy. In this case the Claimant does not seek reinstatement or re-engagement thus the potential remedy is that provided for in section 118 ERA namely a Basic Award and a Compensatory Award.

16.3 Section 119 provides the formula to be applied in calculating the Basic Award which award may be reduced in defined circumstances. Section 122(2) ERA provides that

"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

16.4 The Compensatory Award is calculated in accordance with section 123 ERA subject to the adjustments provided for in 124A and the limit in section 124(1ZA)(b) which provides that the award is capped at 52 weeks of a Claimant's pay if that is less than the amount specified in section 12A(a) ERA. In this case the 52 weeks pay is the lower of those two amounts.

16.5 Section 123(1) ERA provides that subject to the provision of that section and also sections 124A and 126 ERA the amount of the Compensatory Award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. Subsection 6 of that provision provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such portion as it considers just and equitable having regard to that finding.

17.1 In *Chapman v Simon* [1994] IRLR 124 it was held that the Tribunal is limited to determining complaints which have been made to it. It is the act on which the complaint is made and no other that the Tribunal must consider and rule upon. In *McClung v Royal Bank of Scotland plc* EATS/0044/13/JW at the end of paragraph 4 it is

stated that the Employment Tribunal cannot be said to have erred in law if it dealt with the case as it was presented to it. This case is one relying on the implied contractual term of mutual trust and confidence there being a series of breaches culminating in a final straw which led the Claimant to resign. That being the case I refer to a number of other authorities.

- 17.2 From *Western Excavating (ECC) Ltd v Sharpe* in constructive dismissal complaints it is the contract test that applies. The following was said:

“ If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains, for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

- 17.3 From *London Borough of Waltham Forest v Omilagu* [2005] IRLR 35 on the term of mutual trust and confidence, constructive dismissal and last straw cases, the following guidance was given:

“14

The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer’s actions or conduct amounted a repudiatory breach of the contract of employment: *Western excavating (ECC)Ltd v Sharp* [1978] IRLR 27.
2. It is an implied term of any contract that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as ‘the implied term of trust and confidence’.
3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example per Browne-Wilkinson J in *Woods V WM Car Services (Peterborough) Ltd* [1981] IRLR 347, 350. The very

essence of the breach of the implied term is that it is 'calculated or likely to *destroy or seriously damage* the relationship' (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).
5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidences. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:
"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will 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 his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship'.

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. Neil LJ said (p468) 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.468:

"(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? (See *Woods v W M Car Services (Peterborough) Ltd* [1982] IRLR 413.) 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 no curat lex') is of general application. "

- 17.4 From *Vairea v Reed Business Information Ltd* EAT/0177/15 (3rd June 2016) (and Harvey D1 481.01 and 522) (to which I referred myself) on the question of waiver of a fundamental breach and the question of 'revival' affirmation which itself referred to *Addenbrooke v Princess Alexandra Hospital NHS Trust* ET/0265/14/DM, in particular at paragraph 14 of that (latter) judgment, when the guidance was given at paragraphs 81 to 84:

"[81] I accept that, as Flaux J put it in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Ltd* [2013] EWHC 3066 (Comm), "any distinction between repetition and continuation of a renunciation is more apparent than real" (see para 25 of the judgment). Subsequently to an affirmation, however, my own view is that an "entirely innocuous" act cannot "revive" any previous fundamental breach. What is necessary is a new fundamental breach and, whilst in some circumstances that might give the appearance of "revival", I think the correct analysis is that there has been a new breach. I think the division of this Tribunal presided over by Lewis J in *Addenbrooke* should not be taken to have intended to convey anything to the contrary in para 14 of that judgment.

[82] Unless one construes the judgment in *Addenbrooke* in that way it means there exists a real distinction between affirmation of breach of an express contractual term and affirmation of breach of the implied term as to mutual trust and confidence. There is no difficulty about the former, if there has been an affirmation then the breach is "spent" and in my view cannot be "revived". This seems to me to be what the authorities cited above establish. In order for a resignation after an affirmation to amount to a constructive dismissal, it must have been as a reaction to a subsequent repudiatory breach and nothing less will do.

[83] But what is to happen in the case of a breach of the implied term as to mutual trust and confidence but after that and before the breach has been accepted as giving rise to a termination there is then an affirmation. If all that is necessary to justify a subsequent resignation as a constructive dismissal is the addition of a yet further "final straw" then that would be a revival by an act, not in itself repudiatory, of a previous breach which has been affirmed. But, in my judgment, it is this very concept that was being addressed by Dyson LJ in *Omilaju* and his answer clearly means that an "entirely innocuous" further event subsequent to an affirmation does not reopen the matter.

Obviously, I am bound by this and, in any event, I have no difficulty in accepting it as entirely correct.

[84] I think when a contract has been affirmed a previous breach cannot be “revived”. The appearance of a “revival” no doubt arises when the breach is anticipatory or can be regarded as “continuous” or where the factual matrix of the earlier breach is repeated after affirmation but then the real analysis is not one of “revival” but of a new breach entitling the innocent party to make a second election. The same holds good in the context of the implied term as to mutual trust and confidence. There the scale does not rain loaded and ready to be tipped by adding another “straw”, it has been emptied by the affirmation and the new straw lands in an empty scale. In other words, there cannot be more than one “last straw”. If a party affirms after the “last straw” then the breach as to mutual trust and confidence cannot “revived” by a further “last straw”.

- 17.5 From *Nottingham County Council v Meikle* [2204] EWCA CIV 859 (to which I referred myself) in respect of the question of an employer’s repudiation of contract and the employee’s reason for resignation the following was stated at paragraph 33:

“[33] It has been held by the EAT in *Jones v Sirl and Son (Furnishers) Limited* [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee’s resignation. The EAT there pointed out that there may be concurrent causes operating on the mind of an employee whose employer has committed a fundamental breach of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the “effective cause” of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee’s motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of a contract by a repudiation by one party which is accepted by the other: see the *Western Excavating* case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by NCC.”

- 17.6 From *Buckland v Bournemouth University Higher Education* [2010] in respect of the question of affirmation of an employment contract 4AER 186 at paragraphs 54 to 56:

“[54] Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But event that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has been an affirmation.

[55] This case provides a very good example. The repudiatory breach occurred in September – a time when the academic year was just about to start and a particularly difficult time for an academic to leave instantly. The Vinney inquiry was instigated shortly thereafter and it was entirely reasonable (even though he did not think much of the choice of Professor Vinney) for Professor Buckland to wait and see what it said before exercising his right to accept the repudiation. And it was also entirely proper for him to exercise that right by a long period of notice given the fact that his students would otherwise have been adversely affected mid-academic year. That is why the tribunals below (now unchallenged) held there had been no affirmation, either before or after the Vinney report.

[56] Thirdly, the fact that it takes rather a lot to find affirmation on the facts in an employment contract is itself another good reason for refusing to recognise any doctrine of ‘cure’ in that context. Once an employer has committed a repudiatory breach there will generally be some time to make for him to try to make amends, for tempers to cool and for the employee to make a rational decision as whether he or she should stay on.”

and

- 17.7 From *Chindove v William Morrisons Supermarket Plc* (to which I referred myself) in respect of the question of waiving a breach of employment contract and affirming that contract EAT/0201/13/BA paragraphs 24 to 27.

[24] Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the

principles or the name of *Western Excavating Ltd v Sharp* [1978] QB 761, [1978] 1 All ER 713, [1978] IRLR 27. At p769 C D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it “altogether abandons and refuses to perform the contract”, using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this:

“Moreover, he [*the employee*] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

[25] This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct, generally by continuing to work in the job from which he need not, if he accepted the employer’s repudiation as discharging from his obligations, have had to do.

[26] He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employer’s position. As Jacob LJ observed in the case of *Buckland v Bournemouth*

University Higher Education Corporation [2010] EWCA Civ 121, [2011] QB 323, [2010] 4 All ER 186, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words it all depends upon the context and not upon any strict time test

[27] An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force. We are told, and it is consistent with our papers, that the Claimant here was off sick. Six weeks for a Warehouse Operative, who had worked for eight or nine years in a steady job for a large company, is a very short time in which to infer from his conduct that he had decided not to exercise his right to go. All the more so, since there seems, on the short findings of fact of this tribunal, that there was no reason other than the employer's conduct towards him for his choosing to go. We simply cannot say whether this tribunal had in mind these necessary factors. It did not set out the law. It did not set out the facts which caused it to apply the law. It did not honour 30(6). It did not deal with the detailed statement which the Claimant produced in respect of his constructive dismissal though this may be unduly critical of the tribunal's judgment. The reference to time looks as though the tribunal simply thought that the passage of time was sufficient in itself. The decision is, effectively, unreasoned. Mr Robinson said what he could, as best he could, but acknowledged the great difficulties that lay in his way. We have no doubt that the appeal of this ground, too, has to be upheld."

- 17.8.1 From *W A Goold (Pearmark) Ltd v McConnell & Another* [1995] IRLR 516 at paragraphs 11 and 12 on terms implied in the employment contract vis a vis employee grievances:

"11

It seems to us quite clear that the breach of contract identified by the industrial tribunal related to the way the employees' grievances were dealt with. Their process of reasoning was that Parliament requires employers to provide their employees with written particulars of their employment in compliance with the statutory requirements. Section 3(1) of the Employment Protection (Consolidation) Act 1978 (as amended) provides that the written statement required under s.1 of the Act shall include a note specifying, by description or otherwise, to whom and in what manner the employee may apply if he is either dissatisfied with any disciplinary decision or has any other grievance, and an explanation of any further steps in the grievance procedure. It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.

12 Further, it seems to us that the right to obtain redress against a grievance is fundamental for very obvious reasons. The working environment may well lead to employees experiencing difficulties, whether because of the physical conditions under which they are required to work, or because of a breakdown in human relationships, which can readily occur when people of different backgrounds and sensitivities are required to work together, often under pressure.”

17.8.2 I do not take that guidance to mean that a breach of a grievance procedure by an employer is necessarily a breach of the implied contractual term.

17.9 From *Clive Burdett v Aviva Employment Services Ltd* (to which I referred myself) EAT/0439/13/JOJ at paragraphs 28 to 32 on the meaning of gross misconduct in unfair dismissal:

“28 In a claim of unfair dismissal, the starting point is section 98 of the Employment Rights Act 1996. Relevantly, at section 98(2)(b), a dismissal is capable of being fair if for a reason which “relates to the conduct of the employee”. The reference to conduct is in general terms. The conduct in question does not have to amount to gross misconduct, although that is how the ET characterized the nature of the conduct in this case.

29. What is meant by “gross misconduct” – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the Supreme Court in *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see *Wilson v Racher* [1974] ICR 428, CA and *Neary v Dean of Westminster* [1999] IRLR 288, approved by the Court of Appeal in *Dunn v AAH Ltd* [2010] IRLR 709, CA). In *Chhabra*, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09/LA).

30. The characterization of an act as “gross misconduct” is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by *Mummery LJ in London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see *Eastland Homes Partnership Ltd v Cunningham* UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.

31. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterized as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to

consider whether there were reasonable grounds for concluding that she had done so willfully or in a grossly negligent way.

32 Even if the Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. “

17.10 From *Cooper Contracting Ltd v Lindsey* EAT/0184/15/JOJ (to which I referred myself) in respect of whether a Claimant has met the obligation to mitigate his loss at paragraphs 16:

- (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
- (2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of *Tandem Bars Ltd v Pilloni* UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle – which itself follows from the cases I have already cited – that the decision in *Pilloni* itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.
- (3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see *Waterlow, Wilding and Mutton*).
- (4) There is a difference between acting reasonably and not acting unreasonably (see *Wilding*).
- (5) What is reasonable or unreasonable is a matter of fact.
- (6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.
- (7) The Tribunal is not to apply too demanding a standard to the victim: after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see *Waterlow, Fyfe and Potter LJ's* observations in *Wilding*).
- (8) The test may be summarized by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

- 17.11 I was referred to *Bear Scotland Ltd v Fultown* [2015] IRLR 15 and to the guidance given there on the “series” of deductions within the meaning of section 23(3) ERA. The Respondent submitted that when considering the meaning of “series” as used in paragraph 15 of the Judgment in *Omilaju* the meaning used in *Bear Scotland Ltd* should apply. A constructive dismissal situation involving a series of actions or omissions, in my view, is fundamentally different to a series of deductions within the meaning of Section 23(3) of the Act. The latter relates to deductions from wages, a specific line of events in respect of the same part of the employment relationship. The former can be events of any type which taken together break the term of mutual trust and confidence. I do not read across that guidance.
- 17.12 I had the benefit of submissions based on *Fecitt & Public Concern at Work v NHS Manchester* 2012 IRCR 64, a claim brought in respect of whistleblowing by an employee and acts of victimisation by fellow workers. By reference to the headnote paragraph 2 guidance, the following was stated, “The House of Lords has unambiguously held that an employer can be liable vicariously only for the legal wrongs of its employees.” In this case the wrongs complained of by the Claimant are, in the main, not by the Respondents employees or ex-employees but by members of it acting either as members or on occasion otherwise. There was no suggestion that those posts on social media or other statements made by people who were Councillors at the time of their actions or alleged omissions were acting as an agent for the Respondent.
- 17.13 I was referred to *Robins (UK) Ltd v Triggs* [2008] IRLR 317 in respect of the position of employees and the question of remedy for financial loss following termination of employment. In particular, when future loss was caused by an antecedent breach of contract and the question of whether a loss was in consequence of the dismissal. I refer in particular to paragraphs 19 and 20 of that Judgment, which I do not set out, but also paragraphs 30 to 37:

In paragraph 30 reference was made to *Johnson v Unisys Ltd* [2001] IRLR 279 and the following extract quoted:

“ 27 An employee’s remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.

28 *In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to the dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the Johnson exclusion area.*

29 *Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of this subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over.*

30 *If identifying the boundary line between the common law rights and the statutory rights is comparatively straight forward, the same cannot be said of the practical consequences of this unusual boundary. Particularly in cases concerning financial loss flowing from psychiatric illnesses, some of the practical consequences are far from straight forward or desirable. The first and obvious drawback is that in such cases the division of remedial jurisdiction between the court and an employment tribunal will lead to duplication of proceedings. In practice there will be cases where the employment tribunal and the court each traverse much of the same ground in deciding the factual issues before them, with attendant waste of resources and costs.*

31 *Second, the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces. In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the Johnson exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed.*

Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed.

32 The existence of the boundary line produces other strange results. An employer may be better off dismissing an employee than suspending him. A statutory claim for unfair dismissal would be subject to the statutory cap, a common law claim for unfair suspension would not. The decision of the Court of Appeal in Gogay v Hertfordshire County Council [2000] IRLE 703 is an example of the latter. Likewise, the decision Johnson's case means that an employee who is psychologically vulnerable is owed no duty of care in respect of his dismissal although, depending on the circumstances, he may be owed a duty of care in respect of his suspension."

The Facts

18. I consider the majority of the matters the Claimant relies on in the way identified before in paragraph 3 of these reasons. I deal with the matters around the Claimant's grievance and resignation separately. In doing so before concluding my findings however I considered and reviewed all my proposed findings in respect of all the matters described, before making my findings of fact as are now set out. In setting out those findings I have endeavoured to set out the findings in respect of each matter under the relevant item. Inevitably, however, many findings related to a number of items – I have not repeated these facts but nevertheless consider them in relation to the issue. I have given each matter a short descriptive heading for identification purposes only.
- 19.1 The Respondent is the Town Council of a small town in Bedfordshire. The Respondent has a potential 'establishment' of fifteen councillors albeit there were often vacancies during times material to these proceedings. As is inevitable, the Respondent had changes in its membership and, it would appear, frequent resignations. The Respondent had its stresses as described in the finding below. The Respondent's councillors were not organised into 'groups' such as would be the case in many and certainly larger councils. The councillors, so I heard and accept, considered themselves to be independent. While that was the situation there were nevertheless common concerns and ideas held by a number of councillors about whom I heard.
- 19.2 The Claimant was critical of behaviour of certain named Councillors and considered that they did not understand how to conduct council business (see her email to her husband dated 20 March 2014 referred to below). Many of the more recently elected councillors considered that the Claimant obstructed rather than facilitated their

attempts to perform their role and together with the Chairman of the Respondent, attempted to control the Respondent themselves.

- 19.3 The Claimant had a good working relationship with Councillor Daniels and, for the majority of the period about which I heard, Councillor Rencontre such that the Claimant would share some information with her husband who would feel free to write in forthright and critical terms to Councillor Daniels and to a lesser extent Councillor Rencontre about the Respondent's business. (I refer to an application by a member of the public to inspect the Respondent's accounts and also new standing orders prepared by certain councilors). Councillor Rencontre, I find, distanced herself from the Claimant (to a degree) after providing assistance to her following her grievance (about which more below) during which task she and observed the Claimant making copies of documents for a potential constructive dismissal claim. The latter communication being in two emails dated 27 August 2014 9pages 360 – 365 of the bundle).
20. The Claimant, whose date of birth is 21st November 1941, began her employment with the Respondent on 13th June 2005. The Claimant was employed as the Respondent's Clerk, its Responsible Financial Officer and Proper Officer. The Claimant was the Respondent's most senior employee. In addition to the duties derived from her statutory positions (the latter two of the above three), the Claimant was provided with a contract of employment which provided that the overall purpose of her job was:

“ The Clerk to the Council will be the Proper Officer of the Council and as such is under statutory duties to carry out all the functions, and in particular, to serve or issue all the notifications required by law of a local authority's Proper Officer.

The Clerk will be totally responsible for ensuring that the instructions of the Council in connection with its function as a Local Authority are carried out. The Clerk is expected to advise the council on, and assist in the formation of, overall policies to be followed in respect of the Authority's activities and in particular to produce all the information required for making effective decisions and to implement constructively all decision. The person appointed will be accountable to the Council for the effective management of all its resources and will report to them as and when required. The Clark will be responsible for all the financial records of the Council and the careful administration of its finances”.

....addition there were 18 specific responsibilities commensurate with the job's overall purpose including

“ 14 To attend all meetings of the Council and its committees (as required)”.

21. At that time the Claimant had two office staff to manage and a Caretaker. One of the first tasks the Claimant carried out was to set up a computerised accounting system. The following year, an Assistant Clerk, Mrs Lesley Rowe, was appointed and thereafter managed the finances on the Claimant's behalf. Over the course of her employment the responsibilities of the Claimant and the number of her subordinate staff increased. A part time Administration Assistant, Ms Heidi Clark, was appointed in 2009 and also outside ground staff. By the end of her employment the Claimant was managing eight people. By that time the Respondent not only had its own office based in a Community Centre, a recreation ground, a cemetery, a village hall, allotments, but had also acquired a multi use games area and a Resource Centre inside which was a library. Initially relations between the Claimant and Councillors were good. Around 2009/2010 some staff made complaints about the then Chairman of the Council, Councillor Harper, which ultimately led to staff taking their complaints to the Central Bedfordshire Council Standards Committee. In October 2010, the Claimant and the Deputy Clerk, together with Ms Clark, also made a complaint about Councillor Harper to Central Bedfordshire Council. There was a hearing at which the Claimant's husband represented staff. The outcome of these matters was that in September 2011, Councillor Harper was suspended for twenty eight days, but, rather than serve his suspension he resigned his position. Six of the Respondent's other councillors also resigned at the same time.

(1) 2 March 2011 – Internal Audit Review

- 22.1 At the time that complaints made by the Claimant and others to the Monitoring Office of Central Bedfordshire Council were being made, an internal audit was carried out. The report was carried out following a prompt from the Respondents internal auditor who, as per a quotation in the introduction of the report "reminds Council that they should carry out an annual review of the effectiveness of their system of internal audit as an integral part of continually improving governance and accountability" and that the "review was the responsibility of the Council and is not a review that can be carried out by the external auditor or as part of the annual audit". The Respondent as a whole had agreed that such an audit be carried out. A working party of Councillors carried out the audit following which it reported on its work to the Respondent.
- 22.2 The audit report went into detail in a number of areas, identifying a considerable number of matters which, the working party considered, required improvement. The Claimant accepted in evidence that nothing in the report was intended to show her at fault albeit at the time Mrs Rowe (the Assistant Clerk) and Ms Clark (a part-time administrator) had put in a grievance regarding Councillor Harper, and the Claimant and her colleagues were suspicious of this matter. The Claimant's evidence was that while she did not believe, that the report was written in a way to show the Claimant

was at fault she considered that the two councillors who carried out the audit did not understand the Respondent's accounts system. A subsequent note from the internal auditor revealed he considered that the Councillors who had conducted the audit had missed the point of his prompt that it carry out a review (see above).

- 22.3 In oral evidence the Claimant stated that the audit and report was not part of her decision to resign when she did, albeit the atmosphere around the audit at the time was. The Claimant continued that from that followed other things when she and others were accused of taking money. I remind myself of item 4 (social media postings by an ex-councillor below). I did not hear any other evidence of the Claimant and others being accused of taking any money.
- 22.4 I am not persuaded and do not find in light of the above that the review was brought about due to staff complaints, or that the review was intended to show the Claimant at fault, or that it sought to identify costs savings with a view to reducing staff costs. The Claimant presented a rebuttal to the audit report in which she was critical of the way the working party went about its business, including the remit of the audit of the working party. I am not persuaded that the report itself was anything other than what it purported to be. The Claimant's position is that the report generated unwarranted and untrue newspaper publicity and triggered a Facebook site "Arlesey UK" which itself then contained negative criticism of the Respondent. I do not consider the internal management arrangements of the Respondent but having regard to the task it sought to carry out I am not persuaded that the way that the working party went about that task indicates that it did so for any ulterior motive or the reasons the Claimant alleges in her claim.
- 22.5 Following the Claimant expressing her concerns to the Respondent it was recited in the Council's minutes and the Respondent specifically agreed that, "The integrity of the Offices is not in question and there is no dishonesty in the office".
- (2) 17 March and 26 April 2011 – Claimant's complaints about two of the Respondent's Councillors.

- 23.1 The Claimant made a complaint to the Monitoring Office against Councillor's Harper and Dalgano. Mrs Rowe, the Respondent's Assistant Clerk, wrote in support of the Claimant's complaint informing that after a meeting of the Respondent Council on 1 March 2011 there were verbal attacks against the Claimant and herself from "... the same two or three Councillors again.." and that the Claimant was in tears. Mrs Rowe informed that the then Chairman of the Respondent had said to Councillor Harper "Hugh, something has to be done about this." to which Councillor Harper

had responded by reference to the Claimant and Mrs Rowe, "If they dropped the complaints I can stop it immediately. All they have to do is ring up Central Bedfordshire Council and say that they want to drop the complaints". The complaints referred to were the ones made by Mrs Rowe and Ms Clark.

23.2 The Councillors involved resigned their membership of the Respondent on 5 September that year and the Claimant withdrew her complaint some time afterwards. The Claimant continued with her work. There was no finding by the Central Bedfordshire Council. I am satisfied that an incident took place as described by Mrs Rowe in her statement that there had been shouting at the Claimant and the Assistant Clerk and that the background to that was complaints made by employees of the Respondent to the Central Bedfordshire Council Monitoring Officer about Councillors. Having regard to the conversation quoted above I am also persuaded that other unparticularised but inappropriate conduct towards the Claimant by some Councillors took place.

(3) 5 September 2011 – Councillor resignation

24. On 5 September 2011, six members of the Respondent, including Councillors Delgano and Harper resigned. I refer to my findings before. This is not a matter, which, of itself or as described in the Claimant's specific matters, that could contribute to a constructive dismissal.

(4) September – November 2011 – social media postings by an ex Councillor

25.1 The Claimant's position is that during September to November 2011 a former member of the Respondent, Mr Geoffrey Page, promoted newspaper articles and made postings on the Arlesey UK website stating "that the Claimant's work quality was poor: the internal audit was appalling; the Claimant had gagged him; the Claimant had made illegal payments, stolen £1,500 and that he had had to notify the Audit Commission; the Respondent's External and Internal Auditors found no faults at all "and that such comments were repeated by him in 2012, 2013 and 2014." On the Claimant's behalf her husband wrote to Mr Page on 12 October identifying statements she considered to be defamatory requiring him to cease making such statements.

25.2 I refer to the finding before regarding the Respondent's statement as to the Claimant's integrity and that of her colleague at its meeting on 17 May. On 11 October 2011 the then Chairman of the Council reported to its meeting that; a resident had made a complaint to the external Auditor regarding the Respondent's accounts to 31 March of that year in respect of a petty cash issue, that he had informed the resident that the former Chairman of the Council had been aware of the complaint; the Respondent was awaiting an outcome from the external Auditors; and further, that the Claimant had been in contact with the Auditor. There were queries which remained

outstanding and it was resolved that when the Auditor's final report was received it would be discussed by the Respondent.

- 25.3 At a further Council on 1 November the issue of comments made by some residents and others on Facebook was discussed. The Chairman of the Council described them as wholly misrepresentative of the situation and "very unpleasant for Councillors and Town Council staff to read." It is recited in the Respondents meeting minutes that Councillors expressed disbelief that comments could be made for all to see without being certain of the facts. The Council was informed that, "A lot of information had been removed after complaints were made and one Councillor had reported a personal comment that was made to the Police."
- 25.4 A motion was proposed that the Respondent take legal action. The Claimant advised against taking such action and recommended the site was monitored. The Council resolved to note all the comments that were referred to in the recitals and to monitor the site closely.
- 25.5 The fact of a resident reporting a matter to an auditor in itself cannot be inappropriate conduct by the Respondent. Similarly, if that action had (there was no evidence that this actually was the case) been linked to the actions of an ex-Councillor. The discussion referred to reveals that a number of posts were removed. It was the Claimant who advised against taking legal action and to monitor the site which was agreed by the Respondent. I am not persuaded therefore that the Respondent did not support the Claimant. Further I am persuaded that the reason no legal action was considered further or taken against the people writing the letters including Mr Page by the Respondent (I do not make any findings in these reasons as to whether the statements were inflammatory or otherwise) was because of the Claimant's own advice.
- 25.6 Thereafter the monitoring of the site was delegated by the Claimant to the Assistant Town Clerk, thus the Claimant was in a position to decide if or when it may be appropriate to take action or whether other support for herself or other staff was needed. In the event, no further report was made by the Claimant to the Respondent.
- 25.7 The Claimant informed in evidence that Mr Page's actions between September and November 2011 were not part of the reason she resigned in 2015. By that time the Claimant had reported his actions together with the actions of two others to the Bedfordshire Police on 22 April 2014.

(5) July 2013 – Mrs Ward

- 26.1 Mrs Samantha Ward (referred to during the hearing with titles of 'Mrs' or 'Dr') was employed by the Respondent as the Manager of its Resource Centre. Mrs Ward's line manager was the Claimant. The Resource Centre housed the local library and was also used for a number of activities. Those activities included the use of the facility by young children. The Resource Centre and the activities for children were valued highly the many people. In July 2013 a craft session for children was taking place in the Resource Centre,

being run by two people brought in by Mrs Ward. Some of the children were, in the Claimant's view, running wild down a corridor on which water had been spilt. The Claimant reprimanded Mrs Ward.

- 26.2 During the following few months Mrs Ward had cause to question whether her employment contract had been met and raised concerns. In particular Mrs Ward wrote on 23 September 2013 to the Chairman of the Council with copies to Councillors Holloway and Baines. Following a meeting on 18th of that month Mrs Ward stated that it had been five weeks since she had first brought her concerns to Councillor Daniel's attention since when there had not been any agreed timetable for resolution of those concerns. In reference to herself Mrs Ward referred to: failures by the Respondent to: (a) carry out an annual performance appraisals; (b) have a pay review; (c) receive an incremental pay award; sought confirmation that a reconciliation of the hours worked had been paid since the beginning of her employment with appropriate restitution; sought a comprehensive review of her annual leave entitlement since joining the Respondent; and raised pension scheme entitlement issues. Mrs Ward also informed that seven hours of pay from her September wage had been withheld on the basis that her concerns "had yet to be dealt with". The Chairman of the Council reported the matter to the Council's meeting on 1 October, which agreed in principle to a settlement offer to Mrs Ward.
- 26.3 At a committee meeting of the Respondent on 15 October Councillor Gravett spoke on an item in respect of human resources management process by reference to current employment issues. Councillor Gravett opined that: the Respondent was not meeting its lawful obligations to act as a responsible employer; that issue needed to be addressed, and that the Respondent's councillors may not have the requisite or experience to conduct a performance management process, Councillor Gravett proposed that if he was correct he could provide appropriate training for Councillors and the Claimant. The Respondent decided to consider the matter in the future.
- 26.4 During the process of the resolution of Mrs Ward's grievance legal advice was sought and paid for by the Respondent. There was suggestion in those proceedings that that was outside the Respondent's normal process. The following year, 2014, the Library was refurbished, Mrs Ward having secured its approval, prepared a plan for the refurbishment, and secured donations for the refurbishment. Local people, including local tradesmen were brought on board to carry out work. In essence, the people brought on board were to refit the office in their spare time at the weekend without charge. Over one such weekend, while Mrs Ward was on holiday, some trunking with wiring had to be moved. On removing the trunking it became clear to Councillor Ward (Mrs Ward's husband) who was involved that weekend, that the wiring was not up to modern standards and there was, as he put it, a potential problem. As there was insufficient time to make the wiring safe, the

power supply was disconnected and relevant wiring terminated in an insulation block wrapped in insulating tape. Councillor Ward and the others then went home and sent an email alert to everyone explaining what had happened. Unsurprisingly this matter caused concern, particularly as a consequence was that the Claimant closed the Resource Centre until electrical safety checks had been carried out. The Claimant instructed that no further work by Councillor Ward or other volunteers be carried out until the Respondent had discussed the matter. The matter was reported to the Council on 4 March (about which time Mrs Ward was suspended) and on which date the Respondent also considered the continuing dispute between her and itself regarding contractual employment issues. Settlement was then discussed and Councillor Rencontre, subject to obtaining guidance from the Respondent's legal advisor, was authorised to resolve the issues with Mrs Ward.

- 26.5 While the Resource Centre was closed there was speculation by some members of the public about the length of and reason for the closure. The Respondent's stated position was that there was an acute staff shortage. When writing to Councillor Gravett on 20 March the Claimant criticised him for repeatedly making, what she said, were unfair and untrue statements about herself and Mrs Rowe and stated that if it was his intention to repeatedly make unfair and untrue comments about herself and Mrs Rowe she would leave them little choice other than to hold him and those others "who will know who they are" personally liable if the matter needed "to go to law". To the Tribunal the Claimant's evidence was that this was not a threat. I find that it was. I was shown an email from Councillor Gravett of the same date but earlier in the day to a member of the public (at page 323A of the bundle). There was nothing within that email that led me to consider that Councillor Gravett was part of any campaign that had taken a position against the Respondent or the Claimant. Rather, on the face of the email, Councillor Gravett appears to have been acting moderately. In his letter Councillor Gravett counseled against the use of "Vitriol on Facebook". Councillor Gravett concluded his email by stating that he and others would be striving for improvement, while in the context that statement contained a criticism of things that had gone on before it was, however, simply a statement he, as a councillor, would try to do the right things in the right way, as he saw it.
- 26.6 Despite her further and better particulars to the Tribunal the Claimant in evidence stated that she had no criticism of Councillor Gravett and does not say that any support for Mrs Ward was part of a campaign against her. The Claimant was equivocal as to whether this was part of the reason why she subsequently resigned, saying that: she had no criticism of Councillor Gravett; Councillors made decisions and not her; but also stated that, whilst she had not raised a grievance about this, it was some element of why she had resigned.
- 26.7 Mrs Ward was suspended for about twelve weeks before she resigned her employment. The Council authorised Councillor

Rencontre to investigate the suspected misconduct which she did. Mrs Ward was invited to attend a disciplinary meeting but resigned before that meeting could take place.

- 26.8 There were some postings by Councillors Hazelwood and Gravett on the Arlesey UK website to which I was referred (in general and not in reference to any particular issue – see earlier in these reasons). The statements were critical of the Respondent in respect of openness and the ability of serving Councillors to do their work as Councillors as they thought appropriate. In this the Claimant was sometimes referred expressly or implicitly. There was nothing, however, to which I had my attention drawn, which specifically related to this issue.

(6) Early March 2014

- 27 The Claimant's position is that it was reported to her that Councillor Holloway had said during a local pub gathering, that on becoming Chairman of the Council the following May (2014), he would sack the staff. The Claimant believed that Councillor Holloway had made that statement in that setting. Councillor Holloway was not asked about this matter and did not address it in his witness statement. I accept that the statement was made and while I do not consider that Councillor Holloway was acting in any official capacity he was a Councillor and thus a member of that corporate body that is the Respondents, talking about the Respondent's business, his own role as Councillor, and the Respondent's staff. Whoever 'the staff' were that Councillor Holloway referred to I consider that they would have included the Claimant and the Assistant Clerk.

(7) March 2014 – Facebook postings

- 28 The Claimant complained of Facebook postings this month on the AUK site by Councillors Holloway, Gravett, Ward, Hazelwood, Auburn and a Mrs Sarll. Mrs Sarll was not a councillor at the time and so I disregard any statements that she made. It was not specifically identified which comments the Claimant relies on albeit I trawled through all which she had identified as referred to earlier in these reasons. Councillors Holloway, Hazelwood and Gravett all state that their comments were made in a personal capacity. In absence of any specific posting being referred to me and considering those I saw I do not find that it established that Councillors Holloway, Gravett, Ward or Hazelwood or Auburn made comments on the AUK site to criticise or join with others in criticising the Claimant, or as alleged.

(9) 1 April 2014

- 29 At a Council meeting on the 1 April 2014 Councillor Gravett spoke about an email he had received dated 20 March 2014 from the Claimant. This is the email in which the Claimant had referred to 'going to Law' referred to earlier in these reasons. The Claimant's email had been copied to

Councillors Daniels, Rencontre, Baines, the Assistant Clark and Mr Hare, her husband. I accept Councillor Gravett's evidence that he was surprised to receive this as he considered the email contained confidential information and thus non-councillors should not be informed. With the press, public and Claimant excluded Councillor Gravett asked whether it was acceptable to copy confidential council emails outside the council. Councillor Gravett did not mention Mr Hare's name but the Chairman of the Council did, describing him as the Claimant's legal advisor. There is a dispute as to what Councillor Gravett actually said, his position being that he said he was aware there had been complaints about Mr Hare's behaviour in sending letters that had been reported to the Bedfordshire Police, a statement which he understands to be true and that those had been registered on a log he having been advised some weeks earlier. Councillor Gravett continued that he was also aware of internet articles about Mr Hare, publicly available by searching the Google search engine. Councillor Gravett specifically states that he did not say that the Claimant was under investigation by CID. Nevertheless, the draft minutes of the meeting stated that Councillor Gravett had said that Mr Hare "...had an open CID case against him..". It seems quite possible this was a minuting of the matters that Councillor Gravett said but in an inaccurate way. The draft minutes were not approved. Mr Hare subsequently sought to bring civil proceedings against Councillor Gravett which Councillor Gravett settled in order, I accept, to avoid them. In evidence the Claimant informed that she had no involvement in whether her husband took proceedings against other people, that being his own matter, albeit it was Councillor Gravett's behaviour altogether which formed part of the reason why she resigned. I accept the Claimant was upset and she gained the impression that Councillor Gravett had said that her husband had a criminal record. I do not find it established however, that he had said any such thing.

(11) 8 May 2014 – Mr Newbury and Comet Newspaper

30 Mark Newbury, allegedly a close friend of Councillor Holloway, allegedly reported the Claimant to a local newspaper. In oral evidence the Claimant stated that she had informed Mr Newbury that she had reported him to the Police for harassment albeit he was entitled to talk to the newspapers. The Claimant continued in evidence that: Councillor Holloway knew a Jason Auburn as they were both Arlesey people; she did not know if Councillor Holloway was a friend of Mr Newbury but they spoke to each other; Mr Newbury took it upon himself to speak to the press, she did not think that anyone else was involved albeit she also thought others were behind it. As well as saying in evidence that this was not part of the reason she resigned, the Claimant also stated that it was part of the course of conduct why she resigned. I do not find it established that any action of Mr Newbury speaking to the press was in any way connected with the Respondent as a corporate body nor any particular member of the Respondent acted as the Claimant alleged.

(12) May 2014 – Letter to the Police

- 31.1 On 22 April 2014 Mr Hare, on the Claimant's behalf, wrote to the Chief Constable of Bedfordshire Police complaining that she had been the subject of "...continuous, malicious and indeed, vicious attacks from a Facebook site entitled Arlesey United Kingdom since 2011 and in the main from three people daily placing posts on the site [Geoff Page, Tony Margiocchi, and Sandra Sarll]. There have been various others since 2011 but they come and go." Mr Page and Ms Sarll were not Councillors at the time the posts, Mr Margiocchi had never been so far as I heard a Councillor of the Respondent. While other people had place posts including Councillor Holloway, none of any Councillors' posts was specifically referred to. It is going too far to state that the five Councillors named in the further and better particulars "condoned" what all that was said was and about which the Claimant complains on the AUK site.
- 31.2 I refer back to the decision of the Council made in 2011 when the Claimant advised against taking legal action and the decision was made for the site to be monitored. The Claimant was responsible for that monitoring and I did not hear there was any further report by the Claimant to the Council. In addition, Councillor Daniels as Chairman of the Respondent Council made a statement on the 12 May 2014, i.e. after Mr Hare had written to the Chief Constable stating that a number of individuals and certain new Councillors had been making unfair and untrue comments/statements about the Respondent and its staff, inciting others to join in. Mr Daniels informed that the statements were untrue and gave examples.
- 31.3 As part of the grievance process, about which more below, Councillor Baines wrote to the Claimant and Mrs Rowe enquiring about whether they found the support being given to them by Mrs Rencontre and the additional office resource was helping. While informing that the additional resource was helpful, the Claimant continued by describing staffing difficulties that were then current and stated, "it will be very helpful if Councillors could place truthful information on the Arlesey UK site to rebut the false rubbish about [the Respondents] which appears each day." To this Councillor Baines responded that he had not seen the negative social media comments himself and as a Council he considered that it urgently needed to agree an approach to counter it and asked the Claimant to place that as an item on the agenda. He would then be happy to facilitate a discussion. Councillor Baines asked for a couple of examples that he could read out to Councillors. The Claimant neither placed an item on the agenda nor provided examples to Councillor Baines.
- 31.4 I am not persuaded the Respondent did "nothing to stop or rebut such comments", indeed the Council had resolved to monitor the situation when it was initially brought to its attention and when the Claimant was specifically asked to place an item on the agenda she did not. The Claimant was the Clerk of the Council and had been requested by the Chairman of the grievance panel, the other

members being leading members of the Council namely Councillors Daniels and Rencontre. Although I heard evidence, and have made findings of fact elsewhere in these reasons about members of the Respondent carrying out what I would term as executive tasks, such tasks are generally the preserve of the Respondent's employees. There was nothing in the evidence to suggest that this task could not have been carried out by the Claimant. There was no apparent good reason for the Claimant's inaction.

(13) 14th May 2014 – Long Lasting furore by Holloway Supporters

32 At the Respondents 14 May 2014 Annual General Meeting Councillor Holloway expected to be elected Chairman of the Council (see before in these reasons regarding public house talk). In the event Councillor Holloway was not elected. There was an upset at the time because Councillor Holloway had expected to be elected. Councillor Rencontre had taken the Chair so that everyone who wished to vote could. There was nothing to suggest that this was in any way improper or unusual or indeed other than proper administration of the Council meeting. The Claimant's oral evidence to the Tribunal was that no one accused her nor was there any evidence of anyone accusing her of acting against Councillor Holloway in the May 2014 election. I find that the Claimant's allegation that Councillors who supported Councillor Holloway openly accused her of acting against Councillor Holloway in that election not to be true.

(14) 9 June 2014 – Whitehill Report

33.1 Of the Facebook posts on the Arlesey UK website to which I was referred the overwhelming criticism of the Council is of the Respondent's management at Councillor level, albeit on one occasion the Claimant was said to work (I paraphrase) too closely with the Chairman of the Council. The criticisms included difficulty about discussing matters, financial matters, and transparency, I heard evidence from some witnesses that they considered they had inappropriate difficulty gaining information from the Claimant or having items placed on the agenda. While I do not make any findings that the Claimant acted inappropriately or otherwise in that regard those witnesses certainly considered that they were not receiving the information or facilities they thought appropriate and necessary for them to carry out their duties. I have in mind, in no particular order, former Councillor Hazelwood and Councillors Gravett and Holloway. I accept those Councillors had genuine concerns about the financial and other management of the Respondent.

33.2 By the middle of 2014 the Audit Commission had produced a report ("the Whitehill Report") about matters which had taken place at another local authority, Whitehill Parish Council, where, I was informed, the clerk of that council had stolen money from her employer by writing cheques to herself. The report had been

brought to Councillor Hazelwood's attention by a Councillor of Central Bedfordshire Council and he was aware that the matter had been discussed by a neighboring parish council. Having read the report Councillor Hazelwood considered that the Respondent was not operating according to the recommendations set out in the Whitehill report. Councillor Hazelwood asked for the report to be placed on the Respondent's agenda. Although Councillor Hazelwood's evidence was that his request was refused, the Respondent at a full council meeting on the 1 July considered the report and resolved that a working party be established to look into the Respondent's then current procedures, that working party comprising Councillor's Gravett, Holloway, Ward and Hazelwood. The Claimant sent a copy of the report to her husband he, I was informed, being interested in it.

33.3 The Claimant's position is that there was to an extent, an implication of impropriety in respect of herself and Mrs Rowe, the Assistant Town Clerk who compiled the accounts. I am not persuaded that there was any such implication in Councillors wanting to consider the report. Councillor Bains, in any event I was informed, had seen the accounts and confirmed to the Respondent that they balanced. It was not suggested to me that this action of Councillor Bains was because of the Whitehill Report.

33.4 There was concern by Councillor Hazelwood over a lack of transparency and appropriateness of the Respondent's procedures. That some councillors considered it appropriate to consider the Respondent's procedures with a view to whether they should be changed is not to assert impropriety. The matter was subsequently picked up by the local press. There was nothing within the article to which I was referred that was critical of any officer, the point of the article being that external advisors were to be brought in. Councillor Hazelwood denied being critical of the Claimant to the local press and there was nothing to support the Claimant's assertion that he was. I accept Councillor Hazelwood's evidence. I do not consider there was anything untoward in the Respondent appointing Councillor's Holloway, Ward, Gravett and Hazelwood to be on the working party notwithstanding the Claimant's grievance, (also taking into account the small size of the Respondent and its frequent member vacancies).

(15) June 2014 – Councillor Rencontre suggesting to the Claimant, that she should retire because of her age.

34 In late June and into July 2014 the Claimant had four weeks absence from work due to a rotator cuff injury. Prior to this period of absence and when the Claimant was in the office in June, the Claimant's evidence, is Councillor Rencontre came into the office, informed her that Mrs Ward was studying to be a Clerk and that if she passed her exams she would like to be the Clerk of the Council. Councillor Rencontre denies making any statement at all regarding Mrs Ward studying for examinations relevant to be a Town Clerk. There was little evidence given about this.

I do not find it established that any such statement was made. Councillor Rencontre's position is that she is not dissimilar in age to the Claimant (I did not enquire as to her age) but I accept it to be the case. In the context of the above and in a friendly manner Councillor Rencontre asked the Claimant why she did not consider retiring. At this time there was no suggestion by the Claimant that Councillor Rencontre and she were otherwise then on good terms. I accept that the statement was made without malice and that it was both given and taken in a friendly and wholly proper manner. I am satisfied that the statement was made, and, when viewed objectively was one of concern.

(16) 1 July 2014 – Adoption of new standing orders

- 35.1 The Claimant's role is to advise on a number of matters including standing orders. The Claimant complains that the Respondent adopted new standing orders prepared by Councillor Ward, that such was an irresponsible decision, that the Respondent continually ignored her advice, and it was a breach of model standing orders. The Claimant fully accepts however that it is the Respondent that makes decisions on what its standing orders should be and not her. The Claimant expressly stated in evidence that the Respondent not taking her advice was not a breach of her employment contract and that the respondent was able to ignore her advice.
- 35.2 At the Respondent's Annual General Meeting on the 13 May 2014, Councillors Bains, Gravett, Ward and West together with the Claimant were appointed to a working party to consider new model standing orders (such models being prepared from time to time by the National Association of Local Councils (NALC)). The Claimant and her husband discussed these model standing orders prepared by NALC at home, her husband having experience in this area from his role as a parish councillor elsewhere. I am not persuaded, however, that this was just a simple discussion by two people involved in such matters as on the 10 June (and also on 27 August – see paragraph 19.3 before) Mr Hare wrote to the Claimant copying in both the Chairman of the Council and Councillor Rencontre, with a critique of work on this matter carried out by Councillor Ward.
- 35.3 Shortly before the Respondent's meeting to adopt the standing orders, at short notice Councillor Ward convened a meeting of the working party at 9pm in his home. The Claimant lived many miles away did not attend. At the full council meeting of the Respondent on 1 July, Councillor Ward handed to all councillors a document that was described as the New Model Standing Orders that he and some of the working party had drawn up and proposed that they be adopted. After a discussion the proposed standing orders were adopted by the Respondent. The Claimant complains that this was an irresponsible decision indicative of the control of the Respondent's meetings enjoyed by the "Holloway group".
- 35.4 That the Claimant did not approve of the influence of particular Councillors is irrelevant it being a matter for the Respondent how

it's councillors organise themselves into groups, formal or informal. The Claimant's position is that the fact of the Respondent not accepting her advice and it making a decision with which she did not agree with was not part of the reason she resigned.

(18) September 2014 – Councillor Rencontre began a campaign against the Claimant and Councillor Daniels.

36 It is self evident that any actions by one Councillor against another is, of itself, irrelevant to these proceedings and I do not consider any actions Councillor Rencontre may have taken or otherwise against the Chairman of the Respondent Council. I do not make any findings under this specific item there being no specific evidence in respect of it. I do however consider the matter in dealing with the entirety of the claim and in particular the actions of Mrs Rencontre; the Claimant's grievance; the Mrs Ward investigation; and those matters which ultimately led to the Claimant's resignation (including all of her involvement with Ms Clark's wages/holiday pay issues, and her time in the Respondents office following the grievances meeting on 22 March 2014), and the Respondent determining that if the Claimant had not resigned it would have dismissed her in any event.

(19) 18 October 2014 – Ms H Clark's email

37.1 The allegation here is that Ms Heidi Clark (a former employee of the Respondent) had not previously raised concerns regarding her holiday calculations, that it was eleven months since she had left the Respondent's employment; and that Councillor Rencontre was instrumental in getting Ms Clark to write an email dated 18th October 2014 in which she raised concerns. In oral evidence the Claimant stated that she thought there was something else behind Ms Clark's email and although she couldn't prove anything, she never-the-less believed that Councillor Rencontre was behind it. The Claimant also suspected Mrs Ward may have had an involvement in Ms Clark's email. The matter of Ms Clark's holiday entitlement is referred to later in these reasons.

37.2 The previous year Councillor Rencontre had been asked about Ms Clark's holiday pay it being said to her that Ms Clark's annual leave at that time was incorrect. Councillor Rencontre agreed it was incorrect, liaised with the Claimant and indeed the matter was subsequently resolved.

37.3 I do not find anything to support the Claimant's suspicion that Councillor Rencontre had instigated the 18 October email. I do not find that Councillor Rencontre was instrumental in getting Ms Clark to write her email.

(20) 21 October 2014 – Councillor Rencontre unacceptably, aggressively and insultingly shouting at the Claimant in public and in support of her contrived allegations

- 38.1 Within the Claimant's further details of claim appended to her claim form ET1 at paragraph 5(2) (at page 14 of the bundle) this incident is said to be at a council meeting on 4th November. At the Respondent's environmental committee, on 21 October 2014, Councillor Rencontre insisted on making a statement which the Claimant considered was not on the agenda. Councillor Rencontre was not addressing to the Claimant. Within Councillor Rencontre's witness statement she referred to having previously been asked to investigate a breach of health of safety (Mrs Ward – Resource Centre issue); and that later, in respect of another health and safety issue said that all staff, whatever their status, needed to be treated in the same way and that the Respondent needed to establish good employment practices for all its employees. That statement appeared to the Claimant to have motive behind it.
- 38.2 It was not stated within those further details that there was any shouting by Councillor Rencontre on the 21 October nor was the same referred to, at least as a specific incident, in the Claimant's resignation letter dated 10 February 2015.
- 38.3 There was no dispute at this hearing that Councillor Rencontre has a hearing impairment and sometimes speaks loudly. The Chairman at the meeting was Councillor West who has not been linked by the Claimant with Councillors, who she says, were critical of her and indeed he gave evidence at this hearing supportive of her. I have taken into account Councillor West's evidence that Councillor Rencontre shouted at the Claimant and that for all he knew Mrs Rencontre raised her voice to gain attention. I do not however find it established that Councillor Rencontre shouted unacceptably or aggressively or insultingly shouted at the Claimant, let alone in support of contrived allegations, there being no allegations in respect of the Claimant being made on that occasion. Ms Clark's email of 18 October 2014 would have been received, however, by the date of this meeting. The statement made by Councillor Rencontre is, of itself, innocuous. The Claimant herself says that Councillor Ward informed the meeting that the statement was not being made at the appropriate time, never-the-less the Respondent decided to include it in its minutes.
- (21) 24 October 2014 - Email by Councillor Rencontre to all Councillors agreeing that a number of confidential items should be discussed at an extraordinary meeting of the Respondent in the absence of staff.
- 39.1 This relates again to the Ms Clark email of 18 October 2014. Within her email (which was about holiday entitlement) Ms Clark stated that the reason she had not raised the matter earlier was that when she initially queried her holiday entitlement in April 2013, the Claimant displayed an inappropriate attitude towards her. Ms Clark continued that after being informed on three occasions that her holiday entitlement had been calculated correctly, it was subsequently increased albeit the calculations for previous years remained incorrect. Ms Clark alleged that she had not received

sufficient entitlement due to the Claimant's miscalculations and sought rectification. As found earlier in these reasons Councillor Rencontre had intervened in 2013 to ensure that Ms Clark received the correct holiday entitlement when that matter was drawn to her attention.

39.2 On 24 October 2014 referring to Ms Clark's email, Councillor Page wrote to other Councillors and the Claimant asking for item to be placed on the agenda for the Respondent's next meeting. In response Councillor Rencontre expressed agreement that the matter should be an agenda item to be discussed when the press and public were excluded but also stated there were a number of other outstanding issues to be dealt with, which she listed as "1) staff contract of employment 2) investigation play area 3) employment consultants 4) former employee email". Councillor Rencontre continued that the matters were a priority and opined that it was inappropriate to have staff present while they were being addressed as the allegation was against the Claimant. The Respondent is an employer and, like any other, must be able to discuss its employees in their absence. I accept the Respondent's submissions that it was appropriate not to have staff present at the meeting if there was a possibility of disciplinary action being taken against them. There is no restriction on the Respondent conducting meetings without staff present, nor is it a requirement in the Claimant's employment contract that she must attend all meetings. I do not consider that Councillor Rencontre dealt with this inappropriately.

(22) 4 November 2014 – Councillor Rencontre allegedly shouts at the Claimant at a public meeting – Ms Clark's email discussed in public.

40.1 On the agenda for the 4 November 2014 were the four items mentioned by Councillor Rencontre in her email of 24 October. The agenda item was headed as an exempt item; described as a confidential matter; and it was stated that there was to be a resolution to exclude the press and public from the meeting.

40.2 When the Respondent came to consider the email from Ms Clark, described as "To consider former staff correspondence", the Respondent's councilors voted not to exclude the press and public. The minutes as later approved state as follows;

"Because of comments in the correspondence under consideration, the clerk was asked by Cllr Mrs J Rencontre how she calculated staff annual leave. The Clerk replied it should be understood that the staff work under the Terms and Conditions of Local Government Services and stipulated this matter because it concerned a former employee as private and confidential, therefore was not prepared to discuss this matter with the public present. She added she would email the calculations to Cllr Rencontre. The clerk was asked to provide the calculation of annual leave by Monday 10 November 2014 to Cllr Rencontre".

- 40.3 There was no dispute that the recorded minute was a correct record. As is clear from the minute, the Respondent did not require the Claimant to give chapter and verse of the method of calculations of individual staff holiday entitlement. Discussion took place without mentioning Ms Clark's name until the end of the meeting when the Chairman, for reasons unknown, used it.
- 40.4 The Claimant's position is that during this meeting Councillor Rencontre raised her voice, played to the audience, became excited in the way she asked the Claimant questions and shouted at her. The evidence of Councillors Rencontre and Holloway was that Councillor Rencontre did not shout. The Claimant's oral evidence went beyond what she had previously said. Having regard to the matters found before, and taking into account the clear factionalisation among the Respondent's members, I do not find it established that Councillor Rencontre shouted at the Claimant. The matter discussed related to staff as a generality and not specifically Ms Clark albeit it was her email that led to the discussion. I am not persuaded that Respondent did not have reasonable or proper cause to conduct the discussion without excluding the press or public insofar as it was discussing staff as a generality. I do not find it established that the Respondent sought to undermine the Claimant or in fact did so.

(23) 17 November 2014 – Secret extraordinary Council meeting

- 41.1 During this hearing it was suggested during cross examination of the Respondent's witness' that the council meeting of 17 November was not properly constituted in that no notice of it had been given. The following day the Respondent produced a copy of the notice and agenda of the meeting together with a link to a web page where such documents could be found, a copy of which (other than the link) was also in the bundle at page 544 and 545.
- 41.2 By a summons to all members of the Respondent dated 12^t November 2014, an Extraordinary Meeting was called for the 17 of that month. The meeting was properly called and constituted (I note that Councillor Daniels does not say otherwise, only challenging Councillor Rencontre's authority to take executive action and procedural matters to do with the keeping of minutes). The Claimant in oral evidence, fully accepted that the Respondent was entitled to meet without staff present should it so wish. The Claimant was aware of the meeting and had been keeping her husband informed. Indeed shortly before the meeting Mr Hare had prepared some notes for the Claimant on how to respond to a number matters (I refer to pages 375 A – C of the bundle). The meeting was not secret, rather that it was one convened by members of the Respondent to discuss certain items which they wished to do so without the press, public or staff present. The Claimant's position in her claim is that this was "entirely in breach of her contract". No specific contractual provision has been identified and I take it that the term is the implied contractual term of mutual

trust and confidence. I consider it as part of that overall complaint. The Claimant's position is that although she had no evidence, she believed that Councillor Rencontre had driven the suspension, she allegedly not having spoken to her "for weeks". Councillor Rencontre had, however, been in recent written communication with the Claimant and, as demonstrated by the email from Councillor Rencontre to the Claimant, dated 12 November (page 373 of the bundle), called in to the Respondent's office on the 11 of that month in an attempt to speak with the Claimant regarding annual leave allocation. I am not persuaded that Councillor Rencontre was avoiding the Claimant.

- 41.3 At the 17 November council meeting there is no dispute, that: (both Councillors West and Rencontre agreed), that votes were properly taken; and, a decision was taken to suspend the Claimant. The issue of the Claimant providing information to Councillor Rencontre pursuant to the 4 November resolution formed the backdrop to the Respondent's consideration and decision to suspend the Claimant, councillors considering that the Claimant was proving to be difficult in the compliance with the instruction. There was a difference in the evidence as to who proposed the suspension of the Claimant, Councillor West believed it was Councillor Rencontre who, he said, was driven by desire to ensure that all employees were treated the same (being a reference to the suspension of Mrs Ward earlier in the year). It does not matter who made the proposition, the fact remains it was passed. The following day "having slept on the matter" Councillor Rencontre consulted relevant staff at Central Bedfordshire Council and the Respondent's solicitors. Councillor Rencontre accepted the advice she received from both sources namely that suspension was inappropriate. This was reported back and at a meeting of the Respondent council, a decision was taken not to suspend the Claimant.
- 41.4 At the meeting three resolutions were passed one being "to investigate the issues discussed" the topic being the Claimant's dealing with Councillors, specifically access to information. The Respondent, acting as an employer, if it had concerns regarding a member of staff, had an entitlement to meet without the staff member present in order to discuss those concerns and consider whether any action needed to be taken. In so doing I find that the Respondent had reasonable and proper cause to convene the meeting and, having been advised that suspension was inappropriate not to action that suspension. The Claimant was, however, clearly aware of matters.

Claimant's grievance – incorporating items (8) 22 March 2014, (10) May 2014, (17) 4 July 2014, aspects of (23) 17 November 2014, and (26) 8 December 2014

- 42.1 The Respondent has a number of policies, including a Bullying and Harassment Policy and a Staff Grievance Procedure. At the hearing I was not taken to the Bullying and Harassment policy but

was the Grievance procedure. In that procedure the Respondent undertakes to deal objectively and constructively with all employee grievances and states that employees who use the procedure may have confidence that their problem will be dealt with fairly.

- 42.2 The first stage of the procedure envisages an informal grievance being raised with the Town Clerk or Council. In this case the Claimant had expressed her concern on the matters to the Chairman of the General Purposes Finance Committee (Councillor Bains). The policy continues that should an employee formally raise their grievance in writing providing the same to the Chairman of the General Purposes and Finance Committee within 10 working days (presumably of the date of the matter complained of). The second stage of the procedure provides that the Chairman of that committee shall arrange a meeting with the employee to discuss the grievance as soon as possible and normally within 10 working day. In a case such as this it is provided that the Chairman may convene a panel comprising 3 Councillors who have no knowledge of the case from the General Purposes and Finance Committee. An employee invited to attend the meeting has a right to be accompanied by another person of their choice, explain their grievance and how they consider it should be resolved. Should it be considered that other investigation is required, the policy provides that the meeting will be adjourned for a period not to exceed 10 working days in which time necessary investigations, including interviews, will be carried out. The policy continues that the employee will be notified of their right of appeal against that decision if they are not satisfied with it.
- 42.3 Once a decision has been made on the grievance there is the conventional right of appeal to be made to the Respondent within 10 working days of receipt of the formal written response to the appeal. The appeal must set out the grounds of the appeal. The policy continues in the same vein as before that the General Purposes and Finance Committee convene an appeal panel comprising three Councillors from that committee who had not previously been involved in the subject of the grievance to consider the appeal, which the panel shall do within 20 working days of receipt of that written appeal. The employee is entitled to be accompanied by someone of their choice. A formal written response to the appeal should to be issued within 5 working days.
- 42.4 The policy specifically provides that the right to be accompanied at the process is via a trade union representative, work colleague or representative of their choice and also that reasonable preparation time for a hearing will be allowed. At all times during the Claimant's grievance process, she was represented by her husband as was the Assistant Town Clerk for the period she pursued a grievance in the same or like terms. On 14th March 2014 the Claimant formally raised a grievance with the Respondent by writing to the Chairman of the General Purposes and Finance committee, Councillor Gursh Bains, copying the same to the Chairman of the Council, Councillor Daniels, Councillor Rencontre, the Assistant Clerk and Mr Hare.

The grievance letter; referred to Councillor Bains having previously asked her about her experience, which question she said caused her alarm and since that question she had noted comments from “certain coucillors” that appeared directed at her; criticised Councillor Bains for not discussing the exit interview he had conducted with Ms Heidi Clark and opined that if he had discussed the same with Councillor Holloway it would be very unfair; informed that the minutes of the January General Purpose and Finance committee had not been completed and criticise members’ performance at that meeting; and noted a comment by Councillor Holloway in a meeting the Respondent. Nowhere in the written grievance does the Claimant complain of bullying or harassment in terms, refer to the Respondent’s policy on the same, or refer to any Facebook posts.

- 42.5 The grievance was written in moderate but firm terms and its contents limited, albeit the reference to the activities of five named councillors in the fourth paragraph, raises a number of questions. In her grievance the Claimant is critical of the behaviour of those certain Councillors. The Claimant was clearly able to express her concerns, and also wrote about them to her husband, copying in Councillors Daniels and Rencontre, on 20 March in which she compiles a written record of her version of events about certain matters, including Facebook posts and the activities of certain Councillors (see page 323AA of the bundle). Also on the 20 March the Claimant wrote to Councillor Gravett (he being one of the five named councilors), criticising his conduct and putting him on notice of legal action (as referred to before – the “Go to law ..” comment). This of course generated a response from Councillor Gravett. Although the grievance was written in moderate terms, the Claimant concluded by referring to a possible claim to an Employment Tribunal.
- 42.6 Councillor Bains chaired the investigation panel which comprised himself as Chairman, together with Councillor’s Daniels and Rencontre. Councillor Bains, when he gave his evidence was vague. Councillor Bains’ evidence was that he was both aware of and had read the grievance procedure and the policy and understood the timescales within it. At the grievance meeting the Assistant Clerk also attended and informed that she wished to be part of the grievance. The committee agreed that this would be the case. In the meeting the Claimant informed that Councillors: Holloway; Gravett; Ward; and Hazelwood were harassing and bullying her. There were the four Councillors of whose behaviour in a meeting she had been critical in her 20 March email (page 323AA). Councillor Bains was unsure whether the Claimant referred to Facebook – the Arlesey UK site, but thought she probably had, and that the Claimant had referred to the volume of work. The outcome of the meeting was that four measures would take place. I am satisfied that the Claimant was complaining about the volume of work generated by emails and queries from the four named Councillors. I do not find that there was a complaint of

bullying or harassment as these terms are commonly used. A note of the meeting, while taken, has not been produced, Councillor Bains being unable to locate it. Taking into account the evidence to the Tribunal of Councillor Rencontre and subsequent correspondence between the Claimant and Councillor Bains, I am satisfied that it was agreed by the grievance panel that Councillor Bains would interview the four named Councillors. In evidence the Claimant did not complain that that was in any way improper, albeit in correspondence as referred to below, she does (see paragraph 46.15 below). I do not find that that decision was outwith the Grievance Policy.

42.7 Councillor Bains presented a report to the Respondent Council's meeting on the 1 April 2014 regarding the grievance hearing of both the Claimant and the Assistant Clerk in which he informed that both had lost their trust and confidence with the Respondent as their employer and that it had been agreed with the office to:

- “ 1) Investigate the allegations that he had heard which would involve some interviews with Councillors;
- 2) to offer the Clerks one to one consultation with Councillor Rencontre.
- 3) Stress related awareness training to staff
- 4) Recruit a temporary member of staff for the office.

A proposition that the Respondent recruit a temporary member of staff to the office was approved, it deciding to recruit such a person for 16 hours per week. It was recorded that Councillors, Gravett, Hazelwood and Ward abstained from voting and thus I take it that they were at least present when this report was presented and discussed.

42.8 Within the resolution the Respondent's Council meeting there is no reference or intimation to Facebook posts generally, or in particular to the Arlesey UK site.

42.9 Councillor Bain's position is that he obtained statements from Councillors Holloway and Gravett, but only had discussions with Councillors Ward and Hazelwood. In other documentation and from the evidence of Councillor Gravett, I am not persuaded that a statement was obtained from him. Councillor Holloway gave evidence that would have made a statement and it would be on his computer if such statement had been made, none was produced. I am not persuaded that any such written statement was ever obtained. During evidence it was stated that a difficulty for Councillor Bains was that some of the Councillors had ceased to be Councillors. I refer back to paragraph 4 of these reasons regarding the tenure of those to be interviewed. I am not persuaded there was any impediment caused by their tenure to Councillor Bains interviewing and obtaining statements from them.

42.10 On the 14 April the Claimant wrote to Councillor Bains, copying in the two other members of the grievance panel informing that she and the Assistant Clerk were concerned that their "first grievance"

had not been dealt with and "... furthermore very disturbed that the four Councillor's Gravett, Hazelwood, Holloway and Ward's recent comments on The Arlesey UK Facebook site about the office staff and me in particular" and thus they were both lodging a further grievance complaint with Councillor Bains. The Claimant continued that she had to do this as she and the Assistant Clerk's office duties were suffering under victimisation from certain Councillors. Either side of this "further grievance" Mr Hare wrote to Councillor Bains on three occasions, namely the 1 April, 8 April and 18 April asking for a written account of the meeting which took place on 22 March (which he stated that Councillor Bains had agreed to produce together with the actions going forward), referred to the timescales within the Respondent's grievance policy and posts on Facebook.

- 42.11 On the 22 April 2014 Mr Hare wrote to the Chief Constable at Bedfordshire Police on the Claimant's behalf stating that she had been the subject of continuous malicious and vicious attacks on the Arlesey UK site, naming three people (none of whom were members of the Respondent) as referred to before.
- 42.12 On the 22 April, the Claimant wrote to Councillor Bains stating that it had become apparent to her and the Assistant Clerk that: it appeared he had no intention of dealing with their grievance; should any of the Respondent's staff go to an Employment Tribunal he was likely to be held personally responsible for some matters; complaining that he had not made available to her a copy Ms Clark's exit interview; complaining of some aspects of his, alleged non-performance, of duties assigned to him as a Councillor (which appears to be unconnected to the grievances); asserted that she believed that he was now in collusion with the four previously named Councillors; and warning that unless the grievances were dealt with very shortly, she and the Assistant Clerk would file complaints with the Monitoring Officer at Central Bedfordshire Council. The following day Councillor Bains responded informing: that he would respond to all emails by the following Sunday; that he intended to fulfill his responsibilities, albeit there were a number of complaints and other matters which he also had to deal with; and, for that reason asked the Claimant to put on the next Council meeting's agenda an item to discuss the approach to "...complaints, grievances, disputes and allegations." This related to the Claimant and the Assistant Clerk's grievances as well as other unspecified tasks. There was no suggestion that the Claimant was prevented or impeded in any way to placing this item on the agenda or could not do so, but nevertheless she did not.
- 42.13 On the 28 April Councillor Bains again wrote to the Claimant and the Assistant Clerk informing that investigation outstanding in respect of their grievance was the interviewing of the four councillors which he expected to carry out within the next few weeks. In respect of the actions agreed at the grievance meeting and recorded in the 1 April Council meeting decision Councillor Bains enquired as to: whether all staff had been offered stress awareness training; whether any staff had taken up the offer; whether the

Claimant was finding the support from Councillor Rencontre helpful; and if the additional office resource had reduced the workload pressure. On the 9 May the Claimant responded to Councillor Bains informing that she and the Assistant Clerk were finding the support from Councillor Rencontre helpful and the additional office resource was helping. The Claimant then continued by informing of other staff shortages which had occurred. The Claimant disputed that she had been informed at the grievance meeting that all staff should be offered stress awareness training, and did not recall it being agreed. Other than the Claimant's evidence to this Tribunal it had not previously been suggested that the 1 April council meeting record was incorrect. The Claimant continued that it would be helpful if Councillors could place truthful information on the Arlesey UK Facebook site. Councillor Bains in turn responded to the Claimant, three days later (i.e. 12 May), asking her to: outline a proposal he could take to the Respondent council if she needed further temporary resources; informed that while he had not seen negative social media comments, he thought that the Respondent should urgently need to agree an approach to counter them and asked for an item to be placed on the Respondent's agenda and he would then facilitate a discussion; asked for "a couple" of examples of the social media comments so that he could read them out to Councillors; and in respect of stress related awareness training Councillor Bains stated that it was a matter for the Claimant and staff whether they wished to take it up. Councillor Bains continued that he had seen two of the named Councillors to date, and when he had seen the remainder the grievance panel would need to meet to discuss the findings and sought the Claimant's forbearance. In respect of notes of the grievance meeting, Councillor Bains, in the final paragraph of his email referred to an email he had sent on the 27 April which contained his notes to the Respondents annual meeting. There was no suggestion that the Claimant was prevented or impeded in any way in complying with either request either to place an item on the Respondent's agenda or provide an example of the social media comment that she had complained of. Nevertheless the Claimant did not comply with either request. To the Tribunal the Claimant opined that there was in fact nothing else the Respondent could do in respect of her grievance.

- 42.14 Around this time the Claimant was busy with her work and decided not to resign over any breach of the grievance procedure.
- 42.15 Despite her oral evidence to this tribunal as referred to above, on the 12 May the Claimant wrote to Councillor Bains criticising his conduct of the investigation, that he was to interview the Councillors without what she described as 'consulting' the other two panel members which, opining his conduct, was unacceptable and that it appeared that he was in collusion with some of the Councillors he was investigating.
- 42.16 Having heard nothing further on the 4 July 2014 the Claimant and the Assistant Clerk submitted a "notice of appeal" in respect of their outstanding grievance. In the appeal the Claimant stated that: the

timescale within the grievance procedure had not been complied with; Councillor Bains had not responded to their correspondence other than his 12 May 2014 email; the lack of a decision on their grievance; and that Councillor Bains informing that he had interviewed two Councillors without other reference to the grievance panel members; and, that because those matters and others Councillor Bains had become “personally opposed and seriously biased” against the Claimant and Assistant Clerk. The Claimant sought an appeal panel to be convened. Councillor Bains did not take any action in respect of this appeal and (his evidence to the Tribunal was) understood it was being dealt with by Councillor Daniels, there being a complaint about him. It would seem, and I find, he took no action in respect of the appeal until around the time of the 17 November 2014 council meeting.

- 44.17 No appeal meeting or any action apparently took place. There is no indication the Claimant subsequently complained about the lack of action and I find she did not. This, despite her good working relationship with the other two members of the appeal panel (Councillor Daniels throughout and Councillor Rencontre until September). The content of the appeal is incorrect at least in part in that whatever the lack of formality, the matter had been reported to the 1 April 2014 council meeting. The Claimant was aware of the Respondent’s decision and Councillor Bains had responded to some of the Claimant’s written communications as referred to before and enquired as to implementation. I am satisfied on the evidence of Councillor Rencontre and the documentation to which I was referred that she attended the Respondent’s office on a number of occasions in accordance with the council resolution and that additional staff resource was provided. Further when the Claimant sought to raise additional matters she was asked by Councillor Bains to provide information to enable him to deal with them but did not. That does not “excuse” the failure of any lack of action by the Respondent but it does indicate, and I so find, that there were two matters outstanding only, namely the: investigation into the four named Councillor’s behaviour; and, a formal decision on the grievance to be made and be provided to the Claimant. In addition there had been, as the Claimant was aware, a statement published by the Chairman of the Council on 12 May 2014 (page 337/1 of the bundle) referring to Councillor’s activities and social media. The Claimant’s grievance regarding councillor’s activities and behaviour was in respect to their activities in the performance of their role as Councillors, being the extra work they were causing and their approach to their role was addressed by the additional resource the Claimant and Assistant Clerk were provided with. I find that while chasing the Respondent should not be necessary, I do not find either that the Claimant or her representative continually chased. While chasing emails should not have been necessary when Councillor Bains asked the Claimant to place items on the Respondent’s agenda with the aim of better enabling him to deal with her grievance for no good reason she did not. While I do not

find that Councillor Bains “did nothing”, he did not do as he was tasked with doing despite his allocation of a specific duty and informing the Claimant that he would take certain action. I am not persuaded however that he sided with those with whom the Claimant was complaining about. I am not persuaded that Councillor Bains deliberately stalled the grievance procedure rather it appears that he simply did not put enough into it and when he sought the facilities to try and gain additional resources the Claimant, who was the Clerk, did not comply with his request.

- 44.18 That the Claimant filed complaints against Councillor Holloway and Gravett with the Central Bedfordshire Council Monitoring Officer is a matter for her. Without more I did not consider it further. I am not persuaded on the evidence, that there was any findings by the Monitoring Officer on the complaints that was critical of the Councillors. If there was I was not taken to it. Councillor Gravett’s evidence was that he was exonerated.
- 44.19 In the context of the Claimant’s numerous complaints about Councillor Bains as described above it would have been appropriate for the Respondent to have ensured that the action was taken by someone other than him should that be possible. I accept Councillor Bain’s evidence that he understood that the Chairman of the Council Councillor Daniels would take up the matter.
- 44.20 On the 14 November the Claimant wrote to Councillors Derek John Page, Heyes and Auburn copying in a number of others including Councillors Rencontre, Daniels, Bains and Holloway together with the Assistant Clerk. The Claimant was responding to an earlier communication from Councillor Page in which he had written to Councillors assuring those Councillors that Ms Clark did not have any problems with the Respondent’s legal/appropriate way in which holiday pay issue was discussed but as the Claimant had made what he described as “unnecessary comments” considered it would be prudent for the Council to have knowledge of the exit interview in order to ascertain whether it could shed on those comments. In response to these communications, Councillor Auburn opined that if there was a grievance outstanding it should be dealt with as a matter of urgency as should the Claimant’s concerns.
- 44.21 At the Respondent’s 17 November 2014 Extraordinary Council meeting there was a discussion around the Claimant and the Assistant Clerk’s grievance following which it resolved to “review the status of the grievance and ensure it was/is completed appropriately”. Following the meeting a letter was produced by some councilors, including Councillor Bains, and presented to Councillor West who had chaired the meeting, for signature. Although Councillor West now states it was against his better judgment and parts of the contents of the letter are not true, he nevertheless signed the letter. The letter refers to the grievance meeting of the 22 March 2014, the constitution of the disciplinary panel and continued as follows;

“At the meeting you were given full opportunity to explain the nature of your grievance and the resolution you were seeking. You explained the nature of the grievance as “having lost confidence in Arlesey Town Council as an employer’, in particular harassment by four Councillors, Cllr Mick Holloway, Cllr Chris Gravett, Cllr Darren Hazelwood and Cllr Andy Ward in the form of a high volume of queries and questions they generated for the Town Council to deal with. The resolution you were seeking was to be able to conduct your duties without undue pressure from the four named councillors.

Four measures were agreed by all parties at the grievance hearing:

- 1) Additional administrative support for the Town Council Office to handle the volume of queries.
- 2) One to one support from Cllr Judy Rencontre to provide direction and answer any queries that require Councillor input.
- 3) An offer to provide stress management related training for the entire Council workforce.
- 4) An investigation into the conduct of the four named councillors above.

I have given careful consideration to all of the issues presented to me, and my decision is that the grievance is not upheld. The reasons for this are as follows:

The investigation recognised that the four named councillors increased the volume of queries to the Town Council Office; however it concluded that the nature of their queries was to fulfill their roles as Councillors. As an employer the Council took immediate and reasonable action at the Grievance hearing to provide additional resources and support to handle the increased work pressures”.

The Claimant was informed of her right of appeal.

44.22 Councillor West had not given the consideration or made the decision as referred to by him in the penultimate paragraph of the quotation above. Further, I accept that there had not been any investigation as would be understood by that word. Councillor West did not state that the original paragraph of the quotation above was inaccurate and I accept that the matters stated therein other than the lack of any formal investigation into the conduct of the four named Councillors, is an accurate reflection of the Respondent’s decision. It is worthy of observation, however that although the Claimant’s grievance involved four named Councillors only one remained as a member of the Respondent at that time, namely Councillor Holloway. Councillor Holloway was present when at the 17 November meeting when the grievance, in part against him was discussed. There was no record that Councillor Holloway either left the meeting or abstained from the voting when the decision taken.

Councillor Holloway took the minutes. As is apparent, there was no reference to any of the communications between the Claimant and Councillor Bains, the Claimant's appeal, or any consideration of the Claimant's allegations of a bias against Councillor Bains.

- 44.23 Following the 17 November council meeting the Claimant wrote to Councillor Daniels by letter dated 23 November proposing to resign from her employment. Councillor Daniels persuaded the Claimant's husband, however, that the Claimant should not do so. The Claimant did not resign.
- 44.24 At a meeting of the Respondent council on the 2 December 2014 the grievance, described as an incomplete grievance was again discussed. The Respondent resolved that an appeal committee be established to progress the grievance to a conclusion. The Appeal Committee established comprised Councillor's Clapham, Auburn and Heyes. Other matters were considered and discussed at that meeting about which more below.
- 44.25 Councillor Heyes explained to the Claimant: why he was involved and the way forward. On the 8 December Councillor Heyes sent an email to the Claimant seeking confirmation that she wished to proceed to a stage 3 grievance appeal and seeking any documentation upon which she wished to rely. On receipt of this email the Claimant wrote to Councillor Daniels (rather than Councillor Heyes) referring to her July "appeal" and stating that she and the Assistant Clerk were unhappy with choice of panel. Councillor Heyes wrote to the Claimant on the 14 of that month informing that the panel was selected by a majority of the councillors during a closed meeting, it was not in his gift to change the composition, that she had made allegations of bias against two of the panel could be construed as vexatious, the Council only having 12 Councillors and 2 on the panel were new. Councillor Heyes continued however, that if the Claimant had supporting evidence of bias, the Respondent would need to reconsider the panel's composition. The Claimant was informed that the appeal panel would meet on 20th December at 10am to hear the appeal. On the 16th December, Mr Hare wrote to Councillor Heyes providing information why he considered Councillor Auburn was biased, which letter is said to contain enclosures (page 388A of the bundle). Those enclosures were not presented to me. I accept, however, that documents were sent. In response Councillor Heyes responded to Mr Hare on the 19 of the month informing that he had read the documentation provided to him and he would revert to the Council to regarding the makeup of the appeal panel and advise that the make up of the panel be revisited. By this time the Assistant Clerk had withdrawn her grievance.
- 44.26 By that time the Claimant has become unwell and was no longer attending work. Councillor Heyes informed that it would be inappropriate to hold any appeal until the Claimant returned, thus a suitable date would be notified in due course. The Claimant had provided what was described as a "sick note" for four weeks from 17 December with an accompanying letter dated 16 December to

her GP. Within that letter (page 388 A1 of the bundle) the Claimant described her condition. I quote the entirety of that letter as it not only describes her condition as she described it to her doctor but information she informed him of relevant to the events at her employers and her intension for the future.

“Dear Doctor

Would you please provide me with a sick note for 4 weeks. Because due to the unacceptable treatment I have suffered from my employer, Arlesey Town Council, I will have little option than to tender my resignation as from 18 December 2014 and giving 3 months notice and thereafter I intend to immediately apply to the Employment Tribunal.

The reason I require a sickness note is due to the dreadful stress, worry, and upset such treatment has caused me and is seriously affecting my private life and leaving me feeling physically ill and unable to sleep and upsetting those close to me. Also, feeling so unwell and stressed, I will not be able, indeed I am frightened, to drive to Arlesey to resign and to serve my notice, due to the way I know I will be treated and shunned by the majority of the Councillors who are fully intent to have me suspended as from January to undertake investigations on false accusations of poor performance in a job I have held for nearly 10 years. In private meetings they have tried twice to suspend me but lawyers at CBC, and in private practice, have told them they have no grounds, but they are undeterred. My work environment is simply awful. The continual and deliberate email pressure means I am unable to function properly. I continually burst into tears, suffer headaches and stomach cramps, and stress. I cry on the way home which distresses my family and places me at risk.

The Council Chairman and Mayor of Arlesey totally supports me, but he has struggled to stop the relentless behaviour of the majority and that it the problem he is simply outnumbered in the various voting. He has told me they are hell bent to get rid of me. Which although illegal I will only obtain eventual redress in a Tribunal which adds frustration to the whole matter.

Thanking you in anticipation of your help.”

- 44.27 I am not persuaded that Councillor Heyes “reluctantly agreed the panel membership needed to be revisited” or that the panel was “deliberately and unfairly biased against the Claimant” as originally constituted. Rather, the Claimant’s representations had provided information to Councillor Hayes which I am satisfied he perused and as a result considered it correct to advise the Respondent to revisit the make up of the panel. The nature of the documents disclosed by the Claimant’s representative were such that, without more, they would be unlikely to be generally known. The Claimant agreed that it was not inappropriate for the Respondent not to hear her appeal while she was absent from work due to ill health. The Claimant further agreed that after the 18 November 2014 the

Respondent had not done anything wrong in respect of her grievance. I do not consider the issue of the Claimant's grievance further.

(21) (2 December 2014 Council Meeting) and 27 (6 & 13 January, 3 February 2015 Council Meetings)

- 45.1 At a meeting of the Respondent council on the 2 December 2014 in addition to the grievance of the Claimant and the Assistant Clerk the Respondent discussed the calculation of staff holidays. During that discussion the meeting was informed by Councillor Daniels that the Claimant was taking advice on holiday pay from her husband which information "was poorly received by the Councillors (present) and considered it to be a very serious breach of confidentiality". The Claimant's capability was also discussed. The Respondent agreed strategies to address all the above. The Respondent expressly authorised Councillors Rencontre and Daniels to seek access to information which was said to have been denied to Councillor Rencontre; Councillors Heyes, Rencontre and Auburn to begin an investigation into the Claimant passing confidential information to her husband or any other unauthorised third party, which investigation, it was expressly provided, would need access to all areas of the Respondent's offices and equipment; and, Councillor's Daniels and Holloway to present the Claimant's capability statement to her after her grievance had been completed. This was a meeting to discuss matters about which a number of Councillors had concerns about the Claimant. The Respondent, like any employer, is entitled to discuss matters which affect their employees, without those employees present. I am satisfied that the Respondent had reasonable and proper cause to exclude the Claimant from the meeting.
- 45.2 Before that meeting the Claimant and Councillor Rencontre had been in communication regarding holiday leave entitlement for staff. Some information, but not all, had been provided by the Claimant but not in the format sought, and Councillor Rencontre, on reasonable ground, believed information requested was missing. I refer to, but do not repeat my finding under item 22 below.
- 45.3 Although Councillors Rencontre and Daniels had been in communication with the Claimant and/or her husband on a number of occasions in respect of the Respondents business I was not provided with any information to lead me to understand that such communication was common knowledge.
- 45.4 The Claimant alleges that at the 2 December meeting, Councillor Rencontre again failed to suspend her. The Claimant does not have any evidence herself as to this only that the late Councillor Daniels had said to her that "they" were trying to get rid of her. Similarly in respect of the later council meetings of 6 and 13 January and 3 February 2015. While Councillor Daniels in his witness statement does not say it, the statement attributed to him would be in line with the purport of his statement. Against that

however, Councillor Rencontre had been advised that suspension of the Claimant on the 17 November was inappropriate and had taken action to ensure that the decision had not been implemented. This 'no-suspension decision' was made at a meeting of the Respondent as confirmed by Councillor Daniels in his witness statement. This matter was not specifically dealt with in the Claimant's witness statement (as a number of other matters were similarly not addressed). The actions of Councillor Rencontre during this period, and indeed after, do not support the Claimant's allegation. I am not persuaded that Councillor Rencontre sought to have the Claimant suspended at any of those meetings, let alone inappropriately sought to have her suspended. In respect of the January and February meetings, the Claimant was absent from work due to ill health.

(22) (9 February 2015 – 5 February 2015 letter from Councillor Rencontre)
– The Claimant's Resignation

- 46.1 I refer to the facts found before regarding Ms Clark's holiday pay and how the 2013 issue had been resolved following Councillor Rencontre's involvement. The subject then resurrected itself when Ms Clark raised the matter in October 2014 regarding alleged irregularities in respect of holidays and pay over a longer period.
- 46.2 At the Respondent Council's meeting on 4 November 2014, issues around a children's play area were discussed, resolutions made and it was resolved that Councillor Rencontre would carry out a health and safety investigation. This matter had been discussed at the 21 October meeting when Councillor Rencontre had insisted on making a statement (as referred to before). Also on the 24 October Councillor Rencontre had written to Councillors regarding discussing four matters opining that it was inappropriate to have staff present while the matters were being addressed, those matters being: staff contract of employment; investigation of play areas; employment consultant; and former employee email. As referred to before, prompted by the Ms Clark's email, at the 4 November council meeting, there was a discussion on staff annual leave as a generality and Claimant been asked to provide a calculation of staff annual leave by the 10th of that month to Councillor Rencontre.
- 46.3 During the period which the Claimant had been required to provide the information about staff holiday calculations she was in communication with her husband who provided information to her on the 10 November 2014. On the 11th of that month, as referred to before, Councillor Rencontre had visited the Respondent's offices to discuss with the Claimant staff leave and the calculation error but the Claimant had not been in the office, resulting Councillor Rencontre writing to her the following day. On that date, 12 November 2014, the Claimant responded to Councillor Rencontre with copies to Councillor Daniels and a number of other Councillors stating that she understood from the Assistant Clerk that Councillor Rencontre had collected the staff holiday formulations the previous

day and set out the formula she said she used in respect of Ms Clark. The Claimant continued, however, by stating that the Respondent's meeting was illegal as it should have been discussed under 'confidential matters'. It was not explained how that would make the council meeting illegal. It was not suggested to me that in fact the meeting was illegal, nor was I provided with any authority to indicate that such a meeting or decision itself would be illegal, ultra vires or otherwise valid. On the same date, Mr Hare had again written to the Claimant providing a draft statement for her to send to Councillor Rencontre and suggested it be copied to all of the Respondent's Councillors. There had been a further email from the Claimant from Mr Hare to the Claimant earlier that day regarding Ms Clark's holiday entitlement and providing a draft note to all Councillors.

- 46.4 On the 20 November Councillor Rencontre wrote to the Claimant copying in a number of Councillors, including Councillors Daniels and Holloway informing that she was enclosing a spreadsheet for the Claimant to complete regarding staff's annual leave allocations leaving it for the Claimant to add figures against staff names. To this the Claimant responded on the 25 November, not completing the spreadsheet but informing that she was providing her with Ms Clark's leave, understanding that the Assistant Clerk had previously given the information regarding the other staff. The Claimant did provide information regarding her own annual leave and Ms Clark's.
- 46.5 On the 29 November Councillor Rencontre again wrote to the Claimant regarding staff annual leave. Councillor Rencontre's evidence which I accept to be accurate, was that: she had requested the information (she considered she was entitled to) following the 4th November Council decision, on previous occasions regarding staff annual leave and their individual leave entitlement; a formula had been provided for calculating Ms Clark's annual leave for one year only and making reference to the spreadsheet she had provided but to which the Claimant, simply referred to a list of standard leave as per NALC entitlement from its handbook; that she had requested a copy of the Respondent's Complaints Policy as Ms Clark's complaint was submitted to Councillors on the 18 October and she had concerns regarding time limits in that policy; that she did not have the information requested, stating that it had been resolved at the November council meeting that she investigate Ms Clark's complaint; that it was clear the Claimant was aware that an exit interview had taken place with Ms Clark as the Claimant had given the specific date and the only people who would know of that would be herself, Councillor Rencontre and Councillor Bains and the Claimant had stated on the 20 October 2014 "as I have never seen a copy I would like to know. A Court Order may be the only way to look at it"; and that she understood Councillor Holloway had responded to a question regarding the Extra ordinary meeting. Councillor Rencontre concluded her communication by stating that her (Councillor Rencontre's) work was voluntary; she had made it

clear to the Claimant what was required of her; expected her assistance; and that she needed the information by the 4 December. The Claimant sent a copy of this email to Mr Hare on the 1 December.

- 46.6 Councillor Rencontre's email of 29 November followed one of the 28 November from the Claimant to Councillor Rencontre stating that Councillor Rencontre had not reverted to her regarding Ms Clark's holiday information and asked Councillor Rencontre to visit her in the office the following Monday in order that the matter could be discussed in order that a response could be prepared for Ms Clark. By that time of course the request, as was evident from the minute of the 4 November, was much wider than the Ms Clark complaint. A number of Councillors were copied in to Councillor Rencontre's emails. At no stage at that time was it suggested that Councillor Rencontre was acting outside her authority. I am satisfied that Councillor Rencontre was acting within the ambit of the instructions given to her by the Respondent.
- 46.7 At the meeting of the Respondent's council on the 2 December, in addition to appointing an appeal committee to deal with the Claimant's grievance the following resolutions were passed.
- a) Cllr Rencontre and Cllr Daniels to seek to access the information Cllr Rencontre has been denied access to.
 - b) Cllr Heyes, Cllr Rencontre and Cllr Auburn to start an investigation into the Clerk passing confidential information to her husband, or any other unauthorised 3rd parties. It was noted and agreed that this investigation will require 'access to all area's' of the office. This will include, but not be limited to, filing cabinets, electronic documents, archives, PC's, emails etc.
 - c) Cllr Daniels and Cllr Holloway to present the clerks capability statement to the clerk after the grievance has been completed.
- 46.8 Two days later the Claimant provided the previously requested information in the form of a spreadsheet.
- 46.9 At the 6 January 2015 Respondent's council meeting attended by seven councillors, it was resolved that Councillor Rencontre request from the Claimant all necessary keys and passwords to gain access to all areas and if those items were not available in a timely fashion to gain access by any means "to filing cabinets etc".
- 46.10 At a further meeting of the Respondent council on the 20 January 2015, at which nine Councillors were present, the Assistant Clerk, was in attendance. The activities of: the Claimant's husband in writing to a resident's employer (Biggleswade Town Council) about that resident's activities vis a vis the Respondent; and of Councillor West were discussed; as were other communications written by the resident. The Respondent believed that Councillor West had been inappropriately sending confidential information to others and should not be sent any further such information. It was reported by Councillor Rencontre that the Claimant had passed a letter written by the resident to Councillors onto her husband; that because the

Claimant was absent from work due to ill health it was difficult to move forward with the annual leave issue; and that a lawyer had advised her that a Claimant's activities in transferring (confidential) information to her husband and the annual leave issue constituted gross misconduct. It was decided at that meeting that: Councillor Rencontre email the Claimant asking for her views on the annual leave calculations, giving her a deadline to reply, in order that a report on annual leave could be finalised; and Councillor Rencontre provide a rough calculation of holiday pay owed to consider at the next meeting which she did in respect of Ms Clark. There was no suggestion that at the meetings on those matters that Councillor Rencontre was acting beyond her remit.

46.11 By way of explanation of the above Mr Hare had written to the Mayor of Biggleswade Town Council regarding what he said were unacceptable activities and comments made by one of that Council's employees a Mr Rob McGregor and his wife Mrs Tracey McGregor (I did not hear any evidence as to whether Mrs McGregor was also an employee of Biggleswade Town Council) in respect of the Respondent and the Claimant. This caused Biggleswade Town Council to write to the Respondent which in turn caused disquiet to the Respondent who decided to write to Mr McGregor informing that they did not condone Mr Hare's writing to his employer. There is a dispute as to how an email written by Mr McGregor to Councillors entered the hands of Mr Hare. Having considered the evidence of both the Claimant and Councillor West I am persuaded that the communication was passed by Councillor West to the Claimant who then passed it to her husband. I do not consider the activity of Mr Hare in writing to Mr MacGregor's employer or his employer's response in considering the Claimant's claim against the Respondent.

46.12 On 27 January 2015 Councillor Rencontre wrote to the Claimant as follows:

"Dear Elsie

I hope your health is improving and you are feeling better. The reason I am writing is to inform you that my investigation into the complaint regarding annual leave allocations is nearing an end.

In my last email dated 29 November 2014 I did say that you would be given an opportunity to raise any concerns you have regarding the annual leave and with that in mind I would like you to attend an informal meeting which as been arranged for the 4 February 2015 at 11am in the council office. However, I do understand that this may be inappropriate for you to attend as you are on certificated sickness therefore I am happy for you to email me any comments you may have.

My report will be finalised on the 6 February 2015 and taken to council. Therefore if you wish to add any comments or provide me

with further information I will need this by, at the latest, the 5 February 2015.

Kind regards.

Judy
Cllr J Rencontre”

- 46.13 On 4 February, the Claimant informed Councillor Rencontre that she was unable to attend the informal meeting on the 4 February because she was certified sick. Councillor Rencontre responded to the Claimant the following day informing her that unless she could email her comments before the 6 of that month they could not be included in her investigation report on annual leave which was to be completed that day. Councillor Rencontre continued that matters regarding “Potential Breach of Trust and Confidentiality” and “Your Responsibility of Responsible Financial Officer” had come to light that required investigation and that any information and documents pertaining to those investigations would be sent to her within 5 working days. The Claimant was further informed that while no decision had been made she needed to be aware that the investigations may result in disciplinary action being taken and that should would be asked to attend a further investigatory meeting (the date of which she would be notified), her certified sickness being taken into account.
- 46.14 The Claimant received the 5 February letter on the 9 February and sought a copy of the draft report together with details of the new matters. Later that day the Claimant wrote to the Respondent resigning her employment on notice to expire on 10 March 2015, that latter date being the Effective Date of Termination of the Claimant’s employment with the Respondent within the meaning of S:97 of the Act.
- 46.14.1 On 5 March the Claimant’s husband wrote to Councillor Rencontre on the Claimant’s behalf pursuant to “CPR PRO 5.3 [pre action protocol for defamation] and other matters” informing that the Claimant would consider bringing a claim of malicious falsehood against her amongst matters. In issue in these proceedings has been whether Councillor Rencontre acted beyond her authority. I have been taken on a number of occasions to minutes of meeting of the Respondent or its committees where there has been specific authority for Councillor Rencontre or others to take certain steps. Equally it is clear from a number of minutes that Councillors have carried out steps, such as (in apparently appropriate cases and on behalf of the Respondent) obtaining and paying for legal advice for which there has been no identified explicit authority but equally there has been little question raised, and none

pursued so far as I heard, that those councillors were acting beyond their authority. I was not taken to any resolution of the Respondent which specifically authorised Councillor Rencontre to expand the scope of her investigation, as described by her in her letter to the Claimant of the 5th February.

- 46.14.2 At an Extraordinary council meeting on the 17 February, when the Claimant's resignation was considered, apart from the specific resolutions, it was recorded that Councillor Rencontre had informed the meeting that she was "still proceeding with the disciplinary she was in the process of investigating and was in regular communication with both [Central Bedfordshire Council's] and the [Respondents'] lawyers" which process she expected to be completed by the 10th March. In the minutes of a further meeting of the Respondent on 3rd March 2015 (page 394 of the bundle) at which staff holidays, the Respondent's offices and other matters were discussed, it was specifically reported that Councillor Rencontre had invited the Claimant to attend a disciplinary meeting on the 6th March and had proposed certain Councillors, namely Clapham, Heyes and Holloway form the disciplinary panel. There was no recording at this or any other meeting that Councillor Rencontre was acting or had acted beyond her authority.
- 46.14.3 I am satisfied that Councillor Rencontre had the authority to act as she did. For the avoidance of doubt, in arriving at that conclusion I have taken into account the evidence in the witness statement of the late Councillor Daniels.

Post Resignation

- 47 The proposed disciplinary meeting was postponed following communications between the parties and advice from a solicitor. The Respondent determined to proceed with the disciplinary meeting in the Claimant's absence. Again Councillor's Clapham, Heyes and Holloway were appointed to form the panel. I do not make specific findings regarding the minutiae of the arrangements for that meeting but clearly Councillor Holloway was part of the subject of an outstanding and unresolved grievance appeal.
- 48.1 Councillor Rencontre produced an investigation report dated 10 March 2015 in which she stated that she had interviewed the Claimant and Ms Clark amongst other things.
- 48.2.1 In her report Councillor Rencontre gave her conclusions of annual leave allocations stating, amongst other things, that the Claimant "... seemed to struggle with the concept that her calculations were incorrect" regarding the 2013 holiday issue; that Councillor Rencontre assumed that the Claimant

would ensure that all staff's annual leave would be reviewed but that had not happened; although she had informed the Chairman of the Council, Councillor Daniels of her concerns, she did not believe that he discussed the same with the Claimant; and, the Claimant continued to incorrectly allocate staff annual leave. Further that records had been removed from the Respondent's computer which, she opined, indicated the involvement of the Claimant's husband in the annual leave calculation. The report continued that Councillor Rencontre had found records, such as they were, were poor and amongst other things she had reason to believe that all staff employed by the Respondent had not been allocated the correct leave entitlement in line with their employment contracts. There were considerable cost implications for the Respondent.

- 48.2.2 Under a heading of Breach of Trust and Confidentiality Councillor Rencontre said that it was apparent that emails of a confidential nature had been provided to the Claimant's husband by her or relevant to Ms Clark's annual leave entitlement and provided some details of the same. Councillor Rencontre confirmed that it was evidence that a number of documents relevant to the Respondent's business either sent or received from Mr Hare, had been removed from the Claimant's computer. It was noted that despite being on sick leave, the Claimant had attended the Respondent's office on the 9 January 2015.
- 48.2.3 Under a heading of Responsible Financial Officer this again related to the annual leave issue and the Claimant's responsibilities as the Respondents Responsible Financial Officer to ensure that the Respondents employees were paid correctly and that the records showed that.
- 48.2.4 The summary of the report was that; the Claimant had failed to follow the guidelines of NALC or gov.uk regarding annual leave nor adhered to the relevant staff employment contract of Ms Clark; the Claimant had given her husband information on Ms Clark's complaint in breach of the Data Protection legislation, and the Claimant had failed to ensure staff had received the correct annual leave entitlement thus incurring costs to the Respondent. Councillor Rencontre continued that she had been obstructed in her work by the Claimant, that the Claimant said that her husband had been helpful in respect Ms Clark's holiday entitlement.
- 48.2.5 The Recommendation was that there be a "disciplinary", the matter to be dealt with as gross misconduct as it appeared there were issues about the Claimant's integrity, disregard for the welfare of her staff, and had not been honest. I am satisfied that the recommendation was to undertake a disciplinary process that could well lead to dismissal.

- 49 The disciplinary meeting took place on 2 April 2015. Councillors Heyes, Clapham and Holloway comprised the panel. The Respondent did not attend. The Claimant had previously been advised by Councillor Daniels that Councillor Rencontre was acting beyond her powers. The panel considered the report. The outcome was that the panel found that the Claimant had been guilty of gross misconduct and dismissed the Claimant. I was taken to a letter within the Tribunal bundle at pages 410B – C and I accept it sets out the Respondent's reasons. Those reasons were:

"The panel considered breach in trust and confidentiality, in relation to this allegation, the basis of this issue is that you sent confidential information outside the organisation, the panel considered your ability to take advice from other professionals, the chair of ATC and Central Beds Council. It was felt that there was no justification for you to contact individuals outside the organisation concerning confidential matters. In making our decision we considered.

Evidence pack 2

6. Email Elsie Hare to Tony Hare re a sitting councillors request (Human Resources Committee).
7. Email Antony Hare to Elsie Hare, re Annual Meeting Election
8. Email Antony Hare to Nick Daniels (ATC Chair) on ATC email account, re a resident questioning the council mismanaging finances.
9. Email Antony Hare to Town Clerk, re ARA agenda item, discussing council business agenda items.
10. Email Anthony Hare to Town Clerk re part time workers holiday entitlement.

The above emails should not have been distributed outside the organisation, there was a two way flow of information discussing confidential council business that should have remained private and confidential, it appears Tony Hare was acting in some sort of advisory role; this role was never sanctioned by the council nor sought.

The panel concluded that your actions in this matter were in breach of the Data Protection Act and with the lack of any supporting evidence from yourself the panel decided on the basis of probability that this allegation is proven.

The panel considered responsibilities of the Responsible Financial Officer from the evidence that was presented it was clear that the annual leave calculations had been changed outside the norm and as a result this has the potential to underpay staff entitlement and

put Arlesey Town Council at risk of legal action being taken against the council and incurring unnecessary costs for the organisation.

Evidence Pack 3

Money owed to Heidi Clark for Miscalculated Annual Leave

On the balance of probabilities the panel decided that this allegation is proven.

Had you remained in the employment of ATC given that all the allegations were proven and with the magnitude of said allegations, the panel felt the only appropriate sanction that could have been applied under the Arlesey Town Council Disciplinary Procedure Policy 2011(Section 4) is dismissal without notice on the basis of gross misconduct for the allegations below:

- 1 Serious negligence which cause unacceptable loss, damage or injury.
- 2 Conduct bringing the council into disrepute.

You have the right to appeal within five working days against this decision; you should do this in writing to ATC acting Acting Town Clerk stating your reasons for the appeal.”

- 50.1 By a letter dated 11 April 2015, the Claimant exercised her right of appeal. An Appeal Hearing took place on 21 April. The Claimant took part in the appeal and was represented by her husband. The appeal panel determined that had the Claimant remained in its employment she would have been dismissed on the basis of gross misconduct in respect of: serious negligence, which caused unacceptable loss, damage or injury, and also conduct bringing the Respondent into disrepute.
- 50.2 Following further communication from the Claimant to the Chair of the appeal panel, a Councillor White, he responded on 7 May 2015 (page 483 of the bundle) as follows:

“Following the appeal hearing of 21 April 2015 and further to my letter date 22 April 2015 which informed you of the decision of the appeal panel, I apologies for not including the following information:

As you are aware your appeal was heard by myself Cllr White (Chair) Cllr Frost and Cllr Page who listened to the evidence given by Mr Hare your representative who stated that he had calculated the allocation of annual leave and did accept it to be incorrect as he had not been aware that the law changed in 2008. He also highlighted that he was allowed to discuss the staff annual leave as he was acting in capacity of a specialist advisor for you under item 8 of your job description. Mr Hare then stated that the annual leave allocation being incorrect was a minor issue and did not think it would impact on ATC financially. Mr Hare also informed the panel that he was not legally trained just did this role as a hobby. In

respect of the annual leave calculations you were informed about the government.gov.uk website in 2013. In 2014 Louise Ashmore from BATPC sent you an email clearly demonstrating how to calculate part-time employees annual leave entitlement but you chose to be advised by your specialist Mr Hare who admitted his calculations were wrong. ATC were not aware that he was assisting you with section of your work.

The panel considered this evidence and decided that ATC had not agreed that Mr Hare should be used to calculate annual leave and should not have had access to staff information under the Data Protection Act. The allegations 1. Serious negligence, which caused unacceptable loss and 2. Conduct bringing the council into disrepute were both proven. Therefore the decision to dismiss is upheld.

Mr Hare made reference to Facebook comments and many other matters, which were irrelevant to the case in question and also stated your objection to Cllr Page on the grounds of bias, however you did decide to proceed with the hearing.

I attach a copy of the notes, which were written at the meeting.”

Conclusions

- 51 The overwhelming majority of the Claimant's allegations have not been found to be established or not as she described them. The only matter upon which the Claimant could potentially rely on in respect of her claim which occurred before July 2013 was the Councillors Harper and Dalgano issue. As those Councillors were acting, so far as I heard, as Councillors and as part of the corporate body that is the Respondent (and the Claimant's employer) it is not necessary for me to consider whether they were acting as agents for the Respondent. Those Councillors resigned and the Claimant thereafter continued in her employment. I find that the Claimant waived the conduct alleged at item 2 in her schedule. Thereafter the next matter I consider upon which the Claimant can potentially rely is the handling of her grievance. I do not consider item 7 (Councillor Holloway's public house statement) as, there is no suggestion that he was acting as agent for the Respondent when he made the statement and thus the Respondent cannot be liable for it. In addition I am not persuaded that either party took the matter seriously the Claimant not including it as part of her grievance made shortly afterwards.
- 52 The Respondent met with the Claimant as required and considered the grievance. The grievance as presented did not contain any reference to the Arlesey UK Facebook site. Matters in the grievance were identified and a way forward decided upon. Having considered what followed, including the decision at the 1 April council meeting, the reference by Councillor Bains in correspondence to his notes for that meeting, and the

subsequent correspondence between the Claimant and Councillor Bains (including the Claimant's reference to Facebook posts, Councillor Bains' request for copies of the posts and an agenda item, and the Claimant's non compliance with that request), I do not find that the Arlesey UK site was ever part of the grievance despite Councillor Bains' oral evidence.

- 53 I have not accepted that Councillor Bains ever carried out the steps delegated to him, namely the investigation of certain matters including interviewing four named Councillors. The Claimant even purported to raise a second grievance by way of an appeal but that did not generate any specific reaction by the Respondent. While the pressure of other commitments may explain some delay by Councillor Bains it does not excuse the complete absence of any progress. Councillor Bains' lack of response to the Claimant's representative's correspondence before he sought to have an item placed on the Respondent's agenda, compounded the failure. Councillor Bains did ask the Claimant to place an item on the respondent's agenda so that he could raise the topic of complaints and grievances and the pressure on him. The Claimant did not do so. While the Claimant's failure to comply with the request from the Chairman of the Grievance Panel (and Chairman of the Respondent's General Purposes and Finance Committee) is inexplicable that does not explain the lack of any follow up, however, by Councillor Bains himself. The Claimant's lack of compliance with Councillor Bains' request does not release the Respondent from any liability that emanates from its failure to pursue that investigation. On the other hand, the absence of action by either party (other than writing emails) does, indicate that the matter was not as damaging to the employment contract as the Claimant purported.
- 54 In respect of the posts on the Arlesey UK Facebook site about which the Claimant complained, I find that there was no liability attaching to the Respondent for the lack of any investigation into those matters in respect of the Claimant's grievance as when the Claimant complained about the posts to Councillor Bains, she must have known what they were or had access to them but did not comply with the request by Councillor Bains to provide the "couple of examples". That the Claimant, through her husband, was complaining to the local police in respect of non Councillors' posts on that website does not explain the Claimant not complying with Councillor Bains' request.
- 55 There followed a gap during which no action took place before the Claimant presented an appeal in July (by which time she was temporarily absent from work due to a physical condition), in which she asserted that Councillor Bains was no longer an appropriate person to deal with her grievance (as indeed she had challenged his independence in earlier correspondence). In that situation it was reasonable for Councillor Bains to liaise with Councillor Daniels the Chairman of the Respondent and with whom the Claimant had trust. The appeal panel comprise three councilors, two which the Claimant had confidence in for the majority of the period between the grievance meeting and 17 November 2014. I did

not hear any evidence of the Claimant raising Councillor Bains' lack of action with either Councillor Daniels or Rencontre. There was then a further gap until 17 November 2014 by which time the Respondent was contemplating other matters, and it would appear and I so find, determined to bring the grievance to a conclusion. By that time only one of the four Councillors about whom the Claimant complained remained as Councillors. The matter about which the Claimant complained regarding the Councillors was the volume of work they generated by their enquiries and activities as Councillors. I have not found that there was anything in the Claimant's grievance that she had been bullied or harassed by the four named Councillors of the Respondent. Indeed I note that the Respondent has a bullying and harassment policy which policy was not referred to at any time by either in these proceedings.

- 56 The Respondent's outcome letter, following its meeting of the 18 November, was written I conclude, to clear off what was recognized to be the outstanding matter of the Claimant's grievance. In doing so I consider the Respondent was attempting to comply with the obligation on it as an employer. Councillor West did not have any particular information about the details of the grievance, albeit he put his name to the letter. I am persuaded that the outcome letter accurately sets out what the grievance was. It is, however, inexplicable how the Respondent could conclude that the grievance could not be upheld as it had not carried out any investigation as that word is normally understood, into the conduct of the four named councillors. In addition, one of the councillors who was named also took part in the Respondent's decision to draw the grievance to a conclusion. That is a breach of natural justice. I am satisfied that the Claimant was aware (it never being suggested that she was not, confidentiality being difficult for the Respondent to maintain) of that matter.
- 57 I refer to *WA Gould (Piermark) Ltd* referred to before. In this case the Respondent did not completely fail to deal with the Claimant's grievance, indeed it dealt with the majority of it promptly once it had been formally made. The failure by the Respondent to promptly reply to the Claimant or her husband representative's emails promptly is unfortunate (this Tribunal is considering an employment claim and not whether any notional standards in respect of time limits for replying to correspondence are complied with), but written communications were made by Councillor Bains. Bearing in mind it is the Respondent's actions I consider, and in light of all the facts found before, however, before 17 November 2014, and, the lack of any action by the Claimant in her role as Town Clerk to assist Councillor Bains with his task (ie by not placing any items on the Respondent's agenda despite his request) and the trust between the Claimant and two members of the grievance panel, leads me to conclude that not only were the Respondent's inactions not calculated to destroy or seriously damage the relationship of mutual trust and confidence, they were neither likely to, nor did so.

- 58 The Respondents actions of the 17/18 November in conducting the grievance panel, in itself was an attempt by it to uphold the employment contract by providing the Claimant with a formal decision. Had this claim been made on the basis of the handling of the Claimant's grievance to those dates that matter only, I would on the facts found in this case, not have concluded that the Respondent's failures in handling of the Claimants grievance to the 17/18 November 2014 was a breach of the term of mutual trust and confidence. The matter was however of importance. Thereafter there was no complaint by the Claimant about the handling of her appeal. There was nothing untoward in the handling of the appeal during the period to the Claimant's resignation.
- 59 Councillor Rencontre was tasked with carrying out certain enquiries in relation to staff holiday pay. There were a number of delays by the Claimant in providing the information sought albeit the Claimant sent some information to the Chairman of the Respondent (rather than Councillor Rencontre) but it was not until early December, after a further council meeting, that the Claimant provided the information sought. I have found that Councillor Rencontre was authorised to act as she did. In the light of information that the Claimant provided to the Respondent, and Councillor Rencontre's emails to the Claimant of 29 November 2014 and 27 January 2015 together with the Respondent's meetings after 17 November 2014, and the decision made at the Respondent's Council meeting on 20 January 2015, I do not find that there was anything in itself untoward in Councillor Rencontre's letter to the Claimant dated 5 February 2015. The subject being investigated was the Respondent's staff's annual leave entitlement and matters arising therefrom in respect of potential liability for the Respondent if it had not, as it appeared to the Respondent, honoured those entitlements. On the 5 February when Councillor Rencontre referred to "further issues" namely potential breach of trust and confidentiality and the Claimant's responsibility as a Responsible Financial Officer, it was in that context, it did not expand the scope of the enquiry.
- 60 The actions of the Claimant in liaising with, and I find taking advice from, her husband regarding staff holidays, more than just as a generality, but in relation to a specific member of staff, clearly had confidentiality and Data Protection implications as well as raising questions regarding the Claimant's responsibilities as the Respondent's Responsible Financial Officer. I am satisfied that the Respondent, through Councillor Rencontre, had reasonable and proper cause to write to the Claimant as it did on the 5 February 2015.
- 61 In respect of the matters about which the Claimant complained and of which I have found to be established, I am not persuaded that there was a final straw as alleged. It follows that the complaint of unfair dismissal does not succeed.
- 62 In so far as I may be incorrect in that conclusion that the Respondent's failure to action the outstanding part of the Claimant's grievance between

April/May and 17/18 November 2014 the Claimant took no action other than to submit an 'appeal' in July 2014 but not pursue it until after the Respondent's decision of the 18 November. The lack of any action by the Claimant in the proceeding four months, notwithstanding her absence of four weeks during June and July for a physical injury, and taking into account the guidance in "*Chindove*" and also "*Buckland*" leads me to conclude that the Claimant waived any contractual breach. I am fortified in that conclusion by the fact that the Claimant was well aware of her ability to pursue legal action should she consider it appropriate, but did not do so. I am not persuaded that the Respondent's action in respect of the grievance broke the contractual term of mutual trust and confidence.

Reason for Resignation

- 63.1 While it is not necessary to determine this issue in light of the above conclusion, in case it should be necessary, I do now. The Claimant resigned her employment when she received Councillor's Rencontre's letter dated 5 February. Councillor Rencontre made the Claimant aware that the investigations may result in disciplinary action being taken. The Claimant had been liaising with her husband over staff holiday pay such that it would appear, and I have found, that she provided information to him regarding at least one employee's personal details. This and the apparent errors in holiday calculation for all staff led to that letter (I say 'apparent' I did not hear evidence on the detailed conclusions of staff annual leave).
- 63.2 The Claimant had been in the habit of providing her husband with information about the Respondent and its business to some councillors, I refer to Councillor Daniels and Councillor Rencontre – I did not hear of her providing information to any others. That is not to say that those two councillors were necessarily aware of each communication by the Claimant with her husband, or vice versa, regarding the Respondent's affairs or communications. Certainly, however, Mr Hare had provided: a forthright opinion in respect of a request by a member of the public to inspect the Respondent's accounts (I was not informed whether this was pursuant to a statutory procedure); a detailed and forceful critique on proposed amended standing orders; and the Claimant had copied an email from Councillor Gravett to Councillor Daniels and her husband expressing her exacerbation as to the conduct of that councillor and others. While Councillor Rencontre was aware of some of the above she was not aware of the Claimant receiving advice from her husband on the calculation of annual leave for staff until after the investigation following Ms Clarks 'second' complaint.
- 63.3 While the disclosure of other information other than in respect of holiday entitlement of staff, was not directly relevant to the issues in respect of pay, the Claimant's actions in so far as her husband and the Respondent's business were, at least tangentially, as was clear by the councillor's reaction to the announcement by Councillor

Daniels to the 2 December 2014 meeting that the Claimant had been taking advice from her husband. That disclosure of information by the Claimant to her husband raised the issue of confidentiality and data protection as referred to before. In light of the above and the facts found regarding the Claimant receiving assistance from her husband on an important part of her duties I am satisfied that the Claimant resigned when she did, to avoid the disciplinary proceedings. I am further persuaded, and so find, that the Claimant would have resigned in any event. The Claimant had been collecting a record of information (see example her email to her husband dated 20 March 2014 (bundle page 323AA), the oral evidence of Councillor Rencontre regarding a potential constructive dismissal claim, together with her reference to going to an Employment Tribunal in her grievance letter and her letter to her GP, quoted earlier in these reasons. Those matters, I consider supports that conclusion.

- 64.1 Had the Claimant not resigned when she did I find the Respondent would have, as indeed it did, embark on a disciplinary process which would have led to her dismissal (having regard to the decision of the disciplinary panel, the appeal panel and the information contained in the letter from the Chair of the Appeal Panel dated 7 May 2015, which I find reflects the minutes of that appeal meeting and that there would have been a potentially fair reason, namely one relating to the Claimant's conduct. I find that the Claimant's conduct in respect of the staff annual leave and the potential consequences for the Respondent in having calculated it erroneously before in respect of one member of staff but thereafter neither reviewing staff leave entitlement for that employee or generally correcting it beyond the initial year about which that one employee complained, and acting on the advice of a person who was acting as a hobbyist when many other sources of assistance were available to her amounted to gross misconduct in the sense that it was willful negligence. I would not have found, however, that the dismissal was procedurally fair at the dismissal stage in that although the Respondent had a significantly reduced compliment of sitting councillors, it did have the resources to obtain advice on how to conduct a fair disciplinary process and to take steps to recruit (properly) a neutral panel.
- 64.2 That unfairness I would have found would have been overcome by the conduct of the appeal conducted by councillors who had not been the subject of any grievance by the Claimant.
- 64.3 Should it be necessary to do so I would have further found however, that the Claimant had Contributed to her dismissal (within the meaning of Section 123(6) ERA (should it have been a dismissal by the Respondent within the meaning of S:95(1)(a) ERA and assessed that contribution as 100%. In respect of any Basic Award I would have reduced that award by 50% in to reflect the Claimant's conduct but balanced against the Respondent's fairness in its handling of her grievance prior to 17/18 November 2014.

- 65.1 Following the Claimant's resignation she did not seek alternative employment. The Claimant's position is that the reason for this was that the treatment she received from the Respondent prior to the end of her employment led to her lacking in confidence such that she did not feel able to do so. The Claimant did not cite any medical reason, (other than this, insofar as it is, a medical reason) nor did she provide any medical documentation or evidence to support her position. The Claimant did not make any enquiries about alternative work. The Claimant informed that she could have obtained a reference from Councillor Daniels, while he was alive, Councillor West or the other people who had been prepared to give character evidence on her behalf at this hearing.
- 65.2 The Claimant informed that she had intended to work until December 2016 when she would have attained the age of 75. There were a number of vacancies produced to me with Town and Parish Councils albeit one of those was for the Respondent. Not all the vacancies were comparable to the Claimant's employment with the Respondent (although some were) and not all positions were vacant when the Claimant resigned. The Claimant would, I consider have had significant difficulty in obtaining any of these positions, however, due to; her age, the reputation of the Respondent and the role of its Clerk as a result of the disputes about which I heard and have found; the length of time she intended to continue working for and, that the Claimant's husband has (I was informed, and accept) a reputation for taking legal action (I refer to this latter factor, not as an indication that people should not feel free to assert or defend themselves but as a recognition that a potential future employer may be more cautious in recruitment of the Claimant than otherwise).
- 65.3 In the absence of any attempt to mitigate her loss, or medical evidence to explain or corroborate the Claimant's reason for not doing so and having regard to *Lindsey*, I am persuaded that the Claimant acted unreasonably (insofar as she seeks a Compensatory Award). It appears more likely than not, and I so find, that the Claimant simply removed herself from the job market.
- 65.4 The Claimant's position is that she suffered such a lack of confidence and ability to seek alternative work which stemmed from the actions about which she described in her claim. Should the Claimant have been unfairly dismissed I would have accepted the submissions of the Respondent's counsel that the Claimant's lack of ability to seek work was attributable to some antecedent breach by the Respondent and are thus not losses attributable to the dismissal. I would thus not have made any Compensatory Award pursuant to S:123 of the Act.
- 66.1 In respect of the Respondent's application for a costs order, I refer myself to the Employment Tribunals Rules and Procedures 2013 in particular Rules 74 to 78 (inclusive). As referred to before I had

regularly reminded the Claimant that she must not discuss the case with anyone while she was giving evidence. The Claimant indicated that she understood this. I had and have no reason to doubt that, nevertheless the Claimant discussed the case with her husband after she had agreed to prepare a schedule of Facebook posts upon which she relied in these proceedings. The following day the Claimant clearly did not know the content of the schedule she purported to produce as part of her evidence, as demonstrated by the conflicting statements she made when she sought to introduce it and her subsequent evidence about the posts that she relied on. The Tribunal lost appreciable time while this exercise was carried out. I find this to be unreasonable conduct.

- 66.2 It is appropriate in the circumstances of this case to make an Order. The Respondent sought costs in the sum of £700 being a day's brief fee. I consider that the sum lost was nearer half a day (just over). I will Order the Claimant to pay to the Respondent the sum of £350.
- 66.3 I do not consider it necessary or appropriate to consider the Claimant's means in this case, the Claimant's conduct was unreasonable and there is no suggestion that such an award would cause exceptional difficulty to her.

Employment Judge Adamson, Bedford

Date: 28th April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS