



MK

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss M Thompson

Respondent

and

Thanet District Council

Held at Ashford on 24, 25, 26 and, in Chambers, 27 September 2018

Representation

Claimant:

In Person

Respondent:

Mr P Glencross, Solicitor

Employment Judge Kurrein

JUDGMENT

The Claimant was unfairly dismissed by the Respondent.

REASONS

The Claims and Issues

1 On 25 October 2017 the Claimant presented a claim to the tribunal alleging she had been unfairly constructively dismissed. On 21 December 2017 the Respondent presented a response in which it contested that claim.

Summary of Facts

- 2 The Claimant was employed by the Respondent from 2003 as a Technician and qualified as a Building Control Surveyor in the course of her employment. She was given permission by her superiors to engage in an outside business. In 2015 she was involved with a development of a block of seven flats in Ramsgate known as "Beach Retreat".
- 3 Complaints were made by the Owner that in late 2015 the Claimant's then manager, Mr Musk, issued completion certificates in respect of three flats when it was not appropriate to do so. At a meeting on 1 November 2015 the Owner was assured by the Claimant, Mr Musk and his Manager, Abigail Raymond, that no further completion certificates would be issued without consultation.

- 4 Mr Musk retired and, in early 2016, his position was taken up by Mr Weller. At a meeting on 25 May 2016 the Owner was again assured, by Mr Weller and others, that no further completion certificates would be issued without consultation.
- 5 On 1 November 2016 the Owner copied the Claimant in to an email alleging someone had issued completion certificates for a further three flats without the promised consultation. The Claimant replied to that email the same day stating, among other things, that it was of not her doing. She was suspended later that day.
- 6 On 13 December 2016 the Claimant attended an investigation meeting relating to that email, by which time the investigation had been widened to include an allegation that she was improperly engaged in an outside interest.
- 7 On 15 March 2017 a disciplinary hearing took place. At its conclusion she was issued with a first written warning for a period of six months for “undermining her manager”. No case to answer was found in respect of her outside interest.
- 8 She appealed and raised grievances, having returned to work on 3 April 2017, but was signed off as unfit to work because of stress on 5 April 2017. She resigned on 27 July 2017, and her notice expired on 26 September 2017.

The Evidence

- 9 I heard the Claimant, and the following witnesses, on the Claimant’s behalf: –
 - 9.1 Mr Martin Parnell, former Building Control Manager and retired Senior Building Control Surveyor.
 - 9.2 Mr Mark Buckingham, Unison Representative.
 - 9.3 Mr Scot Rigden of Urban Designs, Chartered Surveyor for the Owner, Mr Brown.
- 10 I heard the following witnesses on behalf of the Respondent: –
 - 10.1 Mrs Hannah Thorpe, Head of Communications.
 - 10.2 Mr Bob Porter, Head of Housing.
 - 10.3 Miss Louise Askew, Sector Growth Manager-Creative and Tourism.
 - 10.4 Mrs Maxine Paul, HR Adviser.
- 11 I did not hear from the following relevant employees or (mostly) former employees of the Respondent:-
 - 11.1 Janette Gates, former HR Advisor, who spoke to “employee X”.
 - 11.2 Madeline Horner, former Chief Executive, to whom complaints were made by and on behalf of the Claimant.
 - 11.3 Mike Humber, Head of Maritime and Technical Services, who chaired the appeal hearing.
 - 11.4 Lesley Kenmure, HR Advisor, who was the principal HR advisor to Mrs Thorpe.

- 11.5 Rob Kenyon, former Director of Community Services, who suspended the Claimant and commissioned the disciplinary investigation.
- 11.6 Geoff Musk, former Head of Building Control.
- 11.7 Abigail Raymond, former Head of Built Environment, who approved the Claimant's outside interests in 2015 and attended the meeting on 21 January 2016.
- 11.8 Chris Weller, former Head of Building Control, who left under a confidential agreement when he faced charges, amongst others, of inappropriately issuing a completion certificate.
- 12 I read the documents to which I was referred, which were added to to a material extent in the course of the hearing, and heard the parties' submissions. I make the following findings of fact.

Findings of Fact

The Claimant

- 13 The Claimant was born on 9 September 1969 and started her employment with the Respondent on 2 January 2003 as a Building Control Technician. She studied over the next five years and gained membership of the Association of Building Engineers. She was promoted to being a Building Control Surveyor on 20 April 2006.

The Respondent

- 14 The Respondent is the District Council for a coastal area centred on Margate, but including Broadstairs, Ramsgate and other towns and villages. It has approximately 750 employees. Its annual budget is in excess of £120 million and it provides services to a population of about 140,000.
- 15 The Respondent has joint ventures with nearby local authorities to provide some services, such as human resources. That venture is known as EKHR and is partly based in Dover.
- 16 The Respondent has a number of relevant policies and procedures as follows.

Disciplinary policy.

"1.1 This disciplinary policy and related procedure is designed to help and encourage all employees to achieve and maintain standards of conduct expected by the council. It also provides a fair method of dealing with failure to observe them.

4.3 Head of Service/Directors will:

i) make suitable arrangements to ensure the full implementation of the policy and procedure.

4.4. Line managers will ii) be responsible for the day-to-day implementation and monitoring of the conduct of their staff.

7 Appeals

All employees have the right to appeal against disciplinary action, dismissal or action short of dismissal. This appeal must be made in writing within five working days. An appeal must be heard by a committee or subcommittee that is designated to hear the appeal." Disciplinary procedure.

1.1 General Principles

i) This disciplinary procedure is intended to assist managers and staff in the maintenance of good standards of conduct, ensure fairness and equality in the treatment of employees, and maintain good industrial relations.

vii) In the interests of natural justice, all verbal and written evidence must be given to all relevant persons (i.e investigating officer, the person(s) hearing the case, the individual and their representatives and any HR representatives).

3 Disciplinary Investigations

3.4 The subject of any allegation should be kept informed of the progress of the case and the investigation.

4.4 Informal Advice

i) Once a disciplinary investigation has been undertaken, the investigating officer may conclude that the issuing of a warning is not appropriate, but that the employee should be given informal advice in writing as to the future expectations of their conduct.

4.5 First Written Warning

i) this may be issued when the breach of conduct is regarded as more serious.

7 Right of Appeal

7.2 All employees who wish to appeal against a disciplinary warning or dismissal must do so in writing within seven calendar days of receipt of written confirmation of the outcome of the hearing.

7.5 The appeal may be either a review of the disciplinary sanction or a rehearing, depending upon the grounds of appeal.

9. Suspension of staff.

9.1 It may be necessary in certain circumstances to suspend a member of staff. Suspension is a neutral act and not a disciplinary sanction.

9.2 The code of suspension at appendix 2 sets out the circumstances in which this step would be appropriate.

9.3 The decision to suspend someone should be made after taking advice from EKHR. Where this is not possible EKHR should be informed as soon as practicable.

9.4 Suspension will be kept as short as reasonably practicable in the circumstances. It is expected that the disciplinary investigations will be concluded within this period. Line managers/investigating officers will monitor adherence to this requirement.

Appendix 1

What constitutes misconduct and gross misconduct?

This gave as examples: – dishonesty associated with place of work...
Deliberate continued refusal to carry out a reasonable instruction...
Gross negligence...
Wilfully ignoring responsibilities...
Being unfit to perform duties...
Misuse of computer facilities...
Wilful unauthorised disclosure of information classified as confidential...
Acts of violence or vandalism... Sexual misconduct
Failure to declare criminal offences...
Persistent and substantial failure to follow procedures...
Breaking statutory provisions...
Serious breach of health and safety...
Serious or persistent acts of harassment...
Wilful discrimination...
Misuse of email...
Actions that bring the Council into disrepute.

Appendix 2.

Code of practice on the suspension of staff.

1.1. There are occasions when it is desirable that an individual member of staff should not attend the workplace for a set period of time. It is in circumstances such as these that the council may wish to suspend a member of staff.

1.2. It is important that suspension should be seen as a neutral act - not as a sanction or an act which indicates any judgement of blame or guilt on the part of the member of staff concerned. This suspension should always be on full pay and the council will take steps to provide support to the employee throughout the period of suspension.

2 Circumstances in which suspension is appropriate.

2.1 Suspension is appropriate when:

- i) an employee is alleged or suspected to have committed an act which could be deemed gross misconduct;
- ii) an employee is alleged or suspected to have committed abuses against a vulnerable person;
- iii) it is believed that the presence of an employee at work may inhibit the possibility of an impartial investigation of an allegation (not necessarily against that employee);
- iv) it is felt that the employee is best removed from a stressful or potentially stressful situation;
- v) it is felt that the employee might deliberately destroy evidence in an investigation or remove items or information;
- vi) there is some other substantial reason for removing the employee for a set period of time.

3 Who to consult when considering suspension.

3.1 Prior to suspending a member of staff EKHR must be consulted.

3.2 Suspension should be confirmed in writing, and you should contact EKHR for template letters to be used.

4. Action during the suspension

4.1 During the period of suspension the investigating officer should ensure that a disciplinary investigation is carried out as expeditiously as possible, and normally within 4 weeks of the employee being notified of the investigation being commenced. This will lead to a decision as to whether or not there is a case to answer.

4.2. The manager should ensure that the rules and requirements of suspension are complied with and that other provisions are met (e.g., that the person receives their pay step, etc) and that appropriate support is available.

Appendix 3

Procedure to be followed at disciplinary hearings

This contained standard provisions as to the right of the employee concerned to be represented and to call witnesses and produce relevant documents.

Appendix 4.

Procedure to be followed at appeal hearings.

1.1 Appeal may only be launched where the employee wishes to state the employer has been unreasonable in reaching their decision; when new evidence has come to light since the hearing, or on a point of principle. New evidence is that which was not known or foreseen at the time of the original hearing.

1.2. The employee shall be allowed to call witnesses and evidence relevant to their defence at the hearing.

17 The Respondent also had a comprehensive grievance policy and procedure the details of which are not directly relevant to the issues in this case.

Completion Certificates

18 A completion certificate is issued by a Building Control Surveyor if they are satisfied that the relevant property complies with all necessary statutory provisions and requirements.

19 Building Control Surveyors will visit a property in the course of building works to inspect compliance with the Building and other Regulations. This may start with inspection of the foundations and may include consideration of calculations by structural engineers and other professionals to demonstrate the building meets the standards required.

20 When a property is sold, whether new built or with alterations, a prudent solicitor acting for the buyer will seek proof that an appropriate certificate has been issued.

Beach Retreat

- 21 The land on which this property was being built was owned by Mr Peter Brown, who was being advised by Mr Rigden. The development was a joint venture between Mr Brown and Kentish Properties.
- 22 The joint venture had bank arrangements such that when properties were sold funds could be drawn down.
- 23 It was against the above background, where properties could not be sold without a completion certificate, that the parties to the joint venture had interests in the issuing of those certificates that might be in conflict.

SIPS4U Ltd

- 24 This is the name of the limited company incorporated on 28 October 2015 by the Claimant, with the intention that she should work outside her normal working hours, selling structural insulated panels.
- 25 On that date the Claimant emailed Mr Musk to tell him of her intention to start a business in her off-duty hours supplying structural insulated panels ("SIPS"). Mr Musk discussed that issue with his superior, Abigail Raymond, and on 4 November 2015 Mr Musk emailed the Claimant to give his consent. He expressed the view that maintaining appropriate separation between her professional duties and her business would require a "high degree of professional discipline" and indicated his intention to review the arrangement after six months. Neither he nor his successor did so.
- 26 I accepted the Claimant's evidence that her colleagues and her superiors, Mr Weller and Ms Raymond, were fully aware of her involvement in this business throughout the relevant period.

Mr Weller

- 27 This was Mr Weller's first management post. He was supported by other senior staff and Mr Porter was appointed to mentor him.
- 28 The Claimant specifically informed him of her interest in SIPS shortly after his employment started. He made no objection, and wished her well.
- 29 However, Mr Weller made various changes to the Department's procedures that's resulted in complaints were being received from builders, architects, developers and agents.
- 30 From shortly after his appointment department staff raised informal concerns with his superiors to the effect that he was acting more like a Building Control Surveyor than the Manager, spent little time in the office, failed to give guidance and appeared to lack the specialist knowledge expected of a person in his position.
- 31 It was clear that Mr Weller was not held in high regard by the Claimant and the majority of her colleagues from at least mid-2016.

Disputed Completion Certificates

- 32 In November 2015 Mr Musk issued three completion certificates for Beach Retreat, one in respect of each of three flats, at a time when Mr Rigden, Mr

Parnell and the Claimant were of the view that those flats were not in fact complete.

33 On the 21 January 2016 a meeting took place at the Respondent's offices attended by Ms Raymond, Mr Parnell, Mr Rigden, Mr Brown and the Claimant. At its conclusion Ms Raymond assured Mr Rigden and Mr Brown that no further completion certificates would be issued in respect of Beach Retreat without consultation with them.

34 A further meeting to discuss this issue took place on 25 May 2016. It was attended by Mr Weller, Mr Parnell, the Claimant and Mr Rigden. Once again, an assurance was given, by Mr Weller on this occasion, that no further completion certificates would be issued without Mr Rigden and/or Mr Brown being consulted.

35 On 1 November 2016 at 06:50am Mr Brown emailed Mr Rigden, with a copy to the Claimant, under the subject "re: the arches completion certificates. It attached a number of images which I assume included the recently issued completion certificates. The text was as follows,

"You couldn't make it up.

It also means the written assurance that we were given by planning officer Michelle Thompson that no further certificates would be issued until the building was fully compliant is also not worth the paper it is written on. Which is why I am copying Michelle in.

Looking at the certificates I noticed that both the Name AND the signature are required on the certificates. The name is missing."

36 I accepted the Claimant's evidence that she had lost all trust in Mr Weller's judgment by this time, and was unhappy that she was being accused of wrongly issuing these completion certificates. She did not believe the certificates could be appropriately issued, a view shared by Mr Parnell. She wished to correct Mr Brown's misapprehension as to her role and ensure the matter was dealt with at a higher level. She was concerned Mr Weller had gone back on his word and potentially left the Respondent open to an action in negligence.

37 It was against that background that the Claimant, who spends much of her working day on sites, emailed Mr Brown the same day at 10:02am, copying-in Mr Rigden and Mr Kenyon, as follows,

"Thank you for copying me in your email to Scott.

Firstly I would like to say that the decision **NOT** to issue further certificate was agreed by myself and Chris Weller, as assured to you earlier on in the year. Quite rightly you are angered, as I believe Chris has gone back on this decision. I wasn't aware that further certification had been issued until I received your email this morning.

Unfortunately I have no further involvement or input with this development, this decision to issue further certificates is solely down to Chris Weller, as he has taken the lead with Beach Retreat.

Originally this situation stems back to Geoff Musk, the previous Building Control Manager, I was firmly against issuing any completion certificates, and this was

made clear to the developer Kentish Properties by me at that time, as Geoff made that decision, this was beyond my control, as is any decision Chris has made.

With reference to the comments above, all dealings relating to this application, and site must now go via Chris Weller, the Building Control Manager.

If you feel you want to make an official complaint then please use the link below.”

[hyperlink]

Suspension

38 The Claimant then went out on the site, returning to the office at about 2:30pm. On her return, Mr Weller informed her that she had a meeting with Mr Kenyon. She told Mr Weller about the exchange of emails that morning, and offered to forward them to him, but was told not to. She was also advised by the administrator, Tracey Cousins, that Mr Kenyon had come into the office earlier, when the Claimant was out on site, seeking to talk Mr Weller urgently.

39 The Claimant received about 10 minutes notice of the meeting with Mr Kenyon from his PA. She was advised of her right to be accompanied and, knowing that she had insufficient time to contact her Unison representative, asked Mr Parnell to accompany her.

40 Mr Kenyon was accompanied by Mr Livingstone, the Planning Manager. The Claimant was immediately informed by Mr Kenyon that she was being suspended for “serious gross misconduct” because of the content of the email. Mr Parnell sought to explain the background to the email but, in the Claimant’s words, was “shot down” by Mr Kenyon. The Claimant was required to surrender her ID card and told not to communicate with her colleagues while on suspension before being escorted off the premises by Mr Livingstone. She then gave Mr Livingstone her personal contact details as he had been appointed as her official point of contact.

41 There was no evidence before me that Mr Kenyon had sought EKHR advice prior to suspending the Claimant in accordance with the Respondent’s policy. email exchange

42 At 16:40 that day Mr Kenyon sent an email to Mr Brown and Mr Rigden, forwarding the Claimant’s email, in the following terms,

“I am writing to advise you that the contents of this email do not represent the views of the council and should be ignored. Please do not forward this email to anyone else or reply to it.”

43 On 2 November 2016, at 10:22, Mr Rigden replied to Mr Kenyon and Mr Brown, copying in the Claimant, as follows,

“I have read the email, issued by Michelle in detail.

Having met at the LA offices approximately one year ago with Martin, Michelle and Abigail Raymond, your predecessor, I identified the various non-compliance matters that were apparent at that time.

It is well documented by email and letter between myself and your building control manager, views and actions necessary to demonstrate compliance.

The contents of the email issued by Michelle provides no further information or evidence that is not already known, as disclosed by either email, Local Authority letter, or at my meetings with LA employees.”

- 44 That email was not seen by the Claimant until after her eventual return to work on 4 April 2017.

Complaint

- 45 In the interim, by a further email on 1 November 2016, Mr Rigden complained to Mr Weller, copying in Mr Brown and Mr Kenyon, about the issue of the completion certificates. Mr Weller replied on November 2016 to inform Mr Rigden that his complaint would be investigated at stage I by Mr Porter. Mr Weller subsequently drafted a response to that complaint. That appears to have formed the basis for Mr Porter’s formal decision dated 16 November 2016, rejecting Mr Rigden’s complaint. Investigation

- 46 Mr Kenyon confirmed the Claimant suspension to her in a letter of 2 November 2016. The allegation was defined as,

“You sent an email to a contractor and agent disclosing information which may have undermined your line manager, given a false representation of the council’s position and potentially put the council at risk of disrepute.”

- 47 The Claimant was informed that Mrs Thorpe had been appointed by Mr Kenyon as the investigating officer. The letter then went on to deal with a number of formalities.

- 48 Mrs Thorpe was the head of a small department with just nine staff. She had no training or experience in conducting investigations. She was heavily reliant on advice from EKHR and Mr Kenyon. She was less than impressed with the advice she received from EKHR, commenting on one occasion that a brief chat with a colleague had provided her with more information as to her role than three exchanges with EKHR.

Employee X

- 49 On 3 November 2016 Ms Gates replied to a telephone message and spoke to an employee, who she decided should remain anonymous, and who has been referred to as “employee X”.

- 50 That employee appears to have worked within building control. He informed Ms Gates of the Claimant’s involvement with SIPS and of a possible conflict of interest that the employee had witnessed. The employee told Ms Gates that he did not wish to raise a formal complaint, however, I have no doubt he was aware that the information he imparted would have to be reported to the Claimant’s managers. Ms Gates informed Mr Kenyon of this information, not the Claimant’s direct line manager, Mr Weller.

- 51 Mr Kenyon then emailed Mrs Thorpe on 15 November 2016 to inform her of this new allegation and to send her a link to the Claimant’s business’s website. He thought this to add further weight to there being a breakdown of trust in the Claimant that could in itself amount to gross misconduct, and asked Mrs Thorpe to add it to the matters she was currently investigating.

Investigation Progress

- 52 As a matter of fact Mrs Thorpe was not carrying out any investigations at that time, despite the fact that she had been appointed some two weeks before.
- 53 Her immediate response to Mr Kenyon's email was to reply to him and Ms Kenmure to express the view that matters were now "more complicated" and the wish to be clear as to exactly what was expected of the process.
- 54 It was not until 17:16 on 16 November 2016 that Ms Kenmure sent Mrs Thorpe an email enclosing the relevant template documents needed by an investigating officer and to explain to her that Mr Kenyon was the "Commissioning Officer" and that Mrs Thorpe was the "Investigating Officer". She asked Mrs Thorpe to review the "Guidelines for Investigating Officers, Invite to Investigation Meeting, Investigation Meeting Note template and Investigation Report template", in addition to the Respondent's Disciplinary Policy and Procedures.
- 55 Mrs Thorpe had neither seen nor read any of these documents prior to that date. In the course of then doing so she saw references to the ACAS Guidance on conducting workplace investigations, but did not read it.
- 56 On 18 November 2016 Mrs Thorpe emailed Mr Weller to ask him to provide personal contact details for the Claimant. Mr Weller responded the same day, to give the Claimant's home address and mobile phone number. However, he provided the email address for her business, not the personal email she had provided to Mr Livingstone.
- 57 On 24 November 2016 Mr Buckingham once again raised with Mrs Thorpe the delay in the investigation and the failure of Mrs Thorpe to provide him or the Claimant with a copy of the Claimant's email of 1 November 2016 despite asking "time and again". Mrs Thorpe responded that day and apologised for the delay. She stated she was carrying out "preliminary investigations" and attached a redacted copy of the email. She had redacted it on the advice of EKHR, which has not been disclosed. Mr Kenyon, who had been copied into this correspondence, intervened to offer his advice or assistance necessary.
- 58 On 28 November 2016 Mrs Thorpe interviewed Mr Weller as part of her investigation. On the evidence I heard this was the first actual investigatory step she took.
- 59 In the course of that interview:-
- 59.1 Mr Weller expressed the view that the completion certificates he had issued were appropriate at the time. He was not asked whether any assurances had been given by him for the Respondent in the past that no completion certificates would be issued without consultation. He asserted the Claimant had not discussed the issue with him prior to him issuing the completion certificates, although he gave no evidence and was not asked if he had told the Claimant of his intention. On receipt of Mr Brown's email he would have expected her to raise the issue internally, and not to reply to the email, as she knew he was dealing with the matter.

- 59.2 Mr Weller stated that he had raised issues of conflict with the Claimant in the past and had intended to do so in the future. He did not tell Mrs Thorpe that the Claimant had expressly told him about her business interest. He had not raised it as a concern in her previous appraisal with him, although he described it as an “open secret”.
- 60 Following the interview with Mr Weller, Mrs Thorpe emailed Ms Kenmure, copying-in to Mr Kenyon, setting out in detail the queries and comments she had regarding that interview, and her future conduct of the investigation. Mr Kenyon replied later that evening with an annotated version of Mrs Thorpe’s email, inviting Ms Kenmure’s comments, but his reply and any such comments do not appear to have been disclosed.
- 61 Mrs Thorpe carried out a follow-up interview with Mr Weller on 13 December 2016 during which Mr Weller alleged he had expressly told the Claimant he was dealing with Beach Retreat and that he had told her expressly that she should not be trading in Thanet, although he had not expressly told her that she should formally declare an interest.
- 62 On 1 December 2016 Mrs Thorpe again apologised to Mr Buckingham for the delay in the investigation process. She said she expected to be able to update him once she had consulted with EKHR later that day.
- 63 On 2 December 2016, in the course of seeking advice on the terms in which she should write to the Claimant to invite her to an investigation meeting, Mrs Thorpe queried the appropriateness of using the Claimant’s business email address for personal contact, bearing in mind the new allegation that had been made regarding the Claimant’s involvement in that business. EKHR saw no problem with that, although they pointed out that when he suspended her Mr Kenyon should, according to the script, have asked the Claimant for up-to-date personal contact details.
- 64 On 2 December 2016 Mrs Thorpe told Mr Buckingham she had written to the Claimant to invite her to an investigation meeting. She sent the letter to the Claimant using the Claimant’s business email address.
- 65 In that letter, Mrs Thorpe told the Claimant that she had been appointed on 1 November to investigate the first allegation, which was set out as previously, and went on to say,
“In addition to this, since your suspension further information has come to light and an additional allegation has been made that you have been operating a business outside of your employment with Thanet District Council, which is, or could be, in direct competition and spoke all conflict with the interests of the council and that you have failed to take the appropriate action in declaring this.”
- 66 The invitation was for a meeting to take place on the afternoon of 13 December 2016 and went on to inform the Claimant of its purpose and of her right to be accompanied.
- 67 By email of 9 December 2016, in which the Claimant apologised for not having previously confirmed her attendance at that meeting, the Claimant asked why Mrs Thorpe was using her business email address and not the personal email

address she had provided. Once again, Mrs Thorpe sought advice from EKHR on this issue.

68 The Claimant attended the investigation meeting with Mr Buckingham. They asked that the meeting be recorded, which request was declined as being contrary to the usual practice. In the course of that interview the Claimant explained the background to her email including the assurances that had been given on behalf of the Respondent that no completion certificates would be issued without further consultation. Both the Claimant and Mr Buckingham pointed out that the allegation was that her email “disclosed information” but

68.1 the email she sent contained no information that wasn’t already known to those who received it; and

68.2 there had therefore been no disclosure.

69 The Claimant also confirmed, contrary to what Mr Weller had alleged, that she had never been told that he had taken over the Beach Retreat site.

70 When Mrs Thorpe raised the conflict of interest allegation the Claimant immediately produced the email from Mr Musk giving her permission to run her business. She confirmed that he had retired in December 2015, and that no review had in fact taken place. The Claimant confirmed that Ms Raymond had been aware of the business and they had discussed it orally on a number of occasions without any objection being raised. The Claimant also stated that she had never been made aware of any formal process by which she could have sought permission to operate this business. She believed the allegation had been raised in order to try and inflate the seriousness of the first allegation.

71 At the conclusion of the interview the Claimant was advised that the investigations might continue into the new year and that appropriate processes would be followed. In an email sent on 22 December 2016, enclosing the notes of interview for the Claimant’s approval (which the Claimant returned on 2 January 2017), Mrs Thorpe stated that it was her intention to complete the report, “as soon as I can in the New Year”.

72 On 3 February 2017 Mr Buckingham emailed Mrs Thorpe to ask for an update. He was told that her report was then with HR. On 13 February Mrs Thorpe sent a “draft” of her report, together with numerous appendices, to Mr Kenyon, with a copy to Ms Kenmure.

73 On 14 February 2017 Mrs Thorpe spoke to Abigail Raymond, who reiterated her intention to take no formal part in this investigation.

74 The brief investigation report, dated as having been concluded on 14 February 2016, made a recommendation that the allegations should proceed to a hearing.

75 In dealing with the first allegation Mrs Thorpe: –

75.1 set out a summary of the contents of the relevant emails, copies of which were in appendices;

75.2 set out the background, together with a summary of the Claimant’s, Mr Weller’s and Abigail Raymond’s views; and

- 75.3 gave a conclusion to the effect that, “The evidence suggests that there is a case to answer.”
- 76 She made no findings at all in respect of contested issues of fact, such as whether assurances had been given that no further certificates would be issued without consultation, and failed to set out any reasoning to justify her conclusion.
- 77 In dealing with the second allegation Mrs Thorpe followed a similar course. She went on to set out the “Officers Code of Conduct” to which she had referred the Claimant in the course of her interview, and of which the Claimant had denied any knowledge, and went on to make a finding that both Ms Raymond and Mr Weller, in follow-up conversations which were not put to the Claimant in her interview, had told the Claimant she should not operate a business in the Thanet District. It appears to have been on this basis, which appeared to me to be quite unlike the allegation that had been made, that Mrs Thorpe recommended the matter should proceed to a hearing. Once again, there was a dearth of analysis or reasoning
- 78 It was not until 23 February 2017 that Mrs Thorpe sent a signed and dated report to Mr Kenyon, Mr Porter and Ms Kenmure. It appears, however, that the report retained its original date of 14 February.
- 79 On 1 March 2017, the Claimant emailed the Respondent’s chief executive, Ms Warner, to complain that the “ridiculous farce” had continued for four months since her suspension. She made specific complaints of a lack of consideration, breach of the disciplinary procedures, the unreasonable timeframes and the “bizarre” decision to suspend her without knowledge of all the facts. She believed she had been victimised by Mr Weller and was appalled at the way the Respondent had conducted itself. She complained it was having an adverse effect on her health, and would be seeking advice on lodging a grievance.
- 80 Perhaps coincidentally, Mr Porter wrote to the Claimant on 2 March 2017 to invite her to attend a disciplinary hearing on 16 March 2017 to answer the allegations that had been investigated. He told her that these were serious allegations that “may constitute gross misconduct” that might result in her dismissal. She was informed of the procedure that would be followed and of her right to call the witnesses and to bring any relevant documentation. She had to provide names of witnesses in advance three days before the hearing in writing. She was advised of her right to be accompanied. The letter did not say so, but it appears it did enclose copies of the management report and the disciplinary and performance policies and procedures.
- 81 On 3 March 2017 Ms Horner responded to the Claimant’s approach to her to tell her that she was aware of an invitation to a hearing and that she had asked that an internal review be completed concerning the process that the Claimant had been subjected to. That review resulted in a presentation being made to members of the senior management team titled “Managing Suspension” in May 2017. It emphasised that suspension should be considered as a last resort, should be as brief as possible, and reviewed regularly. It reminded those present of the view of Sedley LJ,

“suspension changes the status quo from work to no work, and it inevitably casts a shadow over the employee’s competence. Of course this does not mean it cannot be done, but it is not a neutral act.”

82 The presentation went on to give detailed advice on managing suspension and referred those present to the “Disciplinary and Performance Guidance Pack”, a document which does not appear to have been disclosed.

83 It was also on 3 March 2017 that Mr Kenyon, acting as the Stage 2 investigator of Mr Rigden’s complaints about the issue of completion certificates for Beach Retreat, wrote to Mr Rigden to set out his reasons for rejecting them.

84 On 6 March 2017 Mr Buckingham wrote to Mr Porter to provide him with details of the witnesses he wished to call on behalf of the Claimant in respect of each allegation, and enclosing copies of the email chain that culminated in the Claimant’s email the subject of allegation one. He also submitted a total of 11 documents relevant to allegation to including: –

84.1 A letter from Mr Musk confirming that he had given the Claimant the permission she alleged, and that both he and Abigail Raymond were in agreement with that course of action at the time.

84.2 A character reference regarding the Claimant’s professionalism from a developer

84.3 Documents regarding the company’s registration and the HC certificate.

84.4 Copies of the Claimant’s last appraisals with Ms Raymond and Mr Musk.

85 In a series of emails between Mr Buckingham and Mr Porter ending on 15 March 2017 Mr Porter took exception to Mr Buckingham’s intention to call the witnesses he had identified. He did not consider it appropriate to allow witnesses who were not employees to give evidence but only to submit a witness statement. He eventually relented on this in respect of Mr Rigden. However, Mr Porter made it plain that he would not admit evidence about the appropriateness of the completion certificates issued by Mr Weller.

86 At the same time, Mr Buckingham raised concerns regarding Mr Porter’s independence to act as the chair of the disciplinary panel. This arose from two matters: –

86.1 Mr Porter had been assigned and acted as Mr Weller’s Mentor following his appointment on 1 February 2016.

86.2 Mr Porter had carried out, and rejected, the Stage 1 complaint made by Mr Rigden into the issue of the completion statements by Mr Weller.

87 Mr Buckingham was open on this issue: he accepted Mr Porter’s assurances that he would be uninfluenced by these matters.

88 At the start of the hearing the Claimant challenged the fact that when she had been suspended: the allegation in the letter was one of simple “misconduct”,

although this had been elevated to “gross misconduct” in the letter of invitation. Mr Porter simply noted this objection.

89 In the course of referring to her report Mrs Thorpe emphasised that there were differences of opinion as to the propriety of the issuing of the completion certificates, something Mr Porter considered irrelevant to the hearing, and that the Claimant was of the view she had not “disclosed” anything that was not known to Mr Brown.

90 Mrs Thorpe accepted that in accordance with HR advice she had not interviewed Mr Parnell as to his view of whether the certificates should have been issued. She also stated more than once that the investigation had been “complicated” from the start and was then added to so that she had sought advice from HR on virtually every aspect of it.

91 When Mr Rigden gave evidence Mr Porter made it plain that he should confine himself to evidence related to the allegation and not deal with his view of the propriety of the issue of the completion certificates.

92 Mr Parnell’s evidence corroborated that of the Claimant in respect of:-

92.1 the assurances that had been given by the Respondent that no completion certificates would be issued without further consultation; and

92.2 he was unaware of any such consultation taking place; and

92.3 the Claimant’s involvement in her outside business was well known to her colleagues and manager.

93 That evidence was further corroborated by the evidence of Tracey Cozens, the Department administrator. When asked whether the Claimant had been open about her involvement in the business with her colleagues she replied “100% yes” and went on to say that Mr Weller had never commented adversely on this.

94 At the conclusion of the hearing there was an adjournment, following which the outcome was given orally in the following terms,

“In respect of allegation one, the key arguments we have considered in reaching a decision are as follows: we acknowledge the controversial nature of the job at Beach Retreat and the difference of professional opinion. However, Chris Weller was the lead officer for the project based on the evidence we have heard. We also acknowledge that the issuing of certificates was a departure from the previous agreed position. Although the email sent on 1 November 2016 did not disclose new information or bring the council into disrepute, it did undermine her line manager. I therefore conclude that the sending of this email was misconduct. I have considered the fact that Michelle felt personally criticised by the customer’s email and recognise that she felt frustrated by this. I have therefore concluded that anything more severe than a first written warning would not be appropriate. The first written warning is therefore issued in respect of allegation one and will remain on your file for a period of six months.

In respect of allegation two, the evidence clearly demonstrates that you consulted your line management about the setting up of your company SIPS4U Ltd, and that they gave written consent. I have further considered that your

managers asked you not to operate within Thanet, but this was never formalised. There is no evidence that your managers ever advised you about the Officer Code of Conduct or the need to have formal approval of a completed Declaration of Interest form. I would have expected however that as a professional officer you would have properly considered the risk of conflict of interest, but it's apparent that this did not happen. Based on the fact that your managers confirm their agreement, I conclude that there is no case to answer in respect of this allegation. However, you need to complete a formal declaration of interest form with immediate effect, seeking formal director approval to operate your business whilst employed at TDC”

- 95 On 20 March 2017 Mr Porter wrote to the Claimant to confirm that outcome in very similar terms.
- 96 On 22 March 2017 the Claimant wrote Mr Porter to appeal against that decision as follows: –
- 96.1 Allegation one
- 96.1.1 In light of the finding that she had not “disclosed new information” the charge against her should not have been found proved.
- 96.1.2 In reality Mr Weller had undermined himself by issuing completion certificates contrary to the assurances he had given to Mr Brown.
- 96.1.3 Mr Porter’s refusal to allow professional evidence as to the propriety of Mr Weller’s action in issuing those certificates was contrary to natural justice.
- 96.1.4 Mr Weller, despite being requested to do so, failed to attend the hearing to give evidence.
- 96.2 Allegation two
- 96.2.1 As there had been no case to answer in respect of this allegation it was unreasonable to now require the Claimant to seek and obtain formal approval.
- 97 On 29 March 2017 the Claimant met her new Head of Service, Ms H Havercroft, informally to discuss her return to work. Having taken advice from Mr Buckingham she sent an email later that day to suggest that a formal return to work interview to discuss a phased return would be more appropriate than some informal arrangement. Ms Havercroft, in turn, emailed Mr Weller that day to tell him of the Claimant’s concerns regarding their working relationship and that she, rather than he, would deal with return to work issues.
- 98 On 30 March 2017 Mr Porter wrote to the Claimant to invite her to an appeal hearing on 12 April 2017, to be chaired by Mr Humber. She was told that the appeal hearing would be solely concerned with allegation one, the wording of which was set out, because no case to answer had been found in respect of allegation two. She was advised of her right to be accompanied and to call witnesses.

- 99 On 2 April 2017 Mr Parnell emailed Ms Horner to inform her of the concerns of himself and his colleagues because of the stress and anxiety caused by the the Claimant's suspension.
- 100 The Claimant in fact returned to work on 3 April 2015. She had a brief meeting with Mr Weller which she found "awkward to say the least." Mr Weller told her he thought that it would be difficult getting back into a working relationship.
- 101 On 3 April 2017 Mr Porter said Mr Buckingham the relevant documents for the appeal.
- 102 On 4 April 2017, in the course of dealing with the backlog of emails accumulated during her long absence the Claimant, as noted above, came across the email from Mr Rigden of 2 November 2016 in response to that from Mr Kenyon in which Mr Rigden made plain his view that the Claimant's email to him on 1 November 2017 had not disclosed any information that was not already known to him. The Claimant was extremely upset at discovering this email and immediately forwarded it to Mr Buckingham. She could not understand why Mr Kenyon had not given consideration to lifting her suspension in light of its contents. She was distraught. A colleague found her in tears and contacted Mr Buckingham. They spoke briefly, and the Claimant went home early.
- 103 The Claimant saw her GP the following day and was signed off with stress at work, never to return to her post.
- 104 The Claimant's appeal hearing took place as planned on 12 April 2017. It was chaired by Mr Humber. He introduced himself and defined the purpose of the meeting as being to consider the outcome of the earlier disciplinary meeting.
- 105 In doing so, it appeared to me that he failed to have regard to the relevant procedure which, at paragraph 7.5, states that the appeal may be either a review of the disciplinary sanction or a re-hearing, depending upon the grounds of appeal. No-one seems to have addressed that issue, and it is wholly unclear on what basis the appeal was intended to proceed.
- 106 In the event Mr Humber, like Mr Porter, ruled that the appeal hearing was not concerned with the propriety of the certificates that Mr Weller had issued for Beach Retreat, and the Claimant did not call any of her intended witnesses. At the end of the hearing the panel upheld the original decision stating,
"Although the email sent on first November by you did not disclose new information that brought the Council in to disrepute, the appeal panel believe that it undermined your line manager and his decision to issue certificates on 3 flats and that the sending of this email to an external party was inappropriate."
- 107 On the same day Mr Humber emailed Ms Havercroft to inform her of the outcome of the appeal. He recounted the issues the Claimant had raised concerning Mr Weller's line management and the problems regarding the certificates he had issued. He expressed the view the Claimant felt let down by Mr Weller and, while that did not justify her actions, he thought it might warrant investigation by Ms Havercroft as Head of Service.
- 108 On 18 April 2017 the Claimant raised grievances:-

- 108.1 Concerning the use by Mrs Thorpe of the Claimant's business email address which had been read by her business partner and caused a breakdown in their relationship, such that the business had ceased trading.
- 108.2 Complaining of the anonymous informant concerning her outside business which had proceeded to a disciplinary hearing despite the fact of her involvement being well known to Mr Weller and her colleagues.
- 109 Although by this time the Claimant had been signed off work for over two weeks there was no contact from her line manager, HR or other senior person.
- 110 On 20 May 2017 the Claimant wrote at length and in detail to complain to Ms Horner about the manner in which she had been treated. She gave particular instances of that unfairness by reference to Mr Kenyon, Mr Porter, Mr Weller and Mrs Thorpe. That letter was not acknowledged until 6 June 2017, following a prompt from the Claimant.
- 111 At about this time there were also exchanges taking place between the Claimant and Ms Havercroft concerning the Claimant's return to work, and between Ms Havercroft and Mr Weller about mediation.
- 112 On 23 May 2017 many of the Claimant's colleagues raised a joint grievance concerning Mr Weller's management and conduct. It appears Ms Havercroft was reluctant to accept that complaint.
- 113 On 25 May 2017 Miss Havercroft wrote to the Claimant to invite her to discuss her absence at an informal meeting. The Claimant was informed of her right to be accompanied, but was to identify any person she intended to bring.
- 114 On 26 May 2017 Ms Havercroft acknowledged receipt of the Claimant's grievances, but indicated she thought them too unclear to proceed further. Following the Claimant's response of 6 June 2017 Miss Havercroft informed her that she would be appointing Ms L Askew to investigate them.
- 115 Ms Havercroft and the Claimant held an informal meeting on 30 May 2017. In the course of that meeting, Ms Havercroft appears to have completed an "Individual Work-Related Stress Risk Assessment" concerning the Claimant. To the extent that this was advanced as a reasonable manner in which to assess the causes of the Claimant's absence because of stress at work I thought it to be particularly unsuited to that purpose. It had a series of questions under the headings "Demands", "Control", "Managers support", "Peer support", "Relationships", "Role" and "Change" following which there were boxes for comments and/or agreed action including timescales. I had no information as to who had designed this form, or their qualifications. I had no information as to Miss Havercroft's qualifications to complete it. To the extent it was used in the hope it might assist the Claimant's return to work, it appeared pointless. There was no planned review date and the spaces for signatures and dates of the employee and employer were blank.
- 116 On 15 June Ms Horner responded to the Claimant's detailed letter of grievance of 20 May 2017 with what was, in effect, a holding response.

- 117 On 21 June 2017 Ms Havercroft emailed the Claimant to express regret that she was not well enough to return to work and to inform her that she was seeking HR advice on the position. She expressed the hope that the Claimant had received an invitation to discuss her grievances. The Claimant responded the same day, to indicate that no such invitation had been extended to her.
- 118 That did not take place until 26 June 2017, when Ms Askew apologised for the Claimant's nonreceipt of a similar letter of 13 June 2017 and invited the Claimant to attend a meeting the following day.
- 119 On the same date Ms Askew interviewed Mrs Thorpe about the Claimant's grievances. She explained that she had received the Claimant's business email address from Mr Weller and checked with EKHR if it was appropriate to use it. She had ceased to do so as soon as the Claimant complained.
- 120 The Claimant attended a grievance hearing with Ms Askew on 27 June 2017. She was accompanied by Mr Buckingham, who assisted the Claimant to reiterate the matters set out in her grievance.
- 121 On 28 June 2017 Ms Askew interviewed Mr Livingstone. He confirmed that he had been appointed as the Claimant's contact person and she had given him her contract details. He had not been requested to pass these on to anyone else.
- 122 It was also on 28 June 2017 that Ms Havercroft emailed the Claimant, and I assume others, to say that she could not take the group complaints regarding Mr Weller further at that time without further information. She thought a meeting might assist. In light of the detailed information provided to Miss Havercroft by the group I thought that surprising.
- 123 In early July, in my view somewhat belatedly in light of the then length of the Claimant's absence, the Respondent took the decision to refer the Claimant to occupational health ("OH"). The Claimant consented on 2 July 2017. At that time the Respondent had a contract with OH providers who offered a monthly clinic at each of three different venues. The Claimant was anticipating seeing an OH specialist when, on 5 July 2017, OH informed her that her appointment would have to be postponed. Her appointment was eventually booked for 28 August 2017.
- 124 On 3 July 2017 Ms Askew interviewed Mr Weller, who told her he obtained the Claimant's business email address from an email he had been handed by a member of his team. On the balance of probabilities. I have concluded that is likely to have been the email referred to in the anonymous complaint by X regarding the Claimant's outside business interests.
- 125 On 4 July 2017 Ms Askew interviewed Ms J Gates of EKHR. She said she had received a telephone message from a person and had subsequently spoken to them. She made a note in which she anonymized their identity as "X" which was later passed to Mr Kenyon and formed the basis for allegation two. It seems highly likely that Ms Gates was aware of X's identity but was never asked to disclose it prior to leaving the Respondent's employment. I thought that inexplicable.

- 126 Ms Askew interviewed Mr Kenyon the same day. It was his evidence that he had never been aware of X's identity.
- 127 Ms Askew finalised her grievance report on 7 July 2017. She rejected the grievance about the anonymous complaint.
- 128 Ms Askew's grievance report concerning the Claimant's business email address was similarly dated and upheld the grievance.
- 129 Ms Askew held a grievance outcome meeting with the Claimant on 12 July 2017 at which Mr Buckingham was present. She read out her letter of outcome of that date, following which Mr Buckingham remarked that he was "flabbergasted". He felt the matters dealt with should have been included in the original investigation. I thought it surprising that Ms Askew, despite not knowing who X was, made a specific finding that there was no evidence that the initial complaint was made maliciously.
- 130 On 25 July Ms Havercroft sought HR advice based on the Claimant's then revised return to work date of 28 September 2017. She felt that was a position she could not sustain and asked what her next steps might be.
- 131 On the same date the Claimant emailed Ms Havercroft raising issues concerning the grievance outcome and alleging Mr Weller's involvement in the disciplinary proceedings against her had been "swept under the carpet". She was dissatisfied that Mr Weller's misconduct in disclosing her business email address had not resulted in his suspension. She was unhappy that no meeting had been arranged to consider the team members' joint complaint. She thought the Respondent to be uncaring about timescales.
- 132 On 27 July 2017 Miss Havercroft wrote to the Claimant to set out what steps she had taken in respect of the Claimant's grievances and to state she considered them closed. She accepted that not every invalid disciplinary investigation involved a suspension, but was not able to comment on the reasons for the Claimant's suspension. She did not accept that the Claimant had not been supported since the start of her sick leave. She did not view the group complaint as a complaint by the entire team. She took the view there was no reason for the Claimant not to be at work while grievances were underway and an occupational health review was being carried out. She stated she would be in touch to arrange a meeting date to review "your occupational health report".
- 133 On 27 July 2017 the Claimant wrote to Ms Havercroft to resign in the following terms,
- "I would like to inform you that I am resigning from my position as Building Control Surveyor of Thanet District Council. Giving two months notice as required. My final date will be 26 September 2017.
- I have enjoyed my time at Thanet District Council, up until this past year.
- The sequence of events have finally undermine the relationship of trust and confidence between myself and Thanet District Council. I have been failed by my employer over a period of 12 months and treated unfairly over the past 8 months.

The reasons for my resignation are listed, as there is too much to explain.

- ✦ Fundamental breach of contract
- ✦ Unnecessary suspension of duty.
- ✦ Failure to investigate allegations properly.
- ✦ Managers conflict of interest.
- ✦ Managers using their authority inappropriately.
- ✦ Breach of confidentiality.
- ✦ Unfair disciplinary hearing.
- ✦ Unfair appeal hearing.
- ✦ Breach of disciplinary policy and procedure ✦ Bullying and victimisation.
- ✦ Breach of sickness policy.
- ✦ Breach of not carrying correct appraisal procedure. ✦ Loss of my business.

Although many members of staff has raised the issue of Chris Weller's capabilities of being a manager prior to suspension. Management and the Chief Executive, Madeleine Homer have done what they can to **avoid** dealing with the situation/person. The fact that my grievance was upheld on 12 July 2017, and it's clear there was a breach of confidentiality by my line manager. This has finally brought me to resign."

- 134 On 28th of July 2017 Ms Havercroft wrote to formally accept the Claimant's resignation and to express regret the Claimant had thought it necessary to resign.

Submissions

- 135 I heard the submission of each of the parties. It is neither proportionate nor necessary to repeat them.

The Law

- 136 I am concerned with S.95(1)(c) Employment Rights Act 1996.

95 Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - (b) [he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
- (2)

- 137 I referred myself, or was referred, to the following cases: -

Western Excavating (ECC) Ltd v Sharp [1978] QB 761
Iceland Frozen Foods v. Jones [1982] IRLR 439
Malik v. BCCI (1998) AC 20

Croft v. Consignia plc [2002] IRLR 851

Morrow v Safeway Stores [2002] IRLR 9

Omilaju v. Waltham Forest London Borough Council [2005] ICR 481

Baldwin v. Brighton & Hove City Council [2007] IRLR 232

Crawford v. Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402

Kaur v. Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 138

The onus is on the Claimant to establish on the balance of probabilities that: - 138.1

The Respondent had fundamentally breached her contract.

138.2 She resigned in response to that breach.

138.3 She did not waive the breach or affirm the contract.

139 I accept the Respondent's submission that the case of *Kaur* is the most recent and authoritative in case where a "last straw" is relied on. Underhill, LJ, said this (para. 55),

"55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)⁶ breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
- (5) Did the employee resign in response (or partly in response) to that breach?"

Further Findings and Conclusions

140 I deal with matters chronologically, as far as possible, to reflect my above findings.

The suspension of the Claimant.

141 This is probably the worst illustration of a "knee-jerk" reaction that I have come across. Mr Kenyon suspended the Claimant without giving her any opportunity whatsoever to state her case. Thereafter he was not willing to listen to a word that was said in her defence.

142 It was clearly against the Respondent's policies for Mr Kenyon to act as he did.

142.1 He did not consult EKHR before the suspension. He clearly could have done so.

142.2 There is no evidence he considered any alternative.

- 142.3 There was no cogent evidence that any of the grounds on which suspension might be considered necessary applied.
- 143 It is notable that no-one on behalf of the Respondent has, since 1 November 2016, made any attempt to justify the suspension.
- 144 I find, on balance, that Mr Kenyon suspended the Claimant because of his personal view of her conduct concerning his close colleague, Mr Weller. He had discussed the situation with Mr Weller before he suspended the Claimant, but gave her and her representative no opportunity to make any representations.
- 145 In light of my above, and further, findings concerning his conduct I consider his decision to suspend the Claimant bordered on being malicious.
- 146 This wrongdoing was exacerbated by Mrs Thorpe's failure at any stage to comply with her duty to review the suspension.
- 147 I have concluded, in accordance with Crawford v. Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, that this was a breach of the implied term relating to trust and confidence and amounted to a fundamental breach of contract.

Mr Rigden's email of 2/11/16

- 148 Mr Kenyon failed to disclose the email from Mr Rigden of 2 November 2016 to Mrs Thorpe or the Claimant at any time. I cannot conceive that he was unaware of its relevance to the investigation he had put in place and was managing. He knew it undermined the charge he had formulated of "disclosing information".
- 149 On the basis of all the evidence before me I have concluded that was a deliberate act on his part. His suppression of that evidence, which clearly favoured the Claimant, was wholly improper.
- 150 The Claimant was not aware of that email until she returned to work in early April 2017. It is entirely understandable that it had a serious impact on her, such that she broke down in tears and was signed off work with stress.
- 151 The Claimant has established, on the balance of probability, that this conduct on the part of Mr Kenyon was, both at the time it took place and when the Claimant discovered his perfidy, a clear and obvious breach of the implied term relating to trust and confidence.

Investigation

- 152 There was unconscionable delay in starting and completing the investigation: -
- 152.1 The policy suggests a 4 week period as normally being appropriate. Ms Thorpe, appointed on 1 November 2016, took until 23 February 2017 to complete her report, just less than 4 months.
- 152.2 There was nothing out of the ordinary concerning the events being investigated.
- 152.3 Ms Thorpe only interviewed 3 people (including the Claimant) and spoke to Ms Raymond, who was not cooperative on either occasion, twice.

152.4 The documentation, other than interview notes and statements, was sparse.

153 With the best will in the world I cannot conceive that such an investigation could reasonably take more than about 2 weeks.

154 This delay arose, in part, from Mrs Thorpe's lack of any knowledge or experience of the role of an investigating manager. She sought advice on every issue that arose, however minor, from Mr Kenyon, who was in no hurry to assist, and EKHR, which she undoubtedly found wanting.

155 Despite Mrs Thorpe's obligation to keep the Claimant updated regularly on the progress of the investigation she abjectly failed to do so: she only responded to prompts from Mr Buckingham.

156 I am entirely satisfied that such inexcusable delay was a breach of the implied term relating to trust and confidence.

Informal advice

157 Mrs Thorpe also failed to have regard to her obligation to consider whether, in light of her findings, informal advice might be more appropriate than proceeding to a disciplinary hearing. Bearing in mind the overwhelming evidence she received that the Claimant had consent to be involved in her business this was a significant failure on her part. It was unfair.

Confidential information

158 It was quite wrong of Mrs Thorpe to ask Mr Weller for the Claimant's personal contact information. She should have known that under the policy a specific contact person had been appointed and, even if unaware of that, should have enquired of EKHR.

159 It was even more improper for Mr Weller to have used a email which was part of the investigation process to inform Mrs Thorpe of the Claimant's supposed personal contact details. He clearly breached the Claimant's confidence in doing so.

Investigatory conduct

160 As noted above, the report Mrs Thorpe prepared was notable for its lack of analysis. This was also apparent from Mrs Thorpe's failure to get hold of the issues. For instance, while she allowed Mr Weller to assert the propriety of the certificates he had issues she failed to ask him a single question about the assurances he had allegedly given that he would not issue such certificates.

161 Such *laissez faire* attitudes were further illustrated by her failure to re-interview Mr Weller in light of the directly contradictory accounts she later received when she interviewed the Claimant.

162 I was also troubled by her failure to obtain and consider records relating to Beach Retreat or to challenge Mr Weller's assertions regarding the Claimant's knowledge he was in charge of that site.

163 I did not accept Mrs Thorpe's reason for not interviewing Mr Parnell as being because the propriety of the certificates was not in issue. He was also able to

give cogent evidence as to Mr Weller's and others' knowledge of the Claimant's interest in her business, as was Ms Cozens 164 The interview process was clearly unfair.

165 I also thought it wholly unsatisfactory, and unfair, for Mrs Thorpe to conclude that the Claimant should face disciplinary proceedings relating to her involvement in her business on a wholly different basis to that which had been alleged against her.

Mr Kenyon's role

166 Bearing in mind his close association with Mr Weller it is at best unfortunate that Mr Kenyon was the Commissioning Manager. It was a direct result of his role and the directions he gave that, at every stage, the Claimant was prevented from justifying the content of her email by calling into question the propriety of Mr Weller issuing the completion certificates he had.

167 That "line" was taken at every stage, by Mrs Thorpe, Mr Porter and My Humber. I have no doubt it was orchestrated by Mr Kenyon.

168 This deprived the Claimant of a major plank of what was her defence, to the effect that Mr Weller had undermined himself by acting as he had. That was unfair.

169 I find it remarkable that Mr Kenyon did not see that he was potentially conflicted. It is apparent that he was also acting at the Stage 2 investigator of Mr Rigden's complaint concerning the issue of the certificates by Mr Weller, which Mr Kenyon rejected by a letter of 3 March 2017. I think it highly likely that he was preventing the Claimant from addressing an issue vital to her defence to ensure his view, and that of Mr Weller and Mr Porter (who had rejected the complaint at Stage 1) were not undermined. He was protecting the interest of the Respondent, without regard to any injustice to the Claimant.

Grievance

170 The Claimant's letter of 1 March 2017 was clearly a grievance concerning the decision to suspend her and the delay in matters being investigated.

171 Ms Horner's response of the 3 March was wholly inadequate. It did not address the issues raised by the Claimant, which were never the subject of a grievance meeting, investigation or outcome.

172 That appears to me to be a breach of the ACAS Code of Conduct on grievances. It is undoubtedly unfair. It is also a breach of the implied term to the effect that grievances will be dealt with fairly and reasonably.

Mr Porter

173 The failure of Mr Porter to recuse himself was contrary to basic principles of natural justice. Any reasonable observer with knowledge of the facts would think there was a risk of him being partial because: -

173.1 Mr Porter was very closely associated with Mr Weller. He had acted as his Mentor for some time.

173.2 At Stage 1 Mr Porter had upheld the decision of Mr Weller that had been directly called into question by Mr Brown's email complaint, to which the

Claimant had responded and which response was the subject matter of allegation one.

173.3 He had rejected that complaint, finding Mr Weller to have acted properly, thus potentially having a closed mind on a major plank of the Claimant's defence.

173.4 Mr Weller was, to all intents and purposes, the complainant in allegation one.

174 I accept that under the Respondent's disciplinary policy and procedure this hearing had to be chaired by a Head of Service, of which there are nine, but there was no evidence to suggest that no other Head of Service was available. In all the above circumstances Mr Porter should have recused himself.

Disciplinary Hearing

175 Mr Porter's ruling that he would not hear the Claimant's witnesses on the propriety of Mr Weller's conduct was also unfair, for the reasons set out above.

Disciplinary outcome

176 I remind myself that allegation one was in the following terms,

"You sent an email to a contractor and agent disclosing information which may have undermined your line manager, given a false representation of the council's position and potentially put the council at risk of disrepute."

177 Mr Porter expressly found that the email: -

177.1 did not disclose new information; or

177.2 bring the Council into disrepute but went on to find the Claimant's email had undermined her manager and was thus guilty of misconduct. He did not make a finding that the emails gave a false representation of the council's position.

178 I consider that to have been unfair because it was not a charge of which the Claimant had notice. The charge specifically linked the disclosing of information with the undermining of Mr Weller, the making of a false representation and the risk of bringing the council into disrepute.

179 If, as he did, Mr Porter found no disclosure of information (in the sense the information was already known to the recipients of the email) the balance of the charge falls away. The charge cannot be dissected to make it read as,

"You sent an email that undermined your line manager."

180 It is essential to fairness and natural justice that any charge is precisely formulated and findings are made on the basis of evidence relevant to the charge as framed. If there are no specific alternative charges it is unfair to find some case other than that brought has been proved. See *Strouthos v. London Underground* [2004] EWCA Civ 402, [2004] IRLR 636.

181 In light of the inevitability of Mr Porter having to find no case to answer in respect of allegation two, which should not have gone to a hearing in any event, it appeared to me that the “alternative” finding of guilt he made was a face saving exercise: an employee who has been suspended and under investigation for over four months could not be wholly exonerated, even if the penalty imposed was the lowest possible sanction at that stage.

Return to work

182 I thought it extraordinary that the Respondent had not taken any steps at all to prepare for this eventuality. I thought the informal meeting with Ms Havercroft on 29 March 2017 to be wholly inadequate. The Claimant had been absent for 5 months. There had been serious conflict with her line manager, Mr Weller, which had put her job on the line. Despite the Claimant’s request for a formal return to work meeting nothing was put in place for her return on 3 April 2017, when she was expected to meet Mr Weller immediately and who was pessimistic about their future working relationship.

183 The failure to organise a formal return to work meeting, perhaps to discuss mediation and to arrange support for the Claimant, clearly necessary in light of Mr Weller’s comment, was certainly blameworthy.

4 April 2017

184 It was on this date that the Claimant learned of Mr Kenyon’s suppression of Mr Rigden’s email of 2 November 2016. I do not need to repeat my findings on that issue, save to repeat that this was a breach of the implied term relating to trust and confidence and thus a fundamental breach of contract.

Appeal hearing

185 This was an appeal concerning allegation one as originally framed, not against the charge as found proved.

186 The appeal panel do not appear to have considered whether this was a rehearing or a review.

187 Mr Humber took the same line as Mrs Thorpe and Mr Porter, ruling that the propriety of Mr Weller’s conduct was not in issue.

188 The appeal panel also fell into error in upholding a charge against the Claimant that had never been laid and wholly ignoring whether Mr Weller might have undermined himself.

189 For all the above reasons that hearing was unfair. It was also blameworthy conduct on the part of the Respondent.

Grievances of 18/4/17

190 The Respondent failed to even acknowledge the Claimant’s grievances until 26 May 2017, when what can only be described as a prevaricating response was sent. That was unreasonable and blameworthy.

Support

191 Contrary to its obligations the Respondent had failed to be proactive in supporting her during her long suspension. That appears to have continued

during her sickness absence. In my view any reasonable employer in the position of the Respondent would have been immediately concerned when the Claimant was signed off with stress less than two days after her return from a long period of suspension. No one took any steps to make enquiry of the Claimant for at least 2 weeks. That was unreasonable and blameworthy.

Grievance of 20/5/17

- 192 This grievance, like that of 1 March 2017, was sent directly to Ms Horner. It was not acknowledged until 6 June 2017, following a prompt from the Claimant.
- 193 A further holding response was sent on 15 June 2017, and it was not until 27 June 2017 that the Claimant met Ms Askew to discuss her grievances.
- 194 However, it is plain that Ms Askew only dealt with the grievances dated 18 April 2017. She did not carry out any investigation into the grievance of 20 May 2017 which complained about her suspension, the investigation, the hearings and outcomes.
- 195 That was unreasonable and blameworthy.

OH referral

- 196 By early June the Claimant had been signed off for two months. It was about a month later before the Respondent decided to refer the Claimant to OH. That delay was unreasonable.
- 197 As it happened, because of the Respondent's woefully inadequate OH provision, it transpired that the Claimant would not see OH until at least 28 August 2017, by which time she would have been signed off for nearly four months.
- 198 The failure of the Respondent to have in place reasonable procedures to obtain prompt OH advice was in my view a serious continuing failing which lasted until the Claimant's resignation.

Grievance outcome

- 199 The Claimant has never received an outcome to the grievance she raised on 20 May 2017. That is a breach of the ACAS Code of Practice, unfair and blameworthy.
- 200 On 12 July 2017 the Claimant was informed of Ms Askew's conclusions, in which her grievance concerning Mr Weller's breach of confidence was upheld. The Respondent has sought to classify that outcome as entirely innocuous.
- 201 I did not accept that. The upholding of this aspect of her grievance confirmed to the Claimant that her suspicion that Mr Weller had acted inappropriately toward her was correct. It undoubtedly added to her sense of injustice. Mr Weller's conduct was improper and blameworthy.

Conclusions

Dismissal

- 202 Having regard to all the evidence I am satisfied, on the balance of probabilities, that the above events, starting with the Claimant's suspension and ending with the grievance outcome, are all part of a course of conduct by the Respondent

which, viewed cumulatively, amounted to a fundamental breach of the Claimant's contract of employment.

203 I have no doubt, and it is set out expressly in her letter of resignation, that she resigned in response to the manner in which the Respondent treated her, as set out above.

204 There is little, if any, delay between the later events and the Claimant's resignation. Having regard to the decision in Buckland v. Bournemouth University [2010] EWCA Civ 121 I am not persuaded that the Claimant has either waived those breaches or affirmed the contract.

205 I am therefore satisfied that the Claimant was dismissed within S.95(1)(c) Employment Rights Act 1996.

Fairness

206 The Respondent did not seek to show there was a potentially fair reason for the Claimant's dismissal.

207 I make a declaration that the Claimant was unfairly dismissed.

208 Directions for a remedy hearing accompany this Judgment

Employment Judge Kurrein

13 November 2018