**Case Number: 1601140/2018**

# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mrs Sarah Lewis** | |
| **Respondent:** | **Mr Chris Davies** | |
| **Heard at:** | **Cardiff** | **On:**<br>**6, 9, 11 and 12 December 2019 and**<br>**13 December 2019 (in chambers)** |
| **Before:** | **Employment Judge S Davies**<br>**Ms W Morgan**<br>**Mr M Pearson** | |
| **Representation:** | | |
| **Claimant:** | **Mr N Caiden, counsel** | |
| **Respondent:** | **Mr I Maccabe, counsel** | |

# RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

(1) The complaint of constructive unfair dismissal under s.98 ERA is dismissed;

(2) The complaint of constructive unfair dismissal under s.103A ERA is dismissed; and

(3) The complaints of public interest disclosure detriment under s.47B ERA are dismissed.

# REASONS

## Claims

1. This is a claim of constructive unfair dismissal (ordinary – section 98 Employment Rights Act 1996 (ERA) and automatic - section 103A ERA) based on a series of allegations, alleged to be both 'whistleblowing' detriments (section 47B ERA) and breaches of the implied term of trust and confidence.

## Issues

2. The parties provided an agreed list of issues [105a-c]. Two dates were amended by consent as follows:

    a. 1.1 from April 2016 (not 2017)
    b. 1.11 a letter dated 6 April 2018 (not 2017)

3. As regards protected disclosures, the Claimant confirmed that she relied upon section 43B(1)(a), (b) and (f) ERA in respect of each alleged disclosure. The Claimant asserts it was her reasonable belief that the criminal offence committed was one of fraud.

## Hearing

4. The hearing was originally listed over seven days but due to the Employment Judge's unavailability the Tribunal did not sit on Tuesday, 10 December 2019. Evidence concluded on 11 December 2019. The parties gave oral submissions on 12 December 2019. The Claimant also relied upon written submission which were read by the Tribunal prior to oral submissions.

## Witnesses

5. The Claimant called four witnesses to give live evidence: the Claimant, Dr Peter Garland, the Claimant's partner, Mrs Jane Pratt, then Conservative party candidate for Caerphilly, and Mr Mark Rhydderch-Roberts, treasurer of the Brecon & Radnorshire Conservative Association.

6. The Claimant also provided written statements for five witnesses who did not attend to give live evidence: Mr Gwilym Williams, chair of the Brecon & Radnorshire Conservative Association, Mr Aled Davies, Welsh Conservative group leader Powys County Council, Elizabeth Francis, Area Chair Mid and West Wales Conservative Council, Jan Harris, former officer of the Brecon & Radnorshire Conservative Association and Christine Chambers, Claimant's friend.

7. The Tribunal informed the Claimant that less weight would be placed on evidence of witnesses that did not attend the Tribunal in person.

8. The Respondent called four witnesses to give live evidence: the Respondent and three former members of his constituency staff, Mrs Wendy Poulton, Caseworker, Mr Jack Gillum, Intern and Mr Matt Mackinnon, Senior Communications Officer.

## Bundle

9. The parties referred the Tribunal to a bundle of approximately 230 pages. The Respondent adduced two further documents, without objection from the Claimant: R1 (extract from Parliamentary Standards Act 2019) and R2 (letter to the Respondent from Stephen Phillips dated 5 February 2018).

10. One document [206-7] was redacted by agreement between the parties and made available in the public bundle on Day 2.

11. In this judgment, references to bundle page numbers are in square brackets and references to witness statements paragraph numbers are in round brackets with the initials of the witness.

## Summary

12. The Claimant made protected disclosures about the existence of fake invoices, created by the Respondent. The fake invoices were created, by the Respondent, to split the costs of photographs he purchased for his new constituency office across two different budgets. The claim is about whether the Respondent (and his staff) subjected the Claimant to detriment because of her protected disclosures and behaved in such a manner that she could resign in circumstances of constructive dismissal.

## Facts

13. The Claimant worked for Brecon and Radnorshire Conservative Association (the Association) from 2014. Following the Respondent's election as MP for Brecon and Radnorshire in May 2015, the Claimant commenced work as his office manager based in the Respondent's Brecon constituency office. This was a part-time position working 18 hours a week [108]. The Claimant continued to work part-time for the Association.

14. The Respondent's constituency was large in terms of geographical spread; the Respondent decided to open a constituency office in Builth

Wells in addition to the existing office in Brecon. The Respondent's caseworkers (including Mrs Poulton) worked out of Builth Wells and Mr Mackinnon split his time between the two offices. For the majority of her working time, the Claimant was a lone worker in the Brecon office. The Claimant performed work for both the Association and the Respondent on the Association's computer.

15. The Claimant took on the responsibility for submitting all of the Respondent's expenses to IPSA from September 2015. This followed a period when the Respondent's expenses had not been properly attended to and he was required to repay a sum of money to IPSA. There was no financial impropriety, rather the accounts were "in a mess".

**Fake invoices**

16. In early 2016, the Respondent took the actions which ultimately led to his criminal conviction, recall by petition and loss of his seat as MP. The Respondent created two fake invoices, using information from a genuine invoice from a local photographer, but altered the amounts, references and date. The Respondent made no financial gain from the offence, as he paid the photographer in full; the fake invoices were created to split the total expenditure on photographs across two different budgets. The Respondent was convicted of an offence contrary to the Parliamentary Standards Act 2010. The facts leading to conviction are recorded in the sentencing remarks of Mr Justice Edis on 23 April 2019 at Southwark Crown Court [208] which include:

> "you decided to create two bogus invoices which would split the sum between the two budgets. This would not benefit you financially because they amounted to the sum which you actually agreed to pay and the money was in fact paid.
>
> These fakes would also create the false impression that some of this money have been spent on furniture for the office. Member's expenses are a matter of public record and that lie would not enrich you, but it would pull the wool over the eyes of any of your constituents who are interested in what you had actually spent your expenses budgets on.
> …
> There was no error here. What you did was done quite deliberately and it must have taken you some time to create your fake documents. You created two, after all. You presented them at different times to suggest that there were two transactions, and attached a post-it note to the second to this effect, thus trying to deceive your own staff. It is an aggravating feature of the offence but you intended that Mrs Lewis should be the person who actually made the claim on your behalf,

> having been deceived in this way. Involving the innocent in a crime can cause serious consequences for them. None happened.
> …
> It remains shocking that, when confronted with a simple accounting problem, you thought that the thing to do was to forge documents. That is an extraordinary thing for a person in your position, and with your background, to do."

**Telephone call to Builth Wells office on 11 April 2016 (first disclosure)**

17. Upon being presented with one of the fake invoices by the Respondent, the Claimant telephoned the photographer on 11 April 2016 to check whether he had been paid. This conversation led to copies of the fake invoices being sent by the Claimant to the photographer. Upon receipt, the photographer raised his concerns that the documents were not created by him but had used his personal and business details: "it is difficult to understand a legitimate reason for this and I will need a full explanation" [132].

18. The Respondent concedes that the Claimant contacted his Builth Wells office on 11 April 2016 to enquire whether staff there knew anything about the invoices. The Claimant's belief was that she was raising an issue that appeared to be an offence – faking an invoice and trying to pass it off as a legitimate one (C11); as well as telephoning, she also emailed proof of her discovery to the Builth office. We find that the Claimant spoke with Mrs Poulton, who later rang her back to confirm that she would be dealing with the issue. We think it likely, on the balance of probability, that Mrs Poulton also said words to the effect that the Respondent had done something stupid. Mrs Poulton could not recall these telephone conversations and the Claimant was not therefore effectively challenged on her evidence. We accept the Claimant's account; which is consistent with the fact that the Respondent subsequently telephoned the photographer about the invoices. The Claimant received confirmation from the photographer that all was resolved from his perspective, although "possibly not what you'd learn in accountancy school" [133]. The Claimant and the Respondent never spoke directly with each other about the issue.

19. The Respondent submitted one of the fake invoices directly to IPSA and was reimbursed for £450 directly. The Claimant never submitted the £250 fake invoice due to her concerns as to its provenance. The Respondent was never in fact reimbursed the full sum of £700 that he paid to the photographer. Around this time, as well as juggling the responsibilities of his role as MP with his young family, the Respondent was also travelling to a hospice in Swansea to spend time with his dying father. In light of these personal circumstances, we accept that the Respondent did not notice the nonpayment of £250 by IPSA.

20. The Claimant raised the issue of the fake invoices with Mr Williams of her Association employer, around the time of her first disclosure. Mr Williams advised the Claimant that the Respondent's staff at the Builth Wells office should deal with it. No action was taken by Association officers or the Claimant with regard to the fake invoices for more than a year. The Claimant explains this as being because the Association was busy preparing for various elections. In April 2016 they were in the midst of the Welsh Assembly election campaign, which the Claimant described as a "very fractious time for the Association" (C11). The Claimant described two factions within the local Conservative party; those who supported the local Welsh Assembly candidate, Gary Price, (i.e. the Respondent and his Builth Wells staff) and those who did not (i.e. the Claimant, Mr Reeves, President of the Association, Mr Williams and Mr Rhydderch-Roberts and others in the Association). The Claimant refers to the divide in a messenger message to Mrs Pratt on 15 September 2017: "real unrest within B&R (all down to Gary, I think)" [148].

21. For a period, the Claimant could not locate relevant emails related to the invoices on the Association computer. At some unspecified date after the County Council elections in May 2017, at the behest of Mr Williams, a computer expert was engaged to look at the Association computer and the emails were recovered from a deleted archive folder. The Claimant asserts that the emails were deleted to conceal the Respondent's offence (C18). However we reject this assertion; the Tribunal was presented with no evidence linking the emails being found in the deleted archive folder to the Respondent or an individual acting on his behalf.

**Working relationships**

22. During their working relationship, the parties were in contact a few times a week, either by email or more frequently by telephone, they would not necessarily see each other face to face on a regular basis.

23. Following her appointment as the Respondent's office manager, the Claimant was elected to public office as a Town and County Councilor in or around May 2017. The Respondent lent his support to the Claimant's election campaign on one afternoon. She was subsequently appointed to the National Parks Authority and became secretary to the, newly revived, Brecon Chamber of Trade.

24. The Claimant was invited to work social events such as the Respondent's Christmas party, but only attended one Christmas party. She declined an invitation to visit Westminster, to meet the Respondent's staff there.

25. We heard evidence from Mr Gillum, Mrs Poulton and Mr Mackinnon who all deny ignoring the Claimant. There is no evidence that the Respondent instructed staff to act in a particular way towards the Claimant.

**Security alarm**

26. After the murder of Jo Cox MP in June 2016, staff at the Builth Wells office were issued with security alarms. No alarm was provided to the Claimant at the Brecon office.

27. The physical set up in the respective offices was different; Builth was ground floor and had no security, whereas the office in Brecon was situated on the first floor and had an entry phone.

28. There was no clear evidence as to who issued the alarms, although the Respondent believed this was administered centrally from Westminster. The Respondent was not involved in the issuing of the security alarms personally.

29. The Claimant did not ask the Respondent for an alarm. The Claimant says she contacted Mrs Poulton, on an unspecified date, for a security alarm but was told it was not necessary for her to have one. Mrs Poulton does not recall this conversation and points out that as a caseworker she had no authority to determine who was issued with security alarms. We find that even if a conversation took place at described by the Claimant, the response was not at the behest of the Respondent.

30. On balance we find that the alarms were issued centrally; it was not Mrs Poulton's decision.

**Complaint about the Claimant and Mr Williams**

31. An issue arose in July 2017 within the Association about the election of a new officer; Mr Hayward. This led to a complaint being lodged with the Respondent and the Welsh conservatives against the Claimant and Mr Williams. The Respondent dealt with the complaint in /around the summer 2017 and referred to dealing with it during the meeting with the Claimant on 9 August 2017.

**Facebook**

32. The Claimant complained that she was 'unfriended' on Facebook by Mr Gillum and Ms Mills on an unspecified date.

33. Mr Gillum was a student who volunteered as an intern during holidays. Ms Mills was one of the Respondent's caseworkers based in Builth office.

34. We accept Mr Gillum's evidence with regard to Facebook; he did not unfriend the Claimant, he was asked to moderate the administrators on the Association Facebook page and mistakenly removed the Claimant as administrator for security reasons, as she appeared to him as an unknown user. Upon realising his error, he apologised and reinstated her.

35. We did not hear evidence from Ms Mills with regard to the allegation that she unfriended the Claimant on Facebook. Even if she did so, we were shown no evidence of a link between Ms Mills' action and the Respondent.

**Royal Welsh Show**

36. It is the Claimant's contention that she was ostracised by the Respondent's staff, in particular Mr Gillum and Ms Mills, whilst working on the Conservative party stand at the Royal Welsh Show in July 2017. By this time, the Respondent had informed Mr Williams that it was his intention to reduce the Claimant's hours and Mr Williams relayed this information to the Claimant at the Royal Welsh Show. The Claimant became upset at the news and was comforted by the Respondent's wife.

37. The Claimant complains that Mr Gillum requested milk from her in an abrupt manner and that the Claimant was not asked whether she would like a glass of wine or to join the others in a drink.

38. Mr Gillum accepts that he asked the Claimant for milk, whilst making tea for somebody visiting the Conservative party stand but denies any intention to mistreat the Claimant. We accept Mr Gillum's evidence in this regard; there was certainly nothing inherently rude in the words spoken (i.e. 'milk') even if he neglected the expected niceties on that one occasion.

39. Mr Gillum accepts that he had a glass of wine with Ms Mills and another individual at the stand without including the Claimant but denies that he did so in a way as to exclude her. Mr Gillum said the Claimant showed no interest in interacting with him and she was not the only other person working on the stand.

**9 August 2017 meeting – reduction in hours**

40. A meeting was called by the Respondent, without any prior written or verbal notice of its subject matter. No minutes were taken. Mr Reeves attended the Brecon office and spoke with the Respondent before the meeting, which led to a reduction in the Claimant's working hours.

41. We find that the Respondent told the Claimant that she was unreliable, as he felt it was not known when she would be in the office. The Claimant sought to demonstrate the hours she worked by showing the Respondent her timesheets; he then questioned how her hours could be verified.

42. The Respondent's evidence (R19-21), was that he was concerned at the Claimant's lack of attendance in the office for some time due to (unspecified) complaints from constituents and Association members. The Respondent also asserted that the Claimant was "overstretching herself and failing to provide the service and commitment that she had previously shown". We consider that this is an assertion of unreliability and on the balance of probabilities, we consider that the Respondent did use that word during the meeting.

43. The Claimant agreed, unwillingly, to the reduction in hours. The Respondent's pleadings refer to the change in hours being "imposed" and we consider this is an accurate description. The meeting was described by the Claimant in an email sent the same day as: ""OK" – bit delicate in parts! Jonathan met with Chris beforehand and obviously warned him to go gently with me, … Chris says he's had to spend about five hours dealing with Edmund and his complaint against Gwilym and me." [140]. In an email reply Mr Rhydderch-Roberts described the Respondent and his associates as a "motley kitchen cabinet of cheats, liars and lower middle class (at best) fuck wits".

44. As well as a reduction in hours, the Respondent agreed to a cost of living pay increase and increased holiday entitlement for the Claimant. A form was completed by the parties to notify IPSA of the change in hours [151]. The Respondent included an incorrect effective date on the notification form, which led to a delay in the Claimant signing the form and sending it off to IPSA. The delay meant that she missed the cut-off date for changes to be processed in the monthly pay for September 2017.

**Meeting with Mrs Pratt on 17 October 2017 (second disclosure)**

45. On 15 September 2017, the Claimant contacted Mrs Pratt, whom she had come to know during the Assembly election campaign, to seek advice about the party complaints procedure. The Claimant and Mrs Pratt corresponded by Facebook messenger [148]. They eventually met in The Bear in Crickhowell on 17 October 2017 after the Claimant returned from holiday. During the meeting, the Claimant told Mrs Pratt about what had happened on 11 April 2016 with regard to the fake invoices. Mrs Pratt encouraged the reporting of the issue and told the Claimant that she had additional responsibilities as a County Councillor and a duty to abide by the code of conduct to pass on the information.

**Remembrance Sunday service**

46. On 1 November 2017 Ms Mills of the Builth office contacted the Respondent about a wreath for the Brecon remembrance Sunday parade, saying that an individual had been trying to get hold of the Claimant for two weeks without response to messages [153].

**3 November 2017 meeting**

47. A further meeting was held between the parties at the Brecon office after the Respondent's constituency surgeries that day.

48. The Claimant contacted Mr Williams to inform him that the Respondent wanted to meet with her and Mr Williams arranged for Mr Reeves to attend. Mr Reeves and the Respondent had a discussion, after which, Mr Reeves popped his head round the Claimant's office door, said goodbye and left before the meeting started.

49. The impression we formed of the Claimant in giving her evidence, was that she is a capable and experienced individual who was able to stand her ground when necessary (for example by not submitting the fake invoice and reporting her concerns). The Claimant was aware that Mr Reeves had been sent to attend the office for the meeting by Mr Williams, yet she did not stop him from leaving or ask him to stay. The Claimant had opportunity to do so when he popped in to see her.

50. The Respondent described the meeting as being 'robust' from both sides yet 'cordial'. The Respondent had discovered that IPSA had continued to pay the Claimant for 18 hours per week, rather than the reduced 10 hours, in September and October 2017 and raised this with her. When the Claimant showed the Respondent that she had contacted IPSA to inform them of the change in hours he continued in a similar 'unpleasant tone', raising other issues of concern with regard to the Remembrance service in Brecon and more generally about what the Claimant was doing with her time when in the office. In response, the Claimant raised her voice, using words to the effect "don't you dare query what I do". We accept the Claimant's evidence that the Respondent 'robustly' challenged her about the fact that she locked the office door after she finished work, but that the Claimant did so at Mr William's request.

51. The Claimant was upset after the meeting and contacted Mr Williams and Mr Rhydderch-Roberts by telephone. Mr Rhydderch-Roberts emailed the Respondent that same day: "I have just had a distraught Sarah Lewis on the phone following what appears to be a very ill natured and unnecessary conversation you had with her earlier… I believe the bullying of any staff member (as this appears to be) falls into the category of completely

unacceptable behaviour and I can guarantee you that I will not allow this to happen.… I have no intention of seeing another respected, intelligent, and valuable association employee being hounded out of the association." [154]

52. The Claimant relayed the fact of the meeting in a message to Mrs Pratt of 8 November 2017: "just to let you know that Chris Davies and I had a MASSIVE falling out and it looks like I'm going to be stopping work for him quite soon … made him launch an onslaught of criticism on me in my office on Friday evening. It was thoroughly unpleasant… I am unwilling to work for someone who treats me in such a way, so I have told Gwilym that I want to stop working for Chris ASAP, but that I will continue with the association for the time being, and at least up to the AGM in February/March… it has been suggested that I sue him for constructive dismissal…".

**Complaint to CCHQ (third disclosure)**

53. The Claimant initially reported her concerns regarding the fake invoices to the party anonymously, by contacting a telephone helpline. Subsequently, on 5 December 2017 the Claimant submitted a written complaint, comprising of a letter and timetable of events with extracts from relevant emails [157-160]. In the letter, the Claimant indicates that "it might prove difficult to continue to work for him in my current capacity".

54. The letter of complaint does not explicitly refer to 'bullying' behaviour by the Respondent; the only reference to interpersonal issues is: "I've always prided myself on my timekeeping and work ethic. But, on a number of occasions, my professional integrity has falsely been brought into question by Chris."

55. The Claimant explained her lateness (20 months) in reporting the issue as being due to the Welsh Assembly elections, Council elections, general election and the disappearance of the relevant emails from the Association computer.

56. Mr Stephen Phillips of CCHQ wrote to the Respondent on 5 February 2018 (R2) to confirm that the complaint had been received and that an investigation would ensue. The Respondent replied by letter of 22 February 2018 [173-5] with his version of events regarding the fake invoices, suggesting that the Claimant had lodged the complaint maliciously, "in order to delay dismissal."

**Radnor Hills Water donation to Conservative party**

57. In early January 2018, the parties had pleasant email exchanges, including the Respondent wishing the Claimant a Happy New Year [130] and complimenting her work [167].

58. Over the Christmas 2017 period, the Respondent and Mr Williams were contacted by a compliance manager at CCHQ to inform them that the Electoral Commission were investigating the finances of the Association. This was because a £5000 donation from Radnor Hills Water had not been declared by the Association but had been declared in the Respondent's Register of Members Interests.

59. The Respondent sent an email on 4 January 2018 [162] to four officers of the Association, including Mr Williams and Mr Rhydderch-Roberts, informing them of the issue in the following terms "The Association will be guilty of a breach… Unlike when I was investigated by the Parliamentary Standards Commissioner and the judgement was that I had to repay the cost of envelopes. This is much more serious… Unfortunately this was completely avoidable".

60. The difficult relationship between the Respondent and Mr Rhydderch-Roberts is illustrated in the replies to this email [162-163] including from Mr Rhydderch-Roberts: "is it more serious? More serious than appearing in the national press a number of times for various irregularities? Hardly...CCHQ has really got us under the microscope – not unsurprisingly, given our chequered recent financial and electoral history – including the original MP selection and of course, who could forget the Gary Price episode? I certainly haven't."

**Sickness absence commences**

61. The Association officers made the Claimant aware of the Radnor Hills Water donation issue immediately; in emails between the Claimant and Mr Rhydderch-Roberts on 5 January 2018 [166]. The Claimant says that she immediately went to her GP to be signed off on sick leave (C41); her sickness absence was not confirmed to the Respondent until 16 January 2008 when she sent him an email [169]:

> "I have been made aware of recent correspondence relating to the issue of the reporting of donations on Votesource… It has become obvious to me that there is now a complete breakdown of trust between us. You have made it clear to me in the past you doubt my integrity, so I am afraid that this situation is just further proof that we can no longer work together and I feel that my job has become untenable, but because I do not feel I have done anything wrong, I am

> not going to resign. Instead, I have consulted with a doctor at Brecon surgery, who has signed me off work for a period of four weeks.
>
> …
>
> As you know, I am fully aware of your financial impropriety regarding the fraudulent invoices you created and the fact that you tried to get me to submit one of those invoices. Had I not acted with the vigilance I did, I would have innocently submitted that invoice and therefore would have exposed myself to potentially being sent to trial for fraud."

62. The Respondent replied to this email on 18 January 2018 [168]; striking in its omission was any response to, or acknowledgement of, the Claimant's reference to financial impropriety/fraudulent invoices.

63. In an email of 26 January 2018 [170], Mr Williams wrote to the Respondent, "with regard to Sarah Lewis she is not coming back to work at the office again".

**Accessing Claimant's personal file/sending emails**

64. The Respondent concedes that, whilst the Claimant was absent on sick leave, he accessed the Association computer, checking the emails and also looking at documents saved by the Claimant.

65. The email address used by the Claimant was not personal to her but was a general Association email. The Respondent discovered that the Claimant had used this email account to contact an individual who owed her money [156]. The Respondent also discovered a personal letter which was saved in a documents folder on the computer [206].

66. On 6 February 2017, the Claimant attended the Brecon office whilst on sick leave to send AGM minutes from the computer to the Association officers. The Claimant found Mr Mackinnon using the Association computer when she arrived in the office. Subsequently, she discovered that Mr Mackinnon had sent some emails to Mrs Poulton and Ms Mills at the Builth office, which the Claimant copied and sent to the Association officers on 7 February 2017 [171-172].

67. In the emails, Mr Mackinnon says: "I'm in, after a long battle with the computer password situation. I can feel the power" and "plugs were pulled out of the computer and the mouse is switched off. All fun and games. The office smells foul after I opened the food bin."

**Letter of 6 April 2018**

68. The 'last straw' relied upon by the Claimant is a letter from the Respondent of 6 April 2018, sent by email on 7 April 2018 [178]. At that point the Claimant had not specified a return to work date. The letter was sent on House of Commons HR advice, to invite the Claimant to a return to work meeting on 16 April 2018 (a date fixed after her fit note expired). The letter specifies that the meeting would not be formal but offered the Claimant the option of being accompanied.

69. In response the Claimant resigned by email, of 9 April 2018, sent the following day [180-1]; in it the Claimant says there is no point in a meeting and that her position is impossible due to the ongoing investigation into her complaint.

**Post termination**

70. As part of the criminal investigation, the Claimant gave a police statement on 9 June 2018 [186-189].

71. The Claimant sold her house in Brecon and now spends more time in Cornwall with her partner.

**Law**

72. The relevant sections of the Employment Rights Act 1996 (ERA) are as follows.

    - Sections 43A, B, C and G on protected and qualifying disclosures, section 47B on the right not to suffer detriments and section 103A on automatic unfair dismissal.

    - Section 48(2) on the burden of proof and section 48 (3) and (4) on time limits.

    - Section 95 and 98 on unfair constructive dismissal.

73. We are grateful to Mr Caiden for his helpful written submissions. We do not repeat all the authorities referred to us, only those of particular relevance.

**Whistleblowing**

74. When considering whether there has been a 'whistleblowing' disclosure, the Tribunal must consider the elements of a "qualifying disclosure"; entailing *'disclosure of information'* by the Claimant, which, in her

'*reasonable belief'* is made in the '*public interest'* and tends to show one of the relevant failures in section 43B(1) ERA.

75. **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** confirms the approach to adopt when considering whether there has been a protected disclosure: (a) identify each disclosure by reference to date and content; (b) identify the employer's alleged or likely failure to comply with a legal obligation etc; (c) address the basis upon which the disclosure was said to be protected and qualifying; (d) separately identify each failure; (e) identify and verify the source of the obligation by reference to statute or regulation; (f) determine whether the Claimant had the necessary reasonable belief; (g) where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act; (h) determine whether the disclosure was made in the public interest (para.98)

76. **Kilrain v London Borough of Wandsworth [2018] IRLR 846** establishes that it is possible for a disclosure to be both an allegation and a relevant disclosure of information. The disclosure must be considered in its own particular context and the issue for the Tribunal is whether there is enough specific factual detail so that the matter can be said to fall within ss.43B(1)(a)-(f) ERA.

77. **Chesterton Global Ltd v Nurmohamed [2017] IRLR 837** provides guidance as to what is in the "*public interest*"; the Tribunal must consider what the Claimant believed, at the time of disclosing, and whether that belief was reasonable (acknowledging that there can be a variance in views as to what is reasonable). The public interest does not have to be the Claimant's predominant motive for making the disclosure. The Tribunal should have regard to all circumstances of the case but some useful tools in assessing it are (a) the numbers whose interest the disclosure served, (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, (c) the nature of the wrongdoing, in particular whether it is deliberate or inadvertent and (d) the identity of the wrongdoer.

78. As for causation, a detriment requires that the whistleblowing disclosure has materially influenced the Respondent's treatment of the Claimant (**Fecitt v NHS Manchester [2011] EWCA Civ 1190**).

**Constructive dismissal**

79. **Buckland v Bournemouth University [2010] IRLR 445** sets out the approach to be taken to unfair constructive dismissal. It is also authority that where there has been a breach of contract, the employer cannot 'cure' the breach at a later stage.

80. Breach of the implied term of trust and confidence (asserted by the Claimant in this case) will amount to a repudiatory breach.

81. For there to be a constructive dismissal, the repudiatory breach need only be a cause of resignation and not the effective cause. If the Claimant resigns for several reasons, one of which is found to be repudiatory, a constructive dismissal is established.

82. **Chindove v Morrisons UKEAT/0043/14/BA** is authority with regard to the relevance of elapsing time and affirmation:

> *[25]…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 him 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…*
> *[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.*

83. Mr Maccabe confirmed there was no disagreement between the parties as to the law. Mr Maccabe handed up a copy of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EVCA Civ 978** with regard to the test in constructive dismissal and the 'last straw' doctrine (and in particular where the last act relied upon was contended to be a reasonable action by the Respondent). In cases of cumulative repudiatory breaches of trust and confidence, subsequent misconduct or a last straw can 'revive' earlier acts which it appeared were affirmed/waived. In the normal case where an employee claimed to have been constructively dismissed, it was sufficient for a tribunal to ask itself: What was the most recent act that the employee said had caused their resignation? Had the employee since affirmed the contract? If not, was the act by itself a repudiatory breach of contract? If not, was it nevertheless part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence? Did the employee resign in response to that breach? (paras 42-46, 52, 55).

## Conclusions

### Protected disclosures

84. The Claimant asserts that she made three protected disclosures in respect of the fake invoices:

    a. on 11 April 2016 a verbal disclosure by telephone call to Mrs Poulton and James Evans in the Respondent's Builth Wells office;

    b. on 17 October 2017 a verbal disclosure to Mrs Pratt in a face-to-face meeting in Crickhowell;

    c. On 5 December 2017 by making a formal written complaint to CCHQ

85. The Respondent concedes the third protected disclosure. The subject matter is the same for each, albeit each disclosure was made to a different category of person within ERA.

### First disclosure

86. We accept the Claimant's evidence about the content of the verbal disclosure of 11 April 2016 (C 4-15). Although her witness statement does not include the gist of the actual words she used, the circumstantial evidence is sufficient for us to accept her account that she relayed information as described in the pleadings at paragraph 6 – 10.

87. The Respondent accepts that the Claimant made contact with his staff in Builth Wells by telephone that day and that he subsequently spoke to the photographer with regard to the issue of the invoices [133]. His actions are consistent with the Claimant having divulged her concerns about the invoices in the way she describes in her witness statement.

88. Mrs Poulton does not recall the telephone call in question but we are satisfied that the purpose of the phone call was to discuss the fact that the invoice provided by the Respondent was not the same as that produced by the photographer. The Claimant's account is consistent with her subsequent written complaint to CCHQ and her police statement and is corroborated by the contemporaneous emails between her and the photographer [132].

89. We note the wording the Claimant uses in the police interview and in the written complaint to CCHQ is that she called the Builth constituency staff to "ask them if they knew anything about this?". This wording on its own would not necessarily be sufficient to amount to a disclosure of information

but teamed with the Claimant sending the Builth staff email proof of her discoveries, the Tribunal concludes that there was a disclosure of information.

90. The nature of the public interest appears to us clear; the proper and transparent use of public money and that an apparently forged document was being used to claim expenses. The Claimant had the requisite reasonable belief that the disclosure was in the public interest as it related to the expenses of a Member of Parliament and concerned, what the Claimant reasonably believed to be, a potential criminal offence.

91. The Claimant did not provide evidence or submissions as to the nature of failure to comply with a legal obligation relied upon with regard to the first disclosure. The Claimant did not provide evidence or submissions as to deliberate concealment with regard to the first disclosure.

92. The Tribunal concludes that the Claimant made a qualifying disclosure on 11 April 2016 under section 43B(1)(a) ERA. The disclosure was made to Builth constituency staff and relayed to the Respondent, as such we find that it was a protected disclosure made to the Claimant's employer under section 43C(1)(a) ERA.

**Second disclosure**

93. With respect to the 17 October 2017 disclosure to Mrs Pratt (C17), the Tribunal concludes that the relevant facts were relayed to Mrs Pratt as described by the Claimant. The purpose of the meeting was to relay information that in processing invoices for the Respondent, the Claimant discovered a fake invoice that did not match the original supplied by the photographer and to seek guidance with regard to the complaint procedure to CCHQ.

94. For the reasons already given above, we consider that this was a further verbal disclosure of information, which in the Claimant's reasonable belief was made in the public interest and tended to show a criminal offence had been committed.

95. Mrs Pratt was not the Claimant's employer, she was a County Councillor at the time in question. The Tribunal must therefore consider whether the disclosure was made in accordance with 43G ERA.

96. We conclude that the Claimant reasonably believed the information she disclosed and any allegation it contained were substantially true (s.43G(1)(b) ERA). That is evident from the Claimant's email correspondence with the photographer and her possession of the original and fake invoices.

97. We conclude that the disclosure was not made for personal gain (s.43G(1)(c) ERA). There was no evidence that the Claimant received a reward, financial or otherwise, by disclosing information to Mrs Pratt.

98. The Claimant had previously already made the disclosure to her employer, s.43G(1)(d) ERA and s.43G(2)(c)(i) ERA.

99. We conclude that in all the circumstances of the case it was reasonable for the Claimant to make the disclosure (s.43G(1)(e) and s.43G(3)). It was a matter relating to a Conservative party MP, that was being made to another party member also elected to public office, who was knowledgeable and able to offer advice on the code of conduct and how the disclosure should take place and the failure was serious - a crime for which the Respondent was ultimately convicted. Although the relevant failure was not continuing it may have re-occurred in the future. The disclosure did not involve a breach of confidentiality owed by the Respondent to another person and was being made to a fellow party member for the purpose of following the newly established complaints procedure. The Tribunal was not referred to any procedure for making disclosures to the Respondent (s 43G(3)(f) ERA).

100. The Claimant's evidence does not extend to an assertion that she made a verbal disclosure on 17 October 2017 to Mrs Pratt tending to show that information was being deliberately concealed. Similarly there was no evidence or submission with regard to the nature of the legal obligation.

101. The Tribunal concludes that the Claimant made a qualifying disclosure on 17 October 2017 under section 43B(1)(a) ERA. The disclosure was a protected disclosure under section 43G ERA.

**Third disclosure**

102. The third protected disclosure relied upon, on 5 December 2017 making a formal written complaint to CCHQ [157-160], is conceded as being a protected disclosure [105h].

**The Respondent's knowledge of disclosures and causation**

103. The parties to this claim never spoke directly about the subject matter of the protected disclosures.

104. The Respondent was aware of the content of the first disclosure made on 11 April 2016 to Mrs Poulton, as was evidenced by the actions he took following the call to speak with the photographer.

105. The Respondent says he was unaware that there was an ongoing issue after he took steps to speak with the photographer in April 2016. The Respondent asserts that the next point in time he realised there was an ongoing issue was upon receipt of the letter dated 5 February 2018 from Stephen Phillips at CCHQ [R2]. We accept the Respondent's evidence that this letter was posted to him and so was received by him on 6 February 2018 at the earliest.

106. We reject the suggestion that the Respondent was unaware of an ongoing issue until 6 February 2018. The Claimant emailed the Respondent on 16 January 2018 specifying that she was 'fully aware of his financial impropriety' regarding fraudulent invoices [169]. The Respondent must have known what was meant by that comment, in the absence of any other fraudulent invoices, and so from 16 January 2018 we find he was aware that the issue was still a live one for the Claimant.

107. It will be rare for there to be overt evidence of a causative link in such claims and it is noted that the causation test is a relatively low bar. We were invited by the Claimant to infer a causative link from established facts. We address her submissions as follows.

108. The Respondent's knowledge of the issue was ongoing from 11 April 2016. The Respondent invited the Tribunal to accept that he had forgotten about the issue as he believed it was dealt with. The Claimant invited us to reject that evidence, submitting that the Respondent must have known because various senior Conservative party members knew about the issue and its progression. We reject that submission by the Claimant. The individuals within the Conservative party who knew the issue was progressing were Mr Williams, Mr Rhydderch-Roberts and Mrs Pratt. There is no evidence before the Tribunal that any of those individuals disclosed the progression of the complaint to the Respondent and we find it highly unlikely that they would have done so in the circumstances. In particular we take into account the personal animosity between Mr Rhydderch-Roberts and the Respondent, evident from the emails between them. Furthermore the Claimant herself said that Mr Williams tried to persuade her not to bring a complaint (message to Mrs Pratt of 28 November 2017 [150]), so it seems even more unlikely that the officers of the Association would have disclosed what she intended to do.

109. The Claimant submitted that, as a politician, the Respondent would have approached disagreements with her with one eye to any "skeletons in his closet" and as such his treatment of her from 11 April 2016 would be more than trivially influenced by the first protected disclosure. Due to the passage of time from the first disclosure to the meetings about the Claimant's hours in August and November 2017, we are not persuaded these actions were influenced by an event that occurred more than a year

before. We consider it is relevant that the Claimant never spoke directly to the Respondent about the issue and that the period of time between the Claimant's first disclosure and her report to CCHQ was 20 months. The elapse of such a long period of time may well have led the Respondent to believe that there was no ongoing issue. We do not accept that the elapse of such a considerable period can be fully explained by intervening election campaigns and lost emails.

110. The Claimant submitted that we should draw inferences from the way in which the Respondent gave his evidence, his credibility and comments made in his correspondence.

111. We are cautious of placing too much emphasis on credibility as a factor. Witnesses can be lacking in credibility on one issue but credible on another.

**112.** Dealing with the Respondent's letter of 22 February 2018, the Respondent's reaction, when notified of the formal complaint to CCHQ, was to suggest that the complaint was malicious, presumably to deflect blame from himself [173]. The assertion that the Claimant made the complaint to 'delay dismissal' is unfounded, as the Respondent had not brought to the Claimant's attention any basis on which he could have commenced disciplinary proceedings for dismissal. The Respondent's letter says that no complaint had been raised against him previously by an employee; this assertion did not provide a full picture (although the Respondent was not a party to a previous Tribunal claim, there were allegations made against him by another former employee of the Association). That the Respondent was less than candid in the letter of 22 February 2018, is not sufficient basis upon which to infer causation in the whistleblowing claims. We consider the Respondent's response seeks to deflect blame and this appears to be his reaction to accusation on more than one occasion; e.g. unnecessary 'tit-for-tat' points appear in his email of 18 January 2018 ('blanking me in the street' and 'your very turbulent personal life'). Returning to the letter of 22 February 2018, we were referred to a phrase used by the Respondent "I find a complaint lodged for financial reasons and improper behaviour to staff very distressing at the very least". We accept the Respondent's evidence that this was a reference to the nature of the complaint lodged against him; we do not consider it reads as an allegation that the Claimant made the complaint for her own financial gain.

113. The Claimant submitted that we should take into account the Respondent indicating an intention to dismiss the Claimant in correspondence as a true indicator of his mindset. Having read it, we are of the view that the Respondent's replies are tit-for-tat in nature; when the Respondent is criticised (by Mr Rhydderch Roberts) or an accusation is

made (by the Claimant) he responds in kind. The Respondent's correspondence is unnecessarily unpleasant at times but we do not think that is sufficient basis to infer causation in this case.

114. The Claimant referred us to the fact that Mr Williams engaged a computer expert to retrieve missing emails from the Association computer after May 2017, when she was elected as a County Councillor, and suggests that it would be improbable that the Respondent would be unaware that this was happening. The Respondent denies any knowledge of the computer expert being engaged. There is no evidence to suggest that the Respondent was aware. The Association computer was kept at the Brecon constituency office. The Respondent spent a large part of his time in Westminster and, when back in his constituency, split his time between the Brecon and Builth constituency offices. He was not present in Brecon on a regular basis. Additionally, in light of the strained relations with officers of the Association and their reluctance to raise a formal complaint to CCHQ, we conclude it likely that the Respondent was unaware that a computer expert had been engaged for this purpose.

115. The Claimant submits that we should take into account the timing of matters occurring close to events which would have triggered the Respondent's memory of the first protected disclosure. The submission relies, in part, upon the Tribunal being persuaded that the Respondent was aware of key events at particular points in time. We are not persuaded of the following. We find that the Respondent was not aware of the computer expert search for deleted emails at the time he reduced the Claimant's hours on 9 August 2017; there is no evidence that the Respondent was aware of the Claimant's meeting with Mrs Pratt on 17 October 2017 at the time of the meeting of 3 November 2017; we accept the Respondent's evidence that he was not aware of the formal complaint to CCHQ until receipt of Mr Phillips letter on 6 February 2018 (and so the Respondent was not aware of the formal complaint when raising the issue about Radnor Hills Water donation on 4 January 2018).

116. It is possible that the Respondent was aware of the formal complaint from CCHQ, when Mr Mackinnon accessed the Association computer in the Brecon office and sent emails from the Association email address on 6 February 2018. However there is no evidence that the Respondent instructed Mr Mackinnon to carry out those actions. We do not consider that the proximity in the timeline is sufficient basis to infer causation; the content of the emails does not lead us to conclude that they were sent at the instruction of the Respondent.

117. The Respondent viewed the Claimant's personal documents file saved on the Association computer and checked sent emails whilst she was on sick leave, after he received the email of 16 January 2018 in which

the Claimant referred to knowledge of his financial impropriety regarding fraudulent invoices. Although the Claimant did not mention the formal complaint in the email of 16 January 2018, the Respondent must have known what the Claimant was referring to when she mentioned the fraudulent invoices. It is particularly striking that the Respondent made no mention of this matter in his reply to the Claimant; we infer from that omission that the Respondent fully understood what the Claimant was referring to.

118. The Tribunal concludes there was another reason, entirely unconnected to the whistleblowing disclosures, to explain poor working relationships between the parties; the Welsh Assembly election candidate in May 2016. The Claimant and her witnesses referred to the selection of this candidate being highly divisive; "since the assembly election campaign in May (2016) the Claimant's work relationship with the first Respondent was very difficult because she could not support the Assembly candidate deemed by many people in the local party to be a divisive character and not the right candidate for the Welsh Assembly elections. The Respondent was supporting this candidate and treated the Claimant very badly and his staff followed suit **because she would not support the choice of candidate**." (Paragraph 30 particulars of claim [17] – our emphasis). This reason is also referred to by the Claimant in her Response to Further Particulars dated 25 June 2019 [105 p] point 14 "The Respondent's attitude towards me started to worsen following the Assembly election in 2016 etc..".

**Detriments/breaches of the implied term of trust and confidence**

119. The Claimant asserts the following as whistleblowing detriments and breaches of the implied term of trust and confidence, both individually and cumulatively.

**From April 2016 the Respondent hardly speaking to the Claimant**

120. The Tribunal was not presented with evidence to support this allegation. The Respondent denies it. The Respondent worked remotely from the Claimant in different locations. The Claimant was invited to social events such as Christmas parties but elected not to attend all but one. This allegation is dismissed as it is not factually established.

**The Respondent's employees ignoring the Claimant, unfriending her on Facebook and ostracising her at the Royal Welsh Show**

121. We refer to our findings above. There was no evidence of the Respondent's employees deliberately ignoring the Claimant.

122. We do not consider there was intention to deliberately cause upset to the Claimant at the Royal Welsh Show. The Claimant may have perceived actions on that day, through the lens of differences within the party stemming from issues concerning Gary Price's selection (as the Claimant herself suggests at point 20 of her response to further and better particulars from the Respondent dated 25 June 2019 [105r]).

123. Furthermore that day the Claimant was told that the Respondent was seeking to reduce her hours. This upset her and may also have affected her perception of events.

124. These allegations are dismissed as they are not factually established and/or lack the necessary qualities of detriment. The actions do not amount to a fundamental breach of contract.

**On 9 August 2017 reducing the Claimant hours from 18 to 10 per week and telling her she was 'unreliable'**

125. The way in which the Respondent imposed the contractual change at the meeting was in breach of trust and confidence. Factors leading us to this conclusion are that there was no warning as to the purpose of the meeting, the Respondent called the Claimant 'unreliable', the change in hours was imposed without consultation and against the Claimant's wishes.

126. However, we are not persuaded that the Respondent was motivated by the first protected disclosure which took place 16 months previously. There was no formal complaint to CCHQ at this time and the parties had continued to work together for more than a year without mention of the fake invoices between them.

127. The Respondent's reasons for imposing the change to hours were that office systems were now in place such that there was insufficient work to fill 18 hours per week, he also felt that the other calls on the Claimant's time were affecting her ability to commit to her duties as she had previously (R20-21, 24). We think it likely that the Respondent was in part motivated by the schism within the party between those who had supported Gary Price and those who did not. In reaching the latter conclusion, we take into account the Claimant's pleadings.

128. Whilst the Respondent went about changing the Claimant's hours in a way that was in breach of contract, we accept his reasons for changing the Claimant's hours were unrelated to the first protected

disclosure. The Respondent calling the Claimant 'unreliable' was a feature of his brusque style; it was an unpleasant thing to say but we do not find it was caused by the first protected disclosure. The complaint of whistleblowing detriment is dismissed.

**On 3 November 2017 the Respondent criticising and bullying the Claimant; stopping the Claimant having a representative (Jonathan Reeves) present at the meeting**

129. The meeting was not set up in a formal manner with notice; thus the question of a companion was not raised in advance or discussed directly between the parties.

130. We are not persuaded that the Respondent stopped Mr Reeves from attending the meeting. We did not hear evidence from Mr Williams or Mr Reeves and so could not consider the latter's evidence about his understanding of the reasons for attendance. Mr Reeves previously attended prior to the meeting on 9 August 2017 and did not stay for the meeting itself; it is possible that he believed this was his remit again.

131. Even if the Respondent had stopped Mr Reeves from attending, we do not consider that was motivated by either the first or second protected disclosure. The first disclosure was, by then, 19 months old and the Respondent was not aware of the second disclosure.

132. The non-attendance of Mr Reeves at the meeting was not a breach of the implied term of trust and confidence.

133. The way in which the Respondent conducted this meeting was unnecessarily confrontational, he concedes that he was 'robust' with the Claimant when challenging her on the issue of her pay and other matters of concern. We consider that the Claimant responded in kind and was similarly robust with the Respondent. However it was not appropriate or necessary for the Respondent, as an employer, to have approached the conduct of the meeting in the way that he did.

134. The Claimant had the support of Association officers, whom she reported events to after the meeting. The email from Mr Rhydderch-Roberts indicates that the Claimant was upset by the meeting, although we take into account the ill-tempered nature of relations between Mr Rhydderch-Roberts and the Respondent may have influenced how he reported matters to the Respondent. We find there is sufficient evidence from the Claimant and in contemporaneous emails to support a finding

that the way in which the meeting was conducted was in breach of the implied term of trust and confidence.

135. We do not consider that the Respondent was influenced by the first disclosure, rather this conduct was a continuation of the deterioration of the relationship between the parties for other reasons set out above. The complaint of whistleblowing detriment is dismissed.

**Not giving the Claimant personal alarm**

136. We do not consider that this was the decision made by the Respondent. Further, we do not consider that any interaction between the Claimant and Mrs Poulton about alarms was at the direction of the Respondent.

137. This allegation is dismissed as it is not factually established.

**Using a complaint from central office about a donation from Radnor Hills Water to undermine the Claimant**

138. We conclude that the Respondent did use this issue to seek to undermine the Claimant. It was not necessary for the email to be sent to four officers of the Association in the terms that it was. The prejudgment as to the seriousness of the issue and its outcome was unnecessary and premature (and as it turned out, incorrect). By describing the issue as more serious than one pertaining to himself, the Respondent was gratuitously undermining the Claimant combined with signing off the email asserting that the situation was ‘completely avoidable’.

139. We reject the suggestion that the Respondent was not criticising the Claimant because she was not named. It was part of the Claimant’s job to register donations. The clear implication of the email was that Respondent believed the Claimant to be at fault and that her actions would lead to a fine.

140. We consider that sending the email in these terms was a breach of the implied term of trust and confidence; it undermined the Claimant by sending critical opinions on her work standards to her other employer.

141. We do not consider that this action was caused by the protected disclosures as we are satisfied that the Respondent was unaware of the second and third protected disclosure at this stage and we are not persuaded that the action was influenced by the first protected disclosure, which, by then, had taken place almost 2 years ago. The whistleblowing detriment complaint is dismissed.

**The Respondent accessing the Claimant's personal files on the Association computer; on 6 February 2018 Mr Mackinnon sending emails from the Association email account including emails that were dishonest / trying to build a case against the Claimant**

142. The Claimant became aware of Mr Mackinnon's emails on 6 February 2018 when she attended the Brecon office. Mr Mackinnon's emails were not sent to the Respondent but to his staff, Mrs Poulton and Ms Mills. There is no evidence that the Respondent instructed Mr Mackinnon to send the emails and the content does not suggest the same. In any event we do not consider the content of the emails to be such that they could reasonably be perceived as detrimental. Mr Mackinnon was reporting the state of the office as he found it to be after the Claimant's absence for several weeks; we do not consider the emails to be 'dishonest', nor do we think there was an attempt to 'blacken' the Claimant's name or build a case against her. At worst Mr Mackinnon's email may have exaggerated what he had found; on reflection he accepted that he was wrong about the mouse being unplugged. We do not understand his comment 'I feel the power'; the explanation given makes little sense to us but we do not consider it has the negative connotation the Claimant ascribes to it. Rather it appears to us to be a flippant, throw away comment. It follows that we do not consider that there was any fundamental breach of contract (nor that the Respondent was even aware of Mr Mackinnon's actions).

143. We do not consider that there is evidence that Mr Mackinnon was aware of, let alone motivated by, any of the protected disclosures; the emails were sent on the earliest day that the Respondent became aware of the third protected disclosure but we are not satisfied that the Respondent influenced Mr Mackinnon in his actions. In any event, in our view, the content of the emails are insufficient to amount to a detriment.

144. The Claimant was informed on or around 6 February 2018, by Mr Williams, that he had heard that the Respondent's staff had accessed her personal files (C45). The Claimant asserted in her particulars of claim that James Evans and Ms Mills had accessed the Association computer and her personal documents [19 – paragraph 46]. In fact, the Respondent admitted that he accessed emails sent by the Claimant from the Association email account and personal documents on the Association computer, whilst the Claimant was on sick leave (R33 and 45).

145. The Respondent accessed two emails sent by the Claimant to an individual seeking repayment of a personal loan, sent in September 2017 and December 2017 [156]. The Respondent also found a letter dated August 2017 of a personal nature [206-7] saved in a folder on the computer desktop. We consider that the Respondent must have spent some time looking through emails and documents to locate the ones referred to above, due to the passage of time since their creation.

146. The Respondent has not put forward a cogent explanation for looking through the emails and documents; he asserted he was entitled to do so because the computer was one that he paid for. In fact the computer was the Association's and had been in the office before he was elected. Any running costs that he contributed to would have been minimal. The Respondent knew the work relationship with the Claimant had soured, particularly following the email of 16 January 2018. The Respondent was likely looking for something that he could use to his advantage in his dealings with the Claimant.

147. The Claimant cannot have had a legitimate expectation of privacy when using the Association email account; it was not her personal account, nor was it one set up in her name or for her sole use by the Association – it was a generic email address. Despite the Respondent's motives we do not consider accessing the email account as being in breach of trust and confidence. However it must have been obvious to the Respondent that the document [206-7] of August 2017, found in a file on the desktop, was of a deeply personal nature, yet he accessed it, printed it and disclosed it in preparation for this Tribunal hearing.

148. We consider that the Respondent's actions with regard to the personal document of August 2017 were in breach of trust and confidence when viewed in the context of preceding events.

**149.** The Claimant was made aware contemporaneously that personal documents had been accessed, although she was not aware which personal document had been accessed until after her resignation, when disclosure took place and she saw the document on 26 January 2019. The Claimant cannot have had in her mind that the Respondent had accessed the personal document of August 2017 when she resigned (rather her understanding was that staff of the Respondent had accessed unspecified personal files).

150. As for whistleblowing detriment, the Respondent has not established that the first protected disclosure had no material influence on his actions. The Claimant made the first protected disclosure a considerable period of time previously, but refreshed the Respondent's memory of the incident by sending her email of 16 January 2018. Her

reference to fake invoices must have brought to the Respondent's mind the first protected disclosure. The fact the Respondent neglects to reference this at all in his email reply of 18 January 2018, persuades us that he was clear about what the Claimant was referring to; it was obvious.

151. We consider the Respondent's actions in accessing emails and personal documents were materially influenced by the first protected disclosure. On balance we consider that the Respondent was concerned about what the Claimant might do in respect of the subject matter of the first protected disclosure and was looking for information that might assist him. We consider that accessing the Claimant's personal documents amounts to a detriment; the Claimant reasonably perceived the action as a detrimental to her and a breach of privacy. Even when using a work computer, the Claimant has a legitimate expectation of privacy in respect of documents which are obviously personal in nature.

152. The detriment complaint is brought out of time and is dismissed for lack of jurisdiction. The test is whether it was reasonably practicable to bring the complaint within 3 months. For the reasons given below, in our conclusions on affirmation, we do not consider that it was not reasonably practicable for the Claimant to bring the claim in time. This is a fairly strict test, akin to what is reasonably feasible. The Claimant has not provided evidence that she was incapacitated from bringing a claim within the relevant period.

**The Respondent's letter of 6 April 2018 trying to force the Claimant out whilst off sick**

153. After the Claimant had been absent from work, with a fit note for 3 months, the Respondent wrote to invite her to an informal meeting to discuss her return to work. The meeting was proposed for a date which fell after the fit note expired. It was written following advice from the HR team at the House of Commons.

154. The Claimant accepts that there is nothing objectionable on the face of the letter or in its content. We agree; it appears to us to be a model letter of the type we would expect to be used with an employee who is absent on long term sickness and with whom the employer is attempting to arrange a back to work / welfare meeting. It invites suggestions for adjustments and makes it clear the meeting is informal (not formal, as the Claimant asserted) but that if she wished the Claimant could bring a companion.

155. The Claimant submits that we need to consider the impact of receiving such a letter from the Respondent in light of their history and that the different tone of the letter from previous correspondence was

indicative that it was false and simply a move to exit her from employment. We were also invited to conclude that it should have been written by someone else and the return to work meeting should have been held with someone other than the Respondent.

156. It is correct that the tone of previous correspondence from the Respondent was at times inflammatory and gratuitous (such as comments in his email of 18 January 2018). However we do not think the fact that the Respondent sought advice and wrote an appropriately worded letter was reasonable grounds for belief that he was attempting to exit her from employment. Seeking advice on how the letter should be worded and how to make arrangements for a return to work meeting was a positive development.

157. We reject the suggestion that the letter of 6 April 2018 should have been written by someone else and that the meeting should have been conducted by someone else. The Claimant had not indicated that she could not correspond with the Respondent and had emailed him directly herself. The letter was appropriate in content and timing and was sent by the Respondent as her employer. It offered assurance to the Claimant in that she could bring a companion and the meeting was informal in nature. We do not think the Respondent can be criticised for sending such a letter on HR advice; the Claimant was into her third month of sickness absence, without indication of when she might return. Mr Williams had told the Respondent that she did not intend to return. The Claimant had informed the Respondent that she would not resign. The situation could not simply be left to continue without some contact. The Respondent could equally have been criticised had he not written to the Claimant in the circumstances.

158. We do not consider the letter was a breach of trust and confidence; neither of itself nor in culmination with the acts that preceded it.

159. The reason the letter was sent was because of the Claimant's long term absence; we do not consider it was materially influenced by the protected disclosures nor could it be reasonably be considered as a detriment.

**Constructive unfair dismissal**

160. The incidences which the Tribunal finds were in breach of contract are: the way in which the Respondent conducted meetings with the Claimant on 9 August 2017 and 3 November 2017; the Respondent's email to officers of the Association about the Radnor Hills Water donation on 4 January 2018 and the accessing of her personal documents on the

Association computer, which she became aware of in or around 6 February 2018.

161. For the reasons given above, we do not consider that the "last straw" relied upon, the letter of 6 April 2018, contributes to events that preceded it so as to revive earlier breaches of contract.

162. The Claimant agreed to continue working under the amended contract after 9 August 2017, thereby affirming the breach of the implied term of trust and confidence at that meeting. Similarly, the Claimant continued working after the 3 November 2017 meeting, for more than 2 months, again affirming the contract after the breach at the latter meeting.

163. The next breach of contract arose on 4 January 2018 but on 16 January 2018 the Claimant specifically affirmed her contract stating that although she felt her job was untenable due to a breakdown of trust "*because I do not feel that I've done anything wrong I am not going to resign. Instead, I have consulted with a doctor… who signed me off work for a period of four weeks*." At the time of writing, the Claimant was aware of the possibility of a constructive dismissal claim, she referred to it in her messages to Mrs Pratt in November 2017. The Claimant took 11 days, from discovery of the Radnor Hills Water email on 5 January 2018, before sending the email. This decision was taken after a period of time sufficient to reflect on how she would respond to the breach; it was not taken in the heat of the moment. The Claimant made an unambiguous election in her email to affirm the breaches of contract arising prior to 16 January 2018.

164. The only acts relied upon arising after 16 January 2018, were the accessing of personal documents and the letter of 6 April 2018. The Claimant was not aware at the point of her resignation that the Respondent had accessed the particular letter of August 2017 [206]. The Claimant did not act upon the information from Mr Williams, telling her about staff accessing personal documents, on or around 6 February 2018. The Claimant's resignation letter of 9 April 2018 [181] makes no reference to staff accessing her personal documents or the emails sent on 6 February 2018 that she found.

165. Although the Claimant was unwell in the period January to April 2018, she was not totally incapacitated. She was able to send emails (e.g. of 16 January 2018 to the Respondent and 7 February 2018 to Mr Williams and Mr Rhydderch-Roberts) and have meetings (with Mr Williams on or around 26 January 2018) and attend the Brecon constituency office on 6 February 2018. We consider that the breach in accessing her personal documents was affirmed in the 2 month period from 6 February 2018 to her resignation. Although she was not working and the affirmation test is not simply one of the passage of time, we conclude she has

affirmed the contract by her inaction. She made no complaint about nor even mentioned the issue in February or March. We consider that she chose to do nothing with the information from Mr Williams and thereby affirmed the breach. She could have complained to the Respondent or CCHQ and was not incapacitated from doing so. In any event we do not consider that the accessing of her personal documents was a reason leading to her resignation, the Claimant had already decided to leave as she had indicated to Mrs Pratt and Mr Williams. The resignation letter does not refer to it, despite being a fairly recent event.

166. The letter of 6 April 2018 from the Respondent to the Claimant was appropriate in terms of its content and sending the letter upon HR advice was a reasonable course of action.

167. The Claimant did not wish to return to work after the expiry of her fit note. In light of her affirmation and there being no subsequent act capable of reviving earlier breaches, we find that the Claimant's resignation was not because of a repudiatory breach of contract.

168. The complaint of constructive unfair dismissal is dismissed.

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Employment Judge S Davies
Dated: 16 January 2020

JUDGMENT SENT TO THE PARTIES ON

……16 January 2020…….

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS