Case Number: 1601775/2019

EMPLOYMENT TRIBUNALS

Claimant: **Miss P Newcombe**

Respondent: **Machynlleth Town Council**

Heard at: **By Video Link** **On: 13 and 14 October 2020**

Before: **Employment Judge R Powell**

Representation:
Claimant: Mr Hanratty, Solicitor
Respondent: Ms Zakrzewska, Legal Consultant

REASONS

The Claim

1. By a claim dated 3 October 2019 Miss Newcombe, who I will now call the Claimant, alleged that she had been unfairly dismissed from her employment with the Respondent.

2. In Section 8.2 of the claim form she alleges that she had been forced to change her hours on the grounds of health and safety, threatened with termination of employment to force her agreement to a in her s of work and that a member of the Respondent's management had produced a falsified version of her employment contract.

3. She then complains that in early 2018, the Respondent's new Town Clerk, Mr. J Griffiths, was asked to consider a grievance that the Claimant had brought against the acting as Town Clerk, Mrs. Lumley, and that Mr. Griffiths concluded, without investigation or a grievance hearing, that there was no case to answer in respect of that grievance and ignored her appeal and later complaint.

4. The Claimant then asserts she suffered increasing ill health including panic attacks and asthma which led to substantial sickness absence in the autumn of that year. In February 2019, she became aware of a letter that Mr. Griffiths had written to her General Practitioner on 7th December 2018. In that letter the Respondent set out “Information” which went far beyond that which was necessary for request for a medical opinion. It included allegations about the Claimant’s alleged dishonesty, alcohol intake and the relationship with her partner. None of which, the Claimant alleges, were disclosed with reasonable and proper cause by her employer.

5. The Claimant presented a grievance in relation to a letter and it is alleged that the Respondent, in breach of its grievance procedure, determined the merits of the grievance without investigation, speaking to the Claimant or indeed informing the Claimant that such a determination was to take place.

6. The Respondent subsequently offered to reconsider that grievance process and for a period the Claimant was prepared to go along with that, but ultimately by 9th May 2019 she decided not to do so, not least because she alleges the Mayor, who was the most senior member of the Council had been party to the decision to reject her 7th February grievance without a hearing, was one of the councilors to reconsider that decision.

7. The Claimant then received a request to provide permission for her medical records on 20 May which she describes as the last straw and she resigned from her employment by letter dated 6 June 2019.

The Response

8. The Respondent denies the claims, it denies that the conduct of its officers was without reasonable proper cause. It denies that the conduct, whether as individual acts or cumulatively, was repudiatory and it denies that the conduct of the Respondent, as alleged by the Claimant or otherwise, was the effective cause of her resignation. Furthermore, it asserts that, by reason of the time which the Claimant remained an employee, the Claimant had affirmed the contract.

The Legal Matrix

9. Section 95(1) of the Employment Rights Act 1996 states for the purposes of this part an employee is dismissed by his employer if (and, subject to sub section 2(c) the employee then 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.

10. I note that lawful conduct is not something that is capable of amounting to repudiation and therefore conduct cannot be repudiatory unless it involves a breach of contract ***Sparfax Limited -v- Harrison*** **[1980] IRLR 442** Court of Appeal.

11. In this case, although not perhaps express in the Claimant's initial pleading, it is in my judgment, absolutely clear that the relevant term of the Claimant's contract which she alleges the Respondent breached is the implied term of trust and confidence.

12. The implied obligation of mutual trust and confidence in employment contracts requires that the employer shall not "without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employee/employer". This is a definition which has been cited in cases such as ***Malik -v- BCCI, Woods -v- WM Car Maintenance Services, Imperial Group Pension Trust -v- Imperial Tobacco*** and ***Lewis -v- Motorworld Garages Limited*** all of which are well known to the experienced practitioners who have assisted the parties today.

13. The implied obligation is formulated to cover a great diversity of situations and a balance has to be struck between the employer's interests in managing the business that they run as they see fit, and the employee's interests in not being unfairly and improperly exploited. It is a mutual obligation though it seems that implied terms adds little to the employee's implied obligations to serve his employer loyally.

14. In assessing whether there has been a breach it is clear that what is of significance is the impact of the employer's behaviour on the employee rather than that which the employer intended, ***BG PLC -v- O'Brien*** **[2001]**.

15. The burden lies on the employee to prove the breach on the balance of probabilities, this means that the employee must prove the alleged act or omission, and the employee must prove that the employer's conduct was without reasonable and proper cause.

16. The test whether such proven conduct, in the absence of reasonable and proper cause, amounts to a breach is said to be severe; ***Gogay -v- Hertfordshire County Council*** **[2000]**

17. It is not enough for the employee to prove the employer has done something which is simply in breach of contract, or "out of order", or perhaps unreasonable. She must prove that the degree of breach was sufficiently serious, or calculated, to cause such damage that the contract can be fairly regarded as repudiatory and that repudiation accepted. The cases of **Croft *-v- Consignia PLC*** and ***The Post Office -v- Roberts*** both indicate that the quality of the breach must be substantial.

18. Those cases along with ***Lewis*** also indicate that a repudiatory breach may be formed of the cumulative effect of a number of incidents which of themselves, in isolation, may or may not be repudiatory.

19. I lastly note two more cases, the first is ***Olandu -v- The London Borough of Waltham Forest*** which directs me that the "final straw" need not of itself be a repudiatory breach or unreasonable or blameworthy conduct but it must have a degree of fault. Thus, entirely innocuous behaviour cannot sensibly be viewed as adding any weight to the accumulation of potentially repudiatory behaviour and therefore not be the final straw.

20. Lastly, I note that in cases where a final straw is alleged but not proven, what matters is the Employment Tribunals findings of fact. If the Tribunal has concluded that the repudiatory breach existed prior to the "final straw" then it matters not whether that final straw is proven.

21. However, if the final straw is not proven, it will be important to analyse the Claimant's conduct in the period following the last incident which is found to have contributed to a cumulative breach; it is likely to be a material consideration in respect of any question of affirmation.

22. I then turn to the issue of affirmation, in particular I have guided myself in accordance with the case of ***W E Cox Toner International Limited -v- Crook*** **[1981] IRLR 443** and ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121***. Deciding to resign is for many, if not most, employees is a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to them in their community. Their mortgage, regular expenses, may depend upon it and economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to

decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

23. I have also reminded myself that cases such as ***Bashir v Brillo Manufacturing Co [1979] IRLR 295*** and ***El Hoshi* v *Pizza Express ltd [2004] EAT*** do not establish any general principle in law with respect to the respect of receipt of sick pay and affirmation. They are explicable on their particular facts.

24. I remind myself that the effective cause and it does not need to be the sole or dominant cause in the case of ***Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493.***

25. If the Claimant were to establish that she resigned in response to a proven repudiatory breach of contract then I must go on to consider whether the reason for her constructive dismissal was a potentially fair one. That requires me to determine what were the set of facts or beliefs held by the employer at the time of the dismissal ***Maund -v- Penwith District Council [1984] ICR 143***.

<u>The Evidence</u>

26. Turning then to the evidence, I have had the benefit of considering the statements of Miss Newcombe which ran to 13 paragraphs. I had the statement of Mr. James Owen Griffiths the Respondent's Town Clerk from January 2018 and the statement of Mrs. Julie Humphries an employee of the Respondent who, in the latter part of the relevant time, took charge of some aspects of the management of the Claimant's sickness absence.

27. I have also considered a bundle which runs to 265 pages. I have considered those documents that were referenced in the course of evidence and in the course of submissions (whether by myself or others).

28. I make the following findings of fact based on the civil standard of proof and reminding myself that it is for the Claimant to discharge the burden of proof to establish (a) the act or omission and (b) that such act or omission was without reasonable cause.

29. On the balance of probabilities, I find the flowing facts to be proven.

30. The Respondent is a town council with a small management team taking responsibility for the day to day management of its staff.

31. The Respondent had a written grievance procedure which went through a series of iterations. It is common ground between the parties that the pertinent terms of that policy relevant to this case, remained the same even if there were a variety of modes of expression.

32. The grievance procedure had the following steps: (a) an informal procedure (b) a formal procedure managed by the employee's line manager and (c) where an employee's complaint was made against their Line Manager, a "Step 2" procedure which was to be undertaken by Councilors, as they were the persons senior to the town clerk in the Town Council.

33. . The procedure states that it incorporates the Acas Code of Practice on discipline and grievances. The essential stages of the Respondent's process are:

a. That there should be an investigation.
b. There should be a meeting with the employee, with a minute taker present,
c. The employee can be accompanied by a colleague or a Trade Union Official.
d. The meeting held will discuss the grievance in detail and the employee should take along any documents or evidence they have regarding the grievance to that such a grievance meeting.
e. That the designated Line Manager will complete a full investigation in the matter and that may involve holding additional meetings with witnesses, requiring witness statements to be produced and reviewing documentary evidence.
f. A decision will be taken by the designated Manager following the investigation and the grievance will be responded to in writing, normally within 5 working days of the meeting being held.
g. The employer will be informed of actions to take if they wish to appeal the outcome.
h. Minutes of the meeting will be taken, copies of which will be made available to the employee.
i. Stage 2 requires the same process to be adopted but in this case, rather than a designated Manager, it is conducted by a committee made up of Councilors.

34. There is a considerable degree of common ground as to the character of much of what I must consider because a good part of the case it is well documented. There is also considerable common ground as to

the character of the 2017 contractual variation proposal and the character of the 2018 contract amendment.

35. The Claimant commenced employment with the Respondent on 7th May 2013. Throughout her employment she worked as a cleaner without any problem; working at the Respondent's premises known as Y Plas.

36. The Claimant's working hours were 6.30am to 11.00am and she worked those hours across a 5 day week. I have considered a copy of the Claimant's annual appraisal and find that there were no issues with her performance and there were no pertinent issues of dispute between the Claimant and any other person until matters of concern arose in late 2017.

37. On 24 November 2017 the Respondent wrote to the Claimant indicating an intention to make changes to the Claimant's contract of employment. The first change proposed an alteration to her job description, principally in respect of the time when the Claimant worked. The Respondent asked the Claimant to work between 4.00pm and 9.00pm each day, Monday to Friday. The rationale for that proposed change was a reduction in the disruption to hirers and visitors at Y Plas and with an associated health and safety benefit; visitors would be less likely to trip over vacuum cleaner cables or to slip on freshly washed floors.

38. A further letter was sent to the Claimant dated 5 December 2017 which stated that in that period a consultation was to commence on that date and would run for 30 days. The Claimant was invited to send her responses to the proposed changes no later than 5 January 2018 and she was informed that she could request a meeting through the Acting Town Clerk and be accompanied by a Trade Union Official or friend.

39. Within the bundle there is evidence a substantial debate between the Claimant, assisted on occasion by her partner, with respect to the benefits or otherwise of altering her working hours from morning to evening. There were disputes over the relative improvement in health and safety that were offered by such changes and there were repeated concerns over lone working and the assessment of risk, but the matter was in my judgment eventually resolved by a decision by the Respondent not to ask the Claimant to change her working hours and the adoption of a policy of lone working.

40. Insofar as the Claimant asserts that Respondent acted or failed to act by failing to hold consultation, I find that she has not established that fact on the balance of probabilities. Had she done so, in my judgment what was undertaken by the Respondent at that time (with regard to a proposal to change the hours) was with reasonable and proper cause for the following reasons (a) it was reasonable for the employer to consider matters of health and safety, (b) it is reasonable for the employer to ask an employee to change their working hours for health and safety reasons and it was reasonable for the employer to consult, but not necessarily agree with the views put forward by the consultee. In those circumstances, I do not find that the acts or omissions relating to the 2017 proposal are established.

41. I note also that the Claimant's says that she felt singled out. I have no evidence from any party to assist me to determine whether the Claimant's feeling was objectively correct. In any event, if she was the only employee whose hours of work were subject to a proposal for change, the Respondent's rationale appears to me to have been both sound and objectively reasonable.

42. I turn then to 2018. One aspect of the consultation process was the deterioration of the relationship between the Acting Clerk, Miss Lumley, and the Claimant.

43. On 6th April 2018 the Claimant wrote to the new Town Clerk, Mr. Griffiths, setting out a grievance against Miss Lumley wherein she asserted that between 24 November 2017 and early January 2018 she was in dispute with the Council over her terms of employment and then alleged that Miss Lumley took personal objection to the Claimant's refusal to accept the proposed changes, that Miss Lumley's attitude towards the Claimant changed during meetings, that their relationship became very awkward and uncomfortable, that she received a letter from Councilor A Jones which was not on headed paper and had no date on it which she found odd, that the Claimant been provided with a copy of a contract which was not her original contract and looked as if a copy of the Claimant's signature had been photocopied onto the contract, that the Claimant was excluded from the Town Clerk's office between 26 November and the completion of the consultation period. I will not set out every complain, as the content is recorded in the document at page 110 of the bundle.

44. The grievance process is documented from page 105 in the bundle. There is no dispute between the parties about the accuracy of the content of those documents, so I will simply note my relevant findings, as follows:

45. A meeting took place between Mr. Griffiths and the Claimant on 13 April in which there was a discussion of her concerns, towards the end of the meeting. the following was recorded;

"the clerk briefly described the process of sending a letter and a reaction, he also mentioned the good quality of Miss Lumley's work and possible recent stress, he said that he was intending to deal with it by giving a verbal warning and there would be no letter on Miss Lumley's file."

The "it" being the character of the Claimant's complaints in the grievance.

46. On 2 May Mr. Griffiths met with Miss Lumley and went through a process of asking her for opinions on the different allegations, Miss Lumley denied any difficulties in the relationship, she gave quite simple answers to a couple of the complaints and she denied any poor relationship.

47. It is notable that the record of her meeting does not appear to document an informal warning. Nevertheless, the outcome of this was set out in two letters, the letter at page 107 was to Miss Lumley which said that there was no formal action whatsoever following the investigation. It went on "it has become very clear over the last couple of months the workload imposed upon you in the recent past has had a detrimental cumulative effect and as an apology for the Council's conduct in that respect" and a further comment that as Miss Lumley had been sick during a week's leave the Council was providing Miss Lumley with an additional week's leave so she could have a holiday.

48. The response to the Claimant at page 108 states,

"having investigated the matter carefully I have concluded that sufficient changes have now been put into place that matters raised cannot happen again and that the changes to the policies of the Council and working practices changed enough to make a repetition of the alleged concerns highly unlikely. The Council will continue to implement the policies and procedures to help staff and employee alike. Miss Lumley was spoken to in the presence of her Union Representative and the outcomes are sufficiently robust to ensure the Council continues to improve its workplace protocols."

I note the word the alleged in respect of the Claimant's concerns.

49. It is certainly the case that the grievance outcome does not give any determination of the allegations as to their merit or otherwise.

50. I find, based on the content of a grievance that Miss Lumley had produced against the Claimant a year after this grievance, that the relationship between Miss Lumley and the Claimant was never restored. I further note that the Lumley grievance of 2019 refers to the poor quality of Mr. Griffith's investigation in the Claimant's 2018 grievance and that was as part of the cause for the continuing perception or anxiety that Miss Lumley felt (of a further complaint being made about her conduct by the Claimant).

51. Once the grievance against Ms Lumley had been completed the Claimant was informed of her right to appeal and by a document which is at page 109 in the bundle the Claimant wrote to Mr. Griffiths saying she wished to appeal. She noted that there was no time frame set in the policy and that her Trade Union Representative would be in contact with Mr. Griffiths.

52. Mr. Jones, the Claimant's trade union representative contacted Mr. Griffiths on 12 June and page 113 sets out the character of the exchange between them. Mr. Jones wrote:

"Hi Jim, is there any update on Pam's appeal? She's informed me that she hasn't heard anything."

53. Mr. Griffiths responded as follows:

"I have subsequently told her partner (Steve) (who does all her negotiations and writes all her messages) that the appeal needs to be in writing and what the grounds for the appeal are. The appeal surely has to be "in a reasonable time" (Acas) and it's usually about 5 days. I've not heard from her, him or her Union so I cannot give a progress report. I'm sorry as to her own admission the ball is in her court and I've not heard anything. Sorry. I'm minded that some of her actions are now seemingly vexatious in nature. I'm struggling not to deal with this matter as she is posting derogatory stories on social media and may fall foul of a disciplinary herself if not careful. Also, after a week sick (last week) she's miraculously better on a Friday night and was seen by all out on a "bender" in town posted all about this on social media too. She can't have the biscuit and the bun."

54. Page 226 shows a record of the Claimant's sickness absence and it shows that there was no sickness absence in the week prior to the 12th, but the Claimant had been absent between 29 May and 1 June. Page 121 shows the Facebook post to which the Town Clerk referred, it is dated Friday 3 June, in it the Claimant posted that she was sorry that she left early from the Friday evening out.

55. The claimant had made her appeal in writing and had done so within a reasonable time.

56. It is an extraordinary response to for a Trade Union enquiry on the progress of a grievance appeal to be met with an assertion that the Claimant is vexatious and may fall foul of disciplinary without her Line Manager having said any of this to the Claimant directly.

57. I note further that on considering the bundle and the witness statements, these matters were not subsequently raised by Mr. Griffiths to the Claimant.

58. On 21 June the Claimant's partner wrote to the Council addressing his email to Mrs. Humphries and Mr. Griffiths. In that email he asserted that there had been a breach of paragraphs 5(1) and 5(2) of the Respondent's policy on bullying and harassment at work [page 124].

59. The character of that complaint I will come to in a moment. Mr. Griffiths responded thus to the Claimant's trade union representative:

"I have the answer and it's not bullying. It was me who penned the question mark on the register as I needed to check with her Line Manager if the paperwork had been seen. Miss Newcombe is notorious for "throwing a sicky" and I needed an aide memoire to check procedures. For her to consider it bullying is beyond comprehension."

60. I find that on two occasions, once when a grievance appeal has been chased, and once when fresh complaint under a procedure of the Respondent has been raised, Mr. Griffiths has responded with assertions that the Claimant was in essence abusing the Respondent's sickness absence or other procedures.

61. Mr. Griffiths did not take any action in respect of the appeal or the bullying complaint made against himself. On the evidence before me, Mr. Griffiths did not communicate this complaint, or the appeal to his Line Managers during the Claimant's employment.

62. I have on considering the evidence, concluded that the two incidences of this behaviour are substantial failures to comply with the Respondent's procedures. Particularly with the bullying complaint, the inaction evidences a degree of self interest in Mr. Griffiths'' failures.

63. The documentary evidence demonstrates no reasonable or proper cause for those failings. The character of the failures is such that the

Claimant could discharge the evidential burden upon her unless the Respondent countered it and that depends much upon my assessment of Mr. Griffiths' evidence to which I will come later.

64. The 21 June complaint concerned an entry made by Mr. Griffiths on the employee signing in book for Y Plas. The photograph of that book was attached to 21 June email and, according to the content of Mr. Bevan's email, the photograph was taken on 21st June.

65. The picture shows the names and times of people "signing in" on 20th June. In evidence, Mr. Griffiths accepted that he had placed the question mark against the Claimant's entry (which had stated she was taking an hour or so off to attend a medical appointment).

66. In cross examination he was asked to agree that it was inappropriate to do so because the question mark was visible to other people who had signed in or out after the Claimant, who as we know, had started work at 6.30 in the morning. Further, the question mark was, in the context of Mr. Griffiths' prior emails, signaling his doubts about the reason for the Claimant's absence.

67. Mr. Griffiths denied that was true. He said the annotation would not have been written at a time or a place, where it would be visible to other people signing in or out, it was probably done in his office.

68. In my Judgment the photograph demonstrates that that Mr. Griffith's account is manifestly not correct. The photograph was taken the following day, it was something the Claimant herself saw and there are a series of hand written names and times of entry below the Claimant's own entry. I have concluded on the balance of probabilities that the annotation of the question mark was present and visible to other employees.

69. Mr. Griffiths has given evidence before the Tribunal in the same manner as his written response I quoted above; that Miss Newcombe was notorious for throwing a sicky. In my Judgment Miss Newcombe's "question mark" was a reflection of Mr. Griffiths' belief that the Claimant was not necessarily being honest when she had signed herself away from work for a medical appointment and this was an expression of his perspective of her, rather than, as he suggested, an aide memoire for a proper purpose of reconciling employee data or compliance with procedure. I find this conduct to be without reasonable and proper cause.

70. Following the lack of action taken by the Council with respect to her appeal and the complaint of 21 June, the Claimant started to suffer

from an increase in anxiety, part of which I consider stemmed from her upset that she had when , via her Trade Union Officer, received the two emails from her Line Manager accusing her of potential gross misconduct and "throwing sickies" and that subsequently whilst no formal contact was made with her in relation to those allegations.

71. Her increasing sickness led to a meeting to be held on 10 October 2018, which was noted by the respondent, in summary form at pages 130 – 132 in the bundle.

72. The purpose of this meeting was to consider the Claimant's recent history of sickness absence and the reasons for her absence.

73. I note that the Respondent's summary records that the Claimant's representative told the Respondent that the Claimant's most recent absence, on 6 October 2018, was related to stress.

74. The Claimant was asked (at the top of page 131) about the self-certification of her absence and her reference to "*she has sought a doctor's advice. We are just seeking clarification"* to which the Claimant confirms that she would be willing; *"I will go to doctor's for documentation."* Mr. Griffiths then stated he was concerned with *"this issue you keep bringing up, why you not coming to see me about what's going on. I want a happy workforce pulling together with a common aim"* to which Miss Newcombe says *"I don't trust anyone here. I never get any answers"* to which, a few lines later, Mr. Griffiths says; *"you need to take control of your feelings*".

75. She then goes on *"does not make feel she can let Jim know*" (that being Mr. Griffiths) "*as she feels that he thinks she is a troublemaker"* to which Mr. Griffiths says "*we need to leave the past on the past, you now have a better pay and better working conditions, why have the contracts not been signed."*

76. In this meeting two matters are of importance (1) Mr. Griffiths is aware that the Claimant does not feel that he trusts her and he is aware that she does not feel that anybody trusts her, (2) Mr. Griffiths evidence was that in this meeting the Claimant gave verbal consent for the Respondent to contact her doctor and seek a medical opinion. The Claimant denies that she gave such that consent.

77. In cross examination Mr. Griffiths was taken to paragraph 31 of his statement wherein he has recorded that the Claimant, despite requests, had refused to sign a permissive note in respect of authority to contact her doctor, but asserted that her permissive oral consent was sufficient.

78. The note I have of 10 October meeting was created by the Respondent and so far as the evidence is put before me, neither party suggests the note is inaccurate in the sense it records anything incorrectly or omits any relevant detail.

79. In my judgment, based on the documents, I find that that the Claimant had been asked to sign a consent to a medical opinion before 10 October and had not done so. The 10th October meeting note does not record the Claimant giving her consent for the Respondent to contact her doctor. I also find, when we turn to page 135 (which is the letter from Mr. Griffiths addressed to the Practice Manager of the Claimant's GP), that there is no reference to the Claimant having given oral permission for the Respondent to seek a medical opinion from her doctor.

80. Taking all those findings into consideration I have concluded that it is more likely than not that the note of 10 October is a true reflection of the Claimant's statement with regard to a request for permission to contact her doctor. Her statement was that she would obtain the documents, she did not consent to the Respondent doing so.

81. I therefore prefer the Claimant's account and find that the Respondent's letter of 7 December 2018 was sent without permission of the Claimant.

82. The letter, on Mr. Griffiths' evidence, is said to be a request for information concerning the Claimant's health and the reasons for her absence. I will set out the first part of Mr. Griffiths' letter;

"I am the Town Clerk to Machynlleth Town Council and one of my duties involves the management of all staff in our employ. Yesterday, 6 December 2018, I received a sick note from the above person issued by yourselves.

The condition that prevents Miss Newcombe from working for the next month is listed as stress of work. Even with our open-door policy this is surprising as stress in the workplace has never been mentioned to either myself or her Line Manager.

It is having a detrimental effect on us managing her absences if this is now listed as a cause for her sickness as we are not aware of any stress. Please can you explain to me what is the doctor's diagnosis based on. Miss Newcombe has in this last year since April alone, had eight separate long sickness absences from work, not one of them stating stress as the reason and we have now asked her for clarification and on each of these occasions she has self-certificated and she sought her doctor's advice.

We have asked her to prove this, and to date we still wait for a response. Our absence management policy seeks to record such things where a member of staff has numerous absences from work."

83. If the true intent of the letter was simply to obtain a medical opinion then certainly the first substantial paragraph would be what one would expect, the second less so because it appears to be a challenge to her candor. The subsequent paragraph is of a completely different character:

"Miss Newcombe is aware that we are a fully caring and supportive employer and even her union has advised her that any other employer would have dispensed with her services long ago. We have employed her on a contract that pays her full pay during sickness absence and it is becoming well known that she abuses this by constantly being seen out in local pubs when "on the sick". We have had return to work meetings and even this is now being challenged by Miss Newcombe even though it is common practice in life, the only stress being generated is by her partner potentially "gas lighting" her. As the Officer responsible for staff management this sick note worries me greatly that the Town Council is being seen as the cause of her sickness when in all honesty, we are bending over backwards to facilitate a good working environment for all of our staff and Miss Newcombe is undermining this to a serious degree. I am confident that you have not been told the truth in this case and that your patient has manipulated this whole situation to her advantage and at great financial cost to ourselves."

84. When challenged in cross examination, Mr. Griffiths denied the Claimant's assertion that this letter had been drafted as part of an investigation into her potential misconduct.

85. When taken to page 156, paragraph 1, a document that he drafted in response to the Claimant's grievance, it can be seen that he expressly contended that the 7th December letter was part of an investigation and used at the investigation to justify the critical paragraphs.

86. I find that the Respondent's explanation to me, that the purpose of the letter was for a proper cause; to obtain medical information, to be less than reliable. The last three paragraphs are statements to a third party which accuse the Claimant of dishonesty, accuse her partner of improper conduct and causing the Claimant stress and accused the Claimant of lying to her GP. That conduct was, in my judgment, intended to damage the Claimant's reputation.

87. Mr. Griffiths has asserted that he was entitled to make these comments and did not anticipate they would be conveyed to the Claimant. I accept that he expected to be able to make allegations about the Claimant's character, her partner's behaviour and the Claimant's honesty, without being at risk of the Claimant discovering his conduct. I do not accept for one moment that he could reasonably expect a General Practitioner receiving, such a vitriol about a patient, along with a request for medical information to be supplied about that patient, to do otherwise than convey the information to their patient.

88. After hearing from Mr. Griffiths, I find that there was no reasonable and proper cause for his conduct in respect of the 7th December 2018 letter.

89. Before moving on to 2019. I am inclined at this point, insofar as the Mr. Griffith's told the Claimant's GP and the Respondent asserts, that it was unaware of the causes of the Claimant's stress within the workplace to note my following findings of fact:

    (1) Mr. Griffiths knew that he had not progressed the Claimant's appeal in June 2018.

    (2) Mr. Griffiths knew of the tenor of his 12 June email to the Claimant's Trade Union officer.

    (3) Mr. Griffiths knew of 21 June complaint of bullying and that he had not actioned it.

    (4) Mr. Griffiths knew of the tenor of his allegations in his email response to the Trade Union on the 21st June.

    (5) Mr. Griffiths knew that all of these matters were unresolved.

    (6) Mr. Griffiths was aware, since the 10th October 2018 meeting, that the Claimant had stated that a cause of stress was her perception that she was not trusted and perceived as a trouble maker by the Respondent's management,

    (6) Mr. Griffiths is the most senior employee of the Respondent and was the Claimant's line manager.

90. In so far as the Respondent has argued that it was unaware of the causes of Claimant's stress by December 2018. I find that Mr. Griffiths was so aware and that he did not communicate this knowledge to the council.

91. The Claimant's ill health absence continued into 2019.

92. The Respondent's contracted medical advisor, Care Health Services interviewed the Claimant by telephone on 17 January 2020. That interview led to a report and the report indicated some causes of Miss Newcombe's difficulties. The penultimate and final paragraphs read:

    "With regards to work we have discussed the reasons preventing a return to work and she tells me that workplace stress is the reason preventing her return along with panic attacks and palpitations. She reports that in 2017 her working hours changed, however this was assessed following a complaint and her complaint was upheld. With regards to ongoing symptoms of stress, she tells me there is always something at the point where she feels bullied and harassed by both her Line Manager and the Town Clerk."

93. In my Judgment one of the causes of the Claimant's stress was unambiguously set out for the Council to understand in the report from the Occupational Health Advisor.

94. The Advisor's then recommend a course of conduct [paragraph 13 on page 141):

"in my opinion it would benefit Pamela to attend mediation … any meeting which contributes to resolve her current symptoms with regards to work and ultimately to provide an appropriate solution to enable her to return to work."

95. In my Judgment, on receipt of the above advice, the Respondent knew of a substantial cause of the Claimant's absence and it knew of a process which a professional advisor said was likely to help resolve matters.

96. In my judgment the Respondent chose not to follow the advice to resolve the Claimant's difficulties. It sent a letter inviting the Claimant to attend what has been described as a welfare meeting, but I note the invitation [142] describes the meeting as a medical capability hearing; a step towards a formal process, which the letter states could conclude with the Claimant's dismissal for her ill health absence. An, which in my judgment was likely to exacerbate her ill health.

97. A few days before the intended meeting the Claimant's GP informed her of Mr. Griffiths' 7th December 2018 letter. In her subsequent grievance she described the effect of this letter as "devastating".

98. On 7 February 2019 the Claimant posted a grievance to the Respondent setting out her detailed concerns with regard to Mr. Griffiths letter of 7 December 2018, [145 – 147]. I do not think it is proportionate in this Judgment to recite the whole content. It is sufficient to record that the Claimant set out serious allegations of breach of data protection, of dishonest assertions, unfounded allegations and exaggeration. In essence allegations that Mr. Griffiths has acted in a way which would warrant a disciplinary process being taken against him.

99. The grievance was first mentioned in a meeting with the Claimant and an external HR service on the 7th February 2019. The external chair of the meeting wanted to explore the causes of the Claimant's absence; her stress and the Claimant was reticent to do so in detail beyond referring to her grievances. At that time her grievance of the same date had not arrived at the Respondent's address

100. Because the complaint was against the Claimant's line manager the grievance procedure required the process to be passed on to members of the Council. On this occasion the complaint was passed to the Town Council and the Respondent wrote to the Claimant on the 11th February 2020 to say that it would follow the grievance process.

101. In the meantime, Mr. Griffiths prepared what he described as an aide memoire. Both Mr. Hanratty and I questioned this description. Mr. Griffiths' initial explanation for the preparation of the document was that he had been asked to prepare it for the inevitable investigation. When challenged about the detail of a number of the statements, Mr. Griffith's account changed; it was an aide memoire; something private and inherently less formal.

102. In the course of submissions, it was noted that there were two different iterations of the same document and in my Judgment none of them have the character of an aide memoire, they are very carefully structured, have a lot of detail and pose questions whose audience would naturally be the persons deciding the merit of the claimant's grievance, as well as addressing the specific allegations raised by the Claimant in that grievance.

103. I do not need to go through them in the greatest detail, but I will address examples briefly for the following reason, the context of those explanations are the same explanations that the Respondent relies upon before me to establish that, if there was a prima facie case of a repudiatory breach, the conduct was with reasonable and proper cause.

104. The Respondent first says, through Mr. Griffiths, that he did not need Miss Newcombe's permission to investigate potential wrongdoing against the Council and it is this he was investigating, through his letter of 7th December 2018.

105. That may well be so, but what Mr. Griffiths did was convey allegations of dishonesty and fraud against Claimant, and "gaslighting" by her partner, to a third party which had no knowledge of the alleged conduct and no concern in such allegations.

106. The Respondent's grievance and disciplinary procedures refer matters being confidential between the parties, the Respondent's conduct was far from a confidential approach.

107. The second point Mr. Griffiths made is that the breach of confidentiality was that of the Practice Manager or GP because Mr. Griffiths had marked his letter "confidential".

108. I do not find that explanation easy to accept. I have noted in the Respondent's data protection policy and that Mr. Griffiths is the person responsible for the Respondent's GDPR compliance. I do not find it credible that he did not understand that sharing personal data with a third party, without the Claimant's permission, and setting out therein allegations of the Claimant's dishonesty, towards both the Respondent and the GP, were matters which he could have possibly have perceived as being compliant with the Respondent's GDPR duties.

109. The balance the respondent's explanations, although detailed in cross-examination, are not, in my view, essential for this judgment. In my judgment Mr. Griffiths' explanations were, put charitably, less than persuasive.

110. On 11 February 2020 the Council had undertaken [page 159] to follow the formal grievance procedure which I have set out above.

111. On the 18th February the external HR Advisor sent a report to the Respondent arising from her meeting with the Claimant on the 7th February 2019. The report recommended that the Respondent should consider the Claimant's grievance and consider mediation; to increase the prospects of the Claimant's return to work.

112. On 18 February 2020 Councilors Gaskell, Atkins and McGarry met to consider the Claimant's 7 February 2019 grievance. There had been no investigatory meetings, there had been no request for

information from the Claimant. It was Mr. Griffiths' account that he had neither been asked, nor provided, any information to the panel.

113. In my judgment, in possession of the Claimant's grievance and Mr. Griffiths' 7th December 2018 letter, the panel decided the merits of the Claimant's grievance. They set out their conclusions in the briefest of terms

114. The panel's first conclusion was their concern about the validity of the grievance as the Claimant's letter was not dated or signed and it was franked as being posted in Brecon.

115. I found nothing in the Respondent's procedure that requires a grievance to be signed or dated or posted from a particular place. Curiously, those first three points are made in Mr. Griffiths' aide memoire, but as I have said, he is adamant that the panel did not receive his evidence.

116. The note goes on to address all of the Claimant's detailed complaints in one sentence;

"*We have discussed it at some length and decided that, although there were some unwise comments in the letter, we did not see any reason for disciplinary action."*

117. The above is the entirety of Respondent's documented analysis. On the face of reasoning the panel made no effort to engage with the specific criticisms raised by the Claimant.

118. It is not apparent why they reached the decision they did. The panel do not appear to have treated the Claimant's complaint as a grievance, rather it was viewed solely as a misconduct allegation. That decision is not explained by the Respondent.

119. I find that the combination of the detail of the intended grievance procedure in the letter of 11 February, the brevity of meeting note of 18 February, the failure to investigate, the failure to follow the relevant parts of the grievance procedure and the failure to warn the Claimant of the 18th meeting to be a sufficient evidential foundation for the Claimant to establish that the councilors' conduct was, in the absence of any explanation, without reasonable and proper cause.

120. The Respondent has not called any evidence from the councillors. Mr. Griffiths asserts he had no part in the process or decision making. On the evidence before me I find that the Claimant

has proved that the said conduct was without reasonable and proper cause.

121. By a letter dated 4 March the Respondent set out its decision of the 18 February. The explanation was short [page 167] and the Claimant was invited to appeal. The Claimant did not appeal, unsurprisingly given that the Mayor of the Council was one of the three councillors who made the decision on the 18 February.

122. On 13 March Julie Humphries wrote to the Claimant saying that:

"now your window of appeal against the grievance decision has past we can now deal with your request to review the full history of why work-related stress has been documented on multiple occasions."

123. This was a matter that the Respondent could have dealt with much earlier through the outstanding 2018 grievance appeal, the 21st June grievance, mediation (as per the occupational health advice of January 2019) and by speaking to the Claimant about her 7th February 2019 grievance before making the decision set out above.

124. It could also have been undertaken as mediation; as proposed in the external report of the 18th February.

125. The Claimant decided to engage in that process.

126. The history of the efforts to hold a meeting, so far as I have the evidence before me, is contained in documents:

127. There was an arrangement for a process of a grievance to look at the past history of events. It was first set down for a hearing in March but the Claimant was not able to attend.

128. A date was set for 25 April, with a view to the proceedings taking place away from the Respondent's offices. The short notice of that proposed date and the Claimant's ill health prevented her from attending.

129. The Respondent then fixed the date for the meeting to take place on Monday 29th. Again, having been given notice on Friday 26th the Claimant did not attend.

130. There has been no explanation why the Respondent did not seek the Claimant's and her representative's availability prior to fixing a date or why it gave the Claimant such short notice.

131. On 29 April the appointed councillors looked at certain aspects of Mr. Griffiths' management of the Claimant's absence. They considered the 10th October 2018 meeting note, the 18th February 2019 Occupational Health Report and the Claimant's 7th February 2018 grievance. They did not consider the Claimant's 2018 grievance appeal or her 21st June grievance.

132. In my judgment the 10th October 2018 report and the 7th February 2019 grievance make clear that the cause of the Claimant's stress was the conduct of Mr. Griffiths and the Claimant's line manager.

133. The 29th April panel reached several conclusions, which they termed "concrete proposals:

(a) That the Claimant should not be managed my Mr. Griffiths or her line manager and a Councillor would take on that role.
(b) Mediation was a process they would undertake.
(c) They would value the opportunity to speak to the Claimant.

134. The Councillors clearly expected the proposals to be communicated to the Claimant because they proposed a deadline of 3rd May 2019 for her response to these proposals [181].

135. Although the Respondent wrote to the Claimant on the 7th May, on the evidence before me, these proposals, which were intended to assist the Claimant, were not communicated to the Claimant. That failure is unexplained.

136. The burden of proof lies upon the Claimant. I find that the failure to communicate the proposed path to resolution was without reasonable and proper cause.

137. There was a subsequently a further effort to arrange a meeting involving the Claimant and her representative on 9 May 2019. The Respondent sent a letter to the Claimant dated the 7th May to forewarn of the proposed hearing on the 9th.

138. By that time, the Claimant had concluded that she no longer wanted to take part in the process. That decision was communicated to the Respondent by her Trade Union Representative in an email [185].

139. The alleged last straw is the Respondent's letter to the Claimant dated the 20 May 2020. This was a standard letter, one

which the Claimant apparently had received before, to ask for her consent to a medical report being obtained.

140. The Claimant submitted her resignation on 3 June 2019.

141. With regard to the "last straw" Mr. Hanratty has argued that in the context of the previous lack of interest and lack of action that the Claimant was justified in perceiving that as a mere "going through the motions" and that the intent of the Respondent had in no way altered and that it was an insult to her injury.

142. I accept that might have been the Claimant's reasonable subjective perception but nevertheless, it seems to me that to request medical evidence albeit at a late date, was a necessary step and I do not find that to be blameworthy conduct in any degree.

143. I reflect that my findings to some extent contradict admissions made in the course of the Claimant's cross examination; it which she conceded that she had not made clear the cause of her stress at work. I took into account those admissions but I must balance them with the contemporaneous documentary evidence to which I have referred. I have concluded that the Claimant's concessions were more indicative the quality of the advocacy for the Respondent than the facts of the case.

Conclusions

144. I then turn to my analysis. I have already made findings of fact with regard to the Respondent's conduct and the absence of reasonable and proper cause for matters occurring between early 2018 and 2019. In doing so I reminded myself that the evidential burden lies upon the Claimant to establish all the elements of the statutory test for dismissal.

145. I must assess whether the incidents I have found proven amount to a cumulative repudiatory breach.

146. I apply my experience as both an advocate and my judicial experience over the last 18 years. I have no doubt whatsoever that, viewed objectively, the Respondent's conduct amounted to a cumulative repudiatory breach of the implied term of trust and confidence.

147. The consistent avoidance of assisting the Claimant by seeing through her grievance appeal or progression her 21st June 2018

complaint, the content of a letter of 7 December 2018, the blindness to understanding the cause of Claimant's stress when it was recorded in writing on more than one occasion prior to the hearing on 7 February 2019, all leave me in no doubt that there was an intentional blocking of Claimant's complaints by the Respondent's senior manager and an unwillingness to allow her to express them as a cause of her stress and anxiety. I note that in Griffiths' cross-examination and in Mrs. Lumley's grievance against the Claimant, (of which she was not informed before it was dealt with by Mr. Griffiths), that there is an apparent antipathy towards the Claimant and a sense that the Claimant's concerns were unjustified. One point in his evidence Mr. Griffiths, and I paraphrase, said "she was likely to raise a grievance if you breathed in her direction".

148. The failure to follow the occupational health, guidance, the failure to investigate the 7th February 2019 grievance and manner of its disposal by councillors all evidence an enduring disregard for the Claimant's treatment by her line manager. I have also made findings which are critical of the Respondent's conduct throughout its subsequent investigation.

149. As I have set out above, the Claimant has proved that such conduct was without reasonable and proper cause.

150. Thus, on the issue of dismissal, the two questions remain, whether in the period between the last act and the Claimant's resignation amounted to an affirmation of her contract and what was the effective cause of her resignation

151. In my Judgment the Claimant's occurred shortly before the Claimant's decision to no longer take part in the grievance process; the short notice of the proposed hearings and the Respondent's failure to take any of those steps (of the sort proposed in the 29th April meeting) which did not require the Claimant to attend such a meeting. The Claimant had been seeking redress from the effects of Mr. Griffiths' management and the Respondent had, to her knowledge done nothing.

152. The Respondent argues that, on any interpretation of the evidence, the Claimant's willingness to take part in the April 2019 grievance process and, her receipt of contractual sick pay are indicative of affirmation.

153. I do not consider that the facts of this case are a foundation for a conclusion that the Claimant's willingness to take part in a

grievance process was evidence of her affirmation of the contract; the substance of her grievance was an assertion of a sustained course of bullying and duplicitous conduct by her line manager. Her conduct was clearly not an acceptance of that behaviour; she was seeking redress for, and the end of, such behaviour.

154. The conduct that I find which could potentially amount to an affirmation is the accepting of the sick pay between 9 May 2029 and 3 June 2013. This is a point developed by the Respondent; that the Claimant's contractual sick pay remained on "full pay" until a few days before her resignation. In essence, she took advantage of the contractual sick pay until that advantage diminished.

155. Balanced with that I also take into account that the Claimant was absent with workplace stress, had been too ill to attend work since late autumn of 2018 and the conduct of the respond between February and early May 2019 continued to cause her distress.

156. I take into account the case law cited earlier and I also remind myself that the passage of time, is not that of itself indicative of affirmation; I must look at all the circumstances in the round.

157. In my Judgment I am persuaded that the conduct of the Claimant does not amount to an affirmation. She was in a difficult emotional and health circumstances, she was not consenting or agreeing to the conduct so long as she pressed on with the process that started with her grievance and then was continued by the Respondent's efforts to investigate matters and the period therefore where it can be said that the Claimant was simply accepting sick pay without any demonstration of her objection to the repudiatory conduct is between 9 May and 3 June, just less than a month. In the context of her mental health condition, her length of service and the surrounding facts I find that that this period of employment did not amount to an affirmation.

158. The next issue is whether or not the cause of the Claimant's resignation was the proven conduct of the Respondent. I have had no other fact or cause put before me except the potential that she chose to remain an employee so long as she was in receipt of full pay. Thus, the effective cause of her resignation was the end of full sick pay.

159. I have taken that into account. Given that the effective cause does not need to be the sole or dominant cause I have no doubt in my mind that the Claimant has proven on the balance of probabilities that the effective cause of her termination was the Respondent's cumulative conduct which I have set out above.

160. I find that the Claimant has proved that her resignation amounted to a dismissal for the purposes of section 95(1)(c) of the Employment Rights act 1996.

161. What then was the principal reason for the dismissal?

162. The pleaded potentially fair for dismissal reason was some other substantial reason that was clarified, I think quite correctly, by the Respondent in its submissions as capability.

163. The burden of proof to establish the reason for dismissal lies upon the Respondent. I reject the Respondent's submission for the following reasons.

164. First of all, in June 2019 the Respondent's capability process was at its outset it had not progressed to a point where the Claimant was facing dismissal. The 20 May 2019 letter from the Respondent was a request for the claimant's consent to a medical report and the respondent's last documented position was as set out in 29 April 2019 grievance meeting proposals. Neither of which supports a conclusion that the respondent was contemplating dismissing the claimant on the 3rd of June 2019.

165. The Respondent developed the point and argued that Claimant would have been dismissed in any event at some point after 3rd June 2019.

166. I see that argument as one which is relevant to issues of remedy and not one which I should consider in respect of liability.

167. Taking all of the above, and drawing it into a conclusion. I find that the Respondent acted in a repudiatory manner, its conduct was without reasonable proper cause, that the Claimant did not affirm the contract. Her resignation was effectively caused by that repudiatory breach and therefore her resignation amounted to a dismissal within the meaning of Section 95(1)(c) of the Employment Rights Act 1996

168. The Respondent has not proven that the dismissal was for a potentially fair reason and accordingly the claim for unfair dismissal succeeds.

169. The parties agreed the judgment in respect of remedy.

Employment Judge R Powell
Dated: 17th November 2020

JUDGMENT SENT TO THE PARTIES ON 18 November 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.